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VOLUME 268

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1924

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ERRATA:

Volume 267 U. S., p. iii. Insert the name of MR. JUSTICE McREYNOLDS, as fourth in the list of Justices.

Volume 267 U. S., p. 602, fourth line from bottom. Change "*Otto*" to *Otho*.

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.
HARLAN FISKE STONE, Associate Justice.

JOHN G. SARGENT, Attorney General.
JAMES M. BECK, Solicitor General.[2]
WILLIAM D. MITCHELL, Solicitor General.[2]
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. IV, *post*.

[2] On June 4, 1925, President Coolidge appointed William D. Mitchell, of Minnesota, Mr. Beck having tendered his resignation to become effective upon appointment of his successor. Mr. Mitchell took the oath and entered upon the duties of his office on June 8, 1925.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924 [1]

ORDER OF ALLOTMENT OF JUSTICES

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, HARLAN FISKE STONE, Associate Justice.

For the Third Circuit, LOUIS DEMBITZ BRANDEIS, Associate Justice.

For the Fourth Circuit, WILLIAM H. TAFT, Chief Justice.

For the Fifth Circuit, EDWARD T. SANFORD, Associate Justice.

For the Sixth Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Seventh Circuit, PIERCE BUTLER, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, GEORGE SUTHERLAND, Associate Justice.

March 16, 1925.

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[1] For next previous allotment, see 267 U. S., p. IV.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1924.

A. J. OLIVER, AS TRUSTEE, ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 180. Submitted March 2, 1925.—Decided April 13, 1925.

Under § 64 of the Bankruptcy Act, federal and state taxes are to be paid in full before paying claims for preferred wages, unless it clearly appear that the particular tax in question has been subordinated to such claims by some relevant federal or local law. *City of Richmond* v. *Bird*, 249 U. S. 174.
290 Fed. 160, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court giving wages priority over taxes in a bankruptcy case. See 283 Fed. 351.

Messrs. Reuben G. Hunt and *Lewis V. Crowley* for petitioners.

The Solicitor General and *Mr. Merrill E. Otis,* Special Assistant to the Attorney General, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The bankrupt's estate consisted of personal property only, and there is no suggestion of a lien thereon to se-

cure any of the claims now under consideration. The fund derived from conversion of all the property is insufficient fully to satisfy taxes due the United States and the City and County of San Francisco, and the allowed claims for preferred wages. Which of these must be paid first is the question for decision. The referee ruled in favor of the wages, and the District Court approved; but the Circuit Court of Appeals held to the contrary and directed that priority should be given the taxes.

The Bankruptcy Act of 1898, c. 541, 30 Stat. 544, 563, provides—

"Sec. 64. *Debts which have priority.*—*a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"*b.* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the com-

mencement of proceedings not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

Guarantee Co. v. *Title Guaranty Co.*, 224 U. S. 152, 159, 160, held that under § 64 wages were entitled to priority over the claim of the United States for damages occasioned by the bankrupt's failure to comply with a construction contract. It was there said—

"By the statute of 1797 (now Sec. 3466) and Sec. 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk, or house servant. A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full*. The only exception is 'taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.' These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The Act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, State and individual—and assigns the order of payment. The policy which it dictated was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

In *City of Richmond* v. *Bird*, 249 U. S. 174, 177, past due taxes were denied priority of payment over a debt secured by a lien which the state law recognized as superior to the city's claims for such taxes. We said—

"Respondents therefore must prevail unless priority over their lien is given by Sec. 64a to claim for taxes

which, under State law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra,* declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend,' as commonly used throughout the Act, means partial payment to general creditors. In Sec. 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the City's unsecured claim for taxes we are unable to conclude that Congress intended by Sec. 64a to place it ahead of valid lien holders."

Of course, this opinion must be read in the light of the question under consideration—Does § 64 require that taxes shall be paid in advance of debts secured by liens which under the local law are superior to claims for such taxes? We pointed out that § 67d preserves valid liens and is not qualified by the direction of § 64a to discharge taxes "in advance of the payment of dividends to creditors," since "'dividend', as commonly used throughout the Act, means partial payment to general creditors." We did not undertake to decide in what order, as among themselves, taxes and the debts specified by § 64 should be satisfied; that point was not presented.

The language of § 64 has caused much uncertainty; and widely different views of its true meaning may be found in the opinions of District Courts and Circuit Courts of Appeals.

Paragraph "a" directs that "the court shall order the trustee to pay all taxes legally due and owing . . . in advance of [*not next preceding*] the payment of dividends to creditors"—that is, partial payments to general creditors. *City of Richmond* v. *Bird, supra.* It does not un-

dertake otherwise to fix the precise position which shall be accorded to them. This, we think, must be determined upon consideration of the circumstances of each case and the provisions of relevant federal and local laws—e. g., those which prescribe liens to secure or special priority for tax claims. It also appears, plainly enough, that all debts mentioned in Paragraph " b " must be satisfied before any payment to general creditors.

Guarantee Co. v. *Title Guaranty Co., supra,* declares that the taxes of Paragraph " a " are " civil obligations, not personal conventions, and preference was given to them " over the wages specified by Clause (4), Paragraph " b ". We adhere to this as a correct statement of the general rule to be followed whenever it does not clearly appear that the particular tax has been subordinated to claims for wages by some relevant law.

We find no error in the action of the court below. The cause will be remanded to the District Court for further proceedings consistent with this opinion.

Affirmed.

LINDER *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 183. Submitted March 9, 1925.—Decided April 13, 1925.

1. Any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the power reserved to the States, is invalid and can not be enforced. P. 17.
2. Direct control of medical practice in the States is obviously beyond the power of Congress. P. 18.
3. Incidental regulation of such practice by Congress through a taxing act, like the Narcotic Law, can not extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure. P. 18.

4. An act of Congress must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. P. 17.
5. Section 2 of the Narcotic Law, declares it unlawful for any person to sell, give away etc., any of the drugs mentioned in the act except in pursuance of an order of the person to whom the article is sold, etc., written on an official blank, but does not apply "to the dispensing or distribution of the aforesaid drugs to a patient by a physician . . . . registered under this Act in the course of his professional practice only." *Held* inapplicable to a case where a physician, acting *bona fide* and according to fair medical standards, gives an addict moderate amounts of the drugs for self-administration in order to relieve conditions incident to addiction. P. 16.
6. What constitutes *bona fide* medical practice, consistent with the statute, depends upon the facts and circumstances of the case. P. 18.

290 Fed. 173, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction under the Narcotic Law.

Mr. George Turner, for petitioner.

Sub-section (a) of § 2 excepts "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under the Act in the course of his professional practice only." The lower courts have engrafted on this exception without any sufficient reason the further requirement that the dispensing or distribution must not only have been in the course of the professional practice of the physician, but that the drugs must have been dispensed or distributed in good faith as medicine, and not to satisfy the cravings of an addict. Other cases holding the same doctrine are *Manning* v. *United States,* 287 Fed. 800; *Melanson* v. *United States,* 356 Fed. 783; *Thompson* v. *United States,* 258 Fed. 196. The term "addict" is not used in the entire Narcotic Act, and the only mention of "good faith" is found in § 8, where, after making it unlawful for any person not registered to have in pos-

session or under his control any of the drugs, a number of exceptions are made, among which is one in favor of those having possession of drugs which may "have been prescribed in good faith by a physician, dentist or veterinary surgeon registered under this Act." Apart from the difficulty of applying provisions relating to one offense to another separate and distinct offense, there are two other very good reasons why the good faith provision in the above exception can have no reference to or influence in construing the exception in favor of registered physicians provided for by sub-section (a) of § 2. The first is the decision of this court in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, in which it was determined that the provision of § 8 against having drugs in possession must be construed as leveled at only those required to register and entitled to register and to procure order blanks; and consequently the good faith provision can have no reference to the dispensing and distribution of drugs to people in general, because they are not entitled to register or to procure order blanks.

Second, an exception to the having drugs in possession cannot be imported into the exception in favor of registered physicians dispensing or distributing the drugs. The two things are entirely different in the considerations which govern them and in the gravity of the act as tending to impair the revenue features of the law. A person entitled to register, but not registered, having the drugs in possession, may very well be considered as presumptively engaged in their clandestine distribution, and therefore to be protected in their possession only by a good faith prescription, and the good faith of the prescription as to him be matter of proper concern. A registered physician, on the other hand, dispensing drugs to patients and keeping the record required, is above board at least, whatever the motive for dispensing the drugs, and no harm can accrue to the administration of the law by

his act, or if harm come, it is infinitesimal, and not worthy of consideration under the maxim *de minimus non curat lex.*

If the exception found in § 2 stands alone, and is not influenced by anything except the general purpose of the law, what dispensing or distribution of drugs to patients may be reasonably considered as "in the course of his professional practice only?" That question, we submit, cannot be answered by the application of any hard and fast rule.

It is the business of the physician to alleviate the pain and suffering of patients as well as to effectuate their cure. If we are to believe the literature on the subject, the suffering of an addict caused by deprivation of his customary drug is as intense as any suffering caused by disease. It is perhaps more so in the insistent demand for relief. Why should not the physician in the course of his ordinary practice take cognizance of that fact and administer temporary relief? It is, we submit, a strained construction of the law to hold that the language in question was intended to prohibit such an act, especially in view of the fact that the entire frame-work of the law shows that it was intended, not to regulate health and morals, but to make regulations with respect to the drug traffic which would keep it above board for the benefit of States and municipalities which do have authority and duty in that direction.

The indictment states no offense even under the construction of the Narcotic Act prevailing in the lower courts. There is nothing in it to negative that the drugs here were dispensed in good faith in the ordinary course of professional practice. It is a well-known fact that one of the means of treating addiction to morphine, or any of the habit-forming drugs, is the administration of diminishing quantities of the drug until the addict is finally weaned away from the habit. In *United States* v.

Behrman, supra, it was only the extraordinary quantity of the drug dispensed that enabled the court to find in the acts charged in the indictment an infraction of the law.

If the mere catering to a diseased appetite in the matter of narcotic drugs, even where such catering has no tendency to impair the revenue features of the Narcotic Act, or so slight a tendency as to be negligible, be held to be within the prohibition of that Act, then the said Act to that extent is clearly unconstitutional.

The Solicitor General, Assistant Attorney General Donovan, and *Mr. Harry S. Ridgely,* Attorney in the Department of Justice, for the United States.

The writ of certiorari should be dismissed on the ground that it was improvidently granted. The sole question now presented is whether the indictment states an offense which Congress had the constitutional power to create. Neither in the trial court nor in the Circuit Court of Appeals did petitioner in anywise assail the validity of the indictment. It was his duty to have raised the alleged constitutional issue in the trial court, and in the event of an adverse ruling, availed of the statutory right to bring the case here for review on writ of error under § 238 of the Judicial Code. *Ex parte Riddle,* 255 U. S. 450, 451; *idem* 262 U. S. 333, 335; *Goto* v. *Lane,* 265 U. S. 393, 401; *Pickett* v. *United States,* 216 U. S. 456, 462; *Magnum* v. *Coty,* 262 U. S. 159, 163; *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267–268; *Sou. Power Co.* v. *Pub. Ser. Co.* 263 U. S. 508, 509; *Grant Bros.* v. *United States,* 232 U. S. 647, 661.

Petitioner contends in substance that if the indictment and the statute upon which it is founded be construed as charging the administration of drugs merely to gratify the appetite of an addict, such an offense is beyond the power of Congress to create. This is precisely what the

indictment and the statute cover, and what this Court intended to uphold in *United States* v. *Behrman,* 258 U. S. 280, 287, 288. The indictment is framed in the same language as the indictment in the *Behrman Case,* except for the amount of the drug alleged to have been sold or distributed otherwise than in the course of professional practice. No distinction, however, can be made on the ground merely of the difference between amounts of drugs. In the *Behrman Case,* this Court had before it only the strict allegations of the indictment, and for that purpose the amount of the drug becomes immaterial in determining whether the indictment actually and sufficiently charges it to have been unlawfully sold or distributed.

Moreover, the case on the record shows a plain purpose on the part of petitioner not to treat the addict in a purely professional way but merely for a money consideration, to make it possible for the addict to obtain the drug solely for the gratification of his addiction. *Hobart* v. *United States,* 299 Fed. 784; *Simmons* v. *United States,* 300 Fed. 321.

The indictment is incapable of the construction of charging that the drug was given in the professional treatment of addiction.

Mr. Justice McReynolds delivered the opinion of the Court.

The court below affirmed the conviction of petitioner by the District Court, Eastern District of Washington, under the following count of an indictment returned therein June 26, 1922. As to all other counts the jury found him not guilty.

"Count II. And the Grand Jurors aforesaid upon their oaths do further present: That Charles O. Linder, whose other or true name is to the Grand Jurors unknown, hereinafter in this indictment called the defendant, late of

the County of Spokane, State of Washington, heretofore, to-wit; on or about the first day of April, 1922, at Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled 'An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes,' as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter and give to Ida Casey a compound, manufacture and derivative of opium, to-wit: one (1) tablet of morphine and a compound, manufacture and derivative of coca leaves, to-wit: three (3) tablets of cocaine, not in pursuance of any written order of Ida Casey on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the Act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that Ida Casey did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to Ida Casey by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey

would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the cravings of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for consumption. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The Harrison Narcotic Law, approved Dec. 17, 1914, c. 1, 38 Stat. 785—twelve sections—is entitled: "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes."

Sec. 1 provides—"That on and after the first day of March, nineteen hundred and fifteen, every person [with exceptions not here important] who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the Collector of Internal Revenue," and shall pay a special annual tax of one dollar. Also, "It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section. . . . The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury,

shall make all needful rules and regulations for carrying the provisions of this Act into effect."

Sec. 2 provides—"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue." [The giver is required to retain a duplicate and the acceptor to keep the original order for two years, subject to inspection.] "Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

"(b) . . (c) . . (d) . .

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned. . . . It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. . . ."

Sec. 8. "That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of Section One of this Act: *Provided,* That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: *Provided further,* That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant."

Sec. 9. "That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

Section 1 was amended by the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1130. This increased the special annual tax to twenty-four dollars on importers, manufacturers, producers and compounders, twelve dollars on wholesale dealers, six dollars on retail dealers, and three

dollars on "physicians, dentists, veterinary surgeons and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance." It also added a provision requiring that stamps—one cent for each ounce—should be affixed to every package of opium, coca leaves, any compound, salt, derivative or preparation thereof, produced in or imported into the United States and sold or removed for consumption or sale, and then, the following paragraph—

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided* That the provisions of this paragraph shall not apply . . . to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this Act of the drugs so dispensed, administered, distributed, or given away."

Manifestly, the purpose of the indictment was to accuse petitioner of violating § 2 of the Narcotic Law, and the trial court so declared. Shortly given the alleged facts follow: Petitioner, a duly licensed and registered physician, without an official written order therefor, know-

ingly, wilfully and unlawfully did sell, barter and give to Ida Casey one tablet of morphine and three tablets of cocaine; he knew she was addicted to habitual use of these drugs and did not require administration of either because of any disease other than such addiction, and he did not dispense them for the treatment of any other disease or condition; they were not administered by him or by any nurse or other person acting under his direction, nor were they consumed or intended for consumption in his presence; the amount was more than sufficient to satisfy the recipient's cravings if wholly consumed at one time; petitioner put the drugs into her possession expecting that she would administer them to herself in divided doses over a period of time; they were in the form in which addicts usually consume them to satisfy their cravings; the recipient was in no way prevented or restrained from disposing of them.

Petitioner maintains that the facts stated are not sufficient to constitute an offense. The United States submit that, considering *United States* v. *Behrman,* 258 U. S. 280, the sufficiency of the indictment is clear.

The trial court charged—

"If you are satisfied beyond a reasonable doubt that defendant knew that this woman was addicted to the use of narcotics, and if he dispensed these drugs to her for the purpose of catering to her appetite or satisfying her cravings for the drug, he is guilty under the law. If, on the other hand, you believe from the testimony that the defendant believed in good faith this woman was suffering from cancer or ulcer of the stomach, and administered the drug for the purpose of relieving her pain, or if you entertain a reasonable doubt upon that question, you must give the defendant the benefit of the doubt and find him not guilty."

In effect, the indictment alleges that the accused, a duly registered physician, violated the statute by giving

to a known addict four tablets containing morphine and cocaine with the expectation that she would administer them to herself in divided doses, while unrestrained and beyond his presence or control, for the sole purpose of relieving conditions incident to addiction and keeping herself comfortable. It does not question the doctor's good faith nor the wisdom or propriety of his action according to medical standards. It does not allege that he dispensed the drugs otherwise than to a patient in the course of his professional practice or for other than medical purposes. The facts disclosed indicate no conscious design to violate the law, no cause to suspect that the recipient intended to sell or otherwise dispose of the drugs, and no real probability that she would not consume them.

The declared object of the Narcotic Law is to provide revenue, and this court has held that whatever additional moral end it may have in view must "be reached only through a revenue measure and within the limits of a revenue measure." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *License Tax Cases,* 5 Wall. 462; *United States* v. *DeWitt,* 9 Wall. 41; *Keller* v. *United States,* 213 U. S. 138; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20. In the light of these principles and not forgetting the familiar rule, that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is

unconstitutional but also grave doubts upon that score," the provisions of this statute must be interpreted and applied.

Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure. The enactment under consideration levies a tax, upheld by this court, upon every person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves or derivatives therefrom, and may regulate medical practice in the States only so far as reasonably appropriate for or merely incidental to its enforcement. It says nothing of "addicts" and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances. Mere pretense of such practice, of course, cannot legalize forbidden sales, or otherwise nullify valid provisions of the statute, or defeat such regulations as may be fairly appropriate to its enforcement within the proper limitations of a revenue measure.

United States v. *Jin Fuey Moy, supra,* points out that the Narcotic Law can be upheld only as a revenue measure. It must be interpreted and applied accordingly. Further, grave constitutional doubts concerning § 8 cannot be avoided unless limited to persons who are required to register by § 1. Mere possession of the drug creates no presumption of guilt as against any other person.

In *United States* v. *Doremus,* 249 U. S. 86, 93, 95, a registered physician was accused of unlawfully selling, giving away and distributing five hundred one-sixth grain tablets of heroin without official written order. Another count charged selling, dispensing and distributing five hundred such tablets not in the course of regular professional practice. The trial court held § 2 invalid because it invaded the police power of the State. This court declared: "Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. . . . If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. . . . We cannot agree with the contention that the provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this Act beyond the power of Congress acting under its constitutional authority to impose excise taxes." The sharp division of the court in this cause and the opinion in *Jin Fuey Moy's Case* clearly indicated that the statute must be strictly construed and not extended beyond the proper limits of a revenue measure.

Webb v. *United States,* 249 U. S. 96, 99, came here on certified questions. Two were answered upon authority of *Doremus' Case.* The third inquired whether a regular physician's order for morphine issued to an addict, not in the course of professional treatment with design to cure the habit, but in order to provide enough of the drug to keep him comfortable by maintaining his customary use, is a " physician's prescription." The answer was that " to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required." The lower

court had sought instruction in order that it might decide the particular cause. The question specified no definite quantity of drugs, nor the time intended for their use. The narrated facts show, plainly enough, that physician and druggist conspired to sell large quantities of morphine to addicts under the guise of issuing and filling orders. The so-called prescriptions were issued without consideration of individual cases and for the quantities of the drugs which applicants desired for the continuation of customary use. The answer thus given must not be construed as forbidding every prescription for drugs, irrespective of quantity, when designed temporarily to alleviate an addict's pains, although it may have been issued in good faith and without design to defeat the revenues. This limitation of the reply is confirmed by *Behrman's Case*, 258 U. S. 280, (*infra*) decided three years later, which suggests at least that the accused doctor might have lawfully dispensed some doses.

In *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 194, doctor and druggist conspired to sell opiates. The prescriptions were not issued in the course of professional practice. The doctor became party to prohibited sales. "Manifestly the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it."

The quoted language must be confined to circumstances like those presented by the cause. In reality, the doctor became party to sales of drugs. He received a

fixed sum per dram under guise of issuing prescriptions. The quoted words are repeated in *Behrman's Case,* which recognizes the possible propriety of prescribing small quantities.

United States v. *Balint,* 258 U. S. 250, 253, 254, holds— "It is very evident from a reading of it [§ 2] that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic."

United States v. *Behrman,* 258 U. S. 280, 287, came up under the Criminal Appeals Act. The indictment charged that Behrman, a registered physician, did unlawfully sell, barter and give to one King, an "addict," one hundred and fifty grains of heroin, three hundred and sixty grains of morphine and two hundred and ten grains of cocaine, by issuing three prescriptions. Further, that the drugs were not intended or required for treatment of any disease or condition other than such addiction, but for self-administration over a period of several days. The question was, "Do the acts charged in this indictment constitute an offense within the meaning of the statute?" And replying, this court said—

"The District Judge who heard this case was of the opinion that prescriptions in the regular course of practice did not include the indiscriminate doling out of narcotics in such quantity to addicts as charged in the indictment. . . . In our opinion the District Judge who heard the case was right in his conclusion and should have overruled the demurrer. Former decisions of this court have held that the purpose of the exception is to confine the distribution of these drugs to the regular and lawful course of professional practice, and that not everything called a prescription is necessarily such. [*Webb* v.

United States and *Jin Fuey Moy* v. *United States, supra,* are cited.] . . . It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the Act; but what is here charged is that the defendant physician by means of prescriptions has enabled one, known by him to be an addict, to obtain from a pharmacist the enormous number of doses contained in 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine "—three thousand ordinary doses!

This opinion related to definitely alleged facts and must be so understood. The enormous quantity of drugs ordered, considered in connection with the recipient's character, without explanation, seemed enough to show prohibited sales and to exclude the idea of *bona fide* professional action in the ordinary course. The opinion cannot be accepted as authority for holding that a physician, who acts *bona fide* and according to fair medical standards, may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of the tax demands no such drastic rule, and if the Act had such scope it would certainly encounter grave constitutional difficulties.

The Narcotic Law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended even though the end seem desirable. The unfortunate condition of the recipient certainly created no reasonable probability that she would sell or otherwise dispose of the few tablets entrusted to her; and we cannot say that by so dispens-

ing them the doctor necessarily transcended the limits of that professional conduct with which Congress never intended to interfere.

The judgment below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.

ALASKA STEAMSHIP COMPANY *v.* McHUGH.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 294. Submitted March 10, 1925.—Decided April 13, 1925.

The First Employers' Liability Act (June 11, 1906, c. 3073, 34 Stat. 232) did not undertake to regulate the liability of shipowners for personal injuries suffered by their employees due to negligence. P. 27.

The Circuit Court of Appeals certified two questions, the first of which is set out and answered in the opinion.

Messrs. W. H. Bogle, Lawrence Bogle, R. E. Robertson and *A. H. Zeigler* for the steamship company.

It was never the intent of Congress that this act should apply to maritime torts either in territorial or other navigable waters. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. The statute requires the amount of damages sustained by the plaintiff and the proportion thereof that should be diminished by reason of his contributory negligence to be determined by a jury, and also that the question of the negligence of the defendant shall be determined by a jury. There is no possibility of reconciling these provisions with the inherent admiralty jurisdiction over maritime causes of action. Again—

Since the decisions of this Court in the *Employers' Liability Cases* (207 U. S. 463), holding the act uncon-

stitutional as general legislation, and in *El Paso etc. Co.* v. *Gutierrez,* 215 U. S. 87, and *Washington etc. Co.* v. *Downey,* 236 U. S. 190, upholding the act as local legislation for the territories, its application to maritime torts will offend against the uniformity rule which this Court has repeatedly held to be a constitutional requirement of any congressional legislation modifying or altering the rules of the maritime law. At any rate, a construction of the statute as applied to maritime causes of action plainly raises grave questions regarding its constitutional validity. *Panama Railroad Company Case, supra.*

If the act was applicable to maritime torts at the time of its enactment, it was repealed by implication or superseded by the Act of April 22, 1908, the Second Employers' Liability Act, Cong. Rec. 60th Cong., 1st Section, 1347.

This Act of 1908 is a revision of the prior Act of June, 1906. *Roche* v. *Jersey City,* 40 N. J. L., 257.

Further, on the unconstitutionality of the act if applied to maritime torts, see *Washington* v. *Dawson,* 264 U. S. 219; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Osceola Case,* 189 U. S. 158; *Atlantic Transport Co.* v. *Imbrovey,* 234 U. S. 52.

Mr. James Wickersham, for McHugh.

The Act of June 11, 1906, is constitutional and valid in the Territories. *El Paso* v. *Gutierrez,* 215 U. S. 87; *Washington Ry.* v. *Downey,* 236 U. S. 190; *Hyde* v. *Southern R. Co.,* 31 App. D. C. 466. Alaska is an organized territory. The Employers' Liability Act was not repealed by the second Act of June 22, 1908. § 8, Act June 22, 1908, 35 Stat. 65; *El Paso* v. *Gutierrez, supra; Walsh* v. *Pacific Steamship Co.,* 172 Pac. 269; *Sanstrom* v. *Pacific Steamship Co.,* 260 Fed. 661.

The provisions of the Act of 1906 apply to and govern a suit for personal injury received on a vessel en-

gaged in trade and commerce in the navigable waters of Alaska Territory. *Walsh* v. *Pacific Steamship Co., supra. Sanstrom* v. *Pacific Steamship Co., supra; Lancer* v. *Anchor Line,* 155 Fed. 433; *Howard* v. *Ill. Cent. R. R. Co.,* 207 U. S. 463.

The Act of 1906 is not void for conflict with any constitutional rule of uniformity. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *The Lottawanna,* 21 Wall. 558. In *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 140, the rule of uniformity in admiralty and maritime law was considered, and *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Chelentis* v. *Luckenback Steamship Co.,* 247 U. S. 372, examined and quoted, and in these three cases the foundation of the rule was stated to be based upon the exclusive jurisdiction of Congress and the federal courts over admiralty and maritime cases, and not upon any supposed rule of exact uniformity in congressional enactment. See *Waring* v. *Clarke,* 4 How. 441; *Workman* v. *New York,* 179 U. S. 552; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *State Industrial Comm.* v. *Nordenholdt Corp.,* 259 U. S. 263. The object in vesting in the General Government the power to regulate commerce with foreign nations and among the several States was to insure uniformity of regulation and to prevent discriminating state legislation. *Walton* v. *Missouri,* 91 U. S. 275; *Webber* v. *Virginia,* 103 U. S. 344; *Mobile Co.* v. *Kimball,* 102 U. S. 691. Congress undoubtedly has authority under the commercial power if no other to introduce such changes as are likely to be needed. *The Lottawanna,* 21 Wall. 558; *Butler v. The B. & S. Steamship Co.,* 130 U. S. 527. In *Alaska* v. *Troy,* 258 U. S. 101, this court said: "the best interests of a detached territory may often demand that its ports be treated very differently from those within the States. And we can find nothing in the Constitution itself or its history which

compels the conclusion that it was intended to deprive Congress of the power so to act."

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The court below has certified two questions of law concerning which it desires instruction. *Judicial Code,* § *239.* The first question follows. Our answer to it renders a reply to the second one unnecessary.

"1. Is the owner of a ship, a common carrier engaged in coastwise commerce trade in the territory of Alaska, liable to one of its employees, a stevedore, for damages which have resulted by reason of a defect or insufficiency due to the owner's negligence in an appliance furnished to the employee as provided under sections 1 and 2 of the Act of June 11, 1906, Ch. 3073, 34 Stat. 232, commonly known as the First Employers' Liability Act?"

The designated statute is entitled, "An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations, to their employees," and provides—

Sec. 1. "That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negli-

gence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

Sec. 3. No contract of employment, insurance, etc., shall constitute a defense to an action brought to recover damages for injuries or death.

"Sec. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

"Sec. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three."

The *Employers' Liability Cases,* 207 U. S. 463, held that, "conceding the power of Congress to regulate the relations of employer and employee engaged in interstate commerce, the [above-quoted] Act was unconstitutional in this, that in its provisions regulating interstate commerce, Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employees when engaged in interstate commerce, but to any of its employees, whether engaged in interstate commerce or in commerce wholly within a State." *El Paso & Northeastern Ry. Co.* v. *Gutierrez,* 215 U. S. 87, 93.

The case last cited declared the Act valid and controlling in so far as it relates to the District of Columbia and the Territories, although invalid as to accidents within a State. It was there said, p. 97: "When we consider the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the Territories over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject."

This Court has never held the act applicable to marine torts. To give it such construction would give rise to a grave constitutional question as to its validity and cause much confusion and uncertainty concerning the reciprocal rights and obligations of ships and those who work upon them. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Panama R. R.* v. *Johnson,* 264 U. S. 375, 386, 390. The language employed—"negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works;" "actions . . . to recover damages for personal injuries;" "all questions of negligence and contributory negligence shall be for the jury"—and the "evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation," oppose the suggestion that the purpose was to regulate purely maritime matters, from time immemorial subject to the law of the sea, which recognizes and enforces rights and remedies radically different from those of the common law.

In the absence of a clear and distinct enunciation of such purpose we cannot conclude that Congress intended to invade the field of admiralty jurisdiction and materially alter long recognized rights and established modes of procedure.

The first question must be answered in the

Negative.

NEW YORK CENTRAL RAILROAD COMPANY *v.* CHISHOLM, ADMINISTRATOR.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 306. Argued March 19, 20, 1925.—Decided April 13, 1925.

1. The right of action given by the Employers' Liability Act is based wholly on tort. P. 31.
2. Legislation is presumptively territorial, and, in the case of this statute, an intention to give it extraterritorial effect is neither disclosed in its words nor inferable from circumstances. P. 31.
3. An employee of an American railroad company was fatally injured while operating on its line in Canada, and his administrator brought an action in this country for damages under the Liability Act, alleging negligence. The plaintiff and the decedent, like the carrier, were citizens of the United States. *Held*, upon a construction of the act, and without considering the power of Congress to impose civil liability on citizens of the United States for torts committed in alien territory, that the action would not lie.

QUESTION certified by the Circuit Court of Appeals, arising on review of a judgment for damages recovered in the District Court by the administrator of a deceased railway employee, in an action under the Employers' Liability Act.

Mr. Lowell A. Mayberry, for the New York Central Railroad.

Mr. William H. Lewis, with whom *Mr. William F. Kane* and *Mr. Charles H. Houston* were on the brief, for Chisholm.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

On November 9, 1920, McTier, a citizen of the United States, while employed on a passenger train operated by the New York Central Railroad Company between Malone, N. Y., and Montreal, Canada, suffered fatal injuries at a point thirty miles north of the international line. His administrator, also a citizen of the United States, claiming damages under the Federal Employers' Liability Act of April 22, 1908, (c. 149, 35 Stat. 65) as amended April 5, 1910, (c. 143, 36 Stat. 291), brought an action in the United States District Court for Massachusetts and recovered a judgment for three thousand dollars. This went for review to the court below, and it has asked instruction on the question which follows. *Judicial Code, Sec. 239.*

"Has the administrator of an employee of a common carrier, who receives an injury in a foreign country resulting in his death—the employee and the common carrier being at the time engaged in foreign commerce and both citizens of the United States—a right of action under the Federal Employers' Liability Act, or must he rely on the law or statute of the foreign country where the alleged act of negligence occurred or the cause of action arose?"

The Liability Act declares that every common carrier by railroad while engaging in interstate or foreign commerce shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

And Section 6 provides—"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

It is unnecessary for us to consider the power of Congress to impose civil liability upon citizens of the United States for torts committed within the territory of another nation. The present case presents nothing beyond a question of construction.

The statute under consideration lacks the essential characteristics of those, now very common, which provide for compensation to employees injured in the line of duty irrespective of the master's fault. It only undertakes to impose liability for negligence which must be shown by proof (*Southern Ry.* v. *Gray,* 241 U. S. 333, 339; *New York Central R. R.* v. *Winfield,* 244 U. S. 147, 150) and demands under it are based wholly upon tort.

It contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose. *United States* v. *Bowman,* 260 U. S. 94, 98. "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction." *Sandberg* v. *McDonald,* 248 U. S. 185, 195.

"The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its

own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. . . . The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' " *American Banana Co.* v *United Fruit Co.*, 213 U. S. 347, 356, 357.

In an action brought in a court of the United States to enforce the liability of a Colorado corporation for injuries wrongfully inflicted upon a citizen of Texas while within the territory of Mexico, this court said: "But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent." *Slater* v. *Mexican National R. R.*, 194 U. S. 120, 126.

Under the circumstances disclosed the administrator had no right of action based upon the Federal Employers' Liability Act. The carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred; and the administrator could not rely upon any others.

DOULLUT & WILLIAMS COMPANY, INC., *v.* UNITED STATES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Nos. 317 and 318. Argued March 20, 1925.—Decided April 13, 1925.

Admiralty has jurisdiction of a suit to recover damages for injuries inflicted by merchant vessels on clusters of piles, constituting no part or extension of the shore, driven into the bottom of a river, in that way only attached to the land, completely surrounded by navigable water, and used exclusively as aids to navigation. P. 34.

Reversed.

APPEALS from decrees of the District Court dismissing for want of jurisdiction two libels brought against the United States, under the Act of March 9, 1920, to recover damages for injuries to piling occasioned by its vessels.

Mr. E. Howard McCaleb, for appellant, submitted.

Mr. J. Frank Staley, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The pleadings and proof in these causes are substantially identical except as to names of vessels, dates of accidents and damages claimed. Relying upon the act of Congress approved March 9, 1920, c. 95, 41 Stat. 525, the appellant instituted proceedings in admiralty to recover damages from the United States for injuries inflicted by their merchant vessels, The City of Elwood and The Galveston, upon clusters of piling standing in the Mississippi River at New Orleans, one hundred and fifty feet from low water mark. The court below dismissed the

libels for want of jurisdiction, and that action is now challenged.

We copy from the libels and accept the following description of the injured structures—

"Said piling cluster consists of five wooden piles or timbers, each of approximately sixty feet in length, firmly driven in and attached to the bottom of the river, fastened and held together as a unit having a diameter of not more than four feet, the depth of the water surrounding them being at all times not less than sixteen feet, said pile cluster extending perpendicularly about twenty-five feet out of and above the water. . . . That at no time has said pile cluster any connections either actual or anticipated nor has it any connections for any purpose whatever with the shore of said River or with anything on said shores, either of a temporary, prospective or permanent character and either actual or anticipated with any commerce on land or anything connected with land or with the shores of said River. That libellant had and has authority from the proper governmental authorities to erect, maintain and use said pile cluster for such marine purposes as said cluster may be adapted and used. . . . That at times of the swift current of the Mississippi River and during bad weather said pile cluster is used by vessels to tie up to so as to avoid anchor dragging and likewise to lessen the dangers of collision with other vessels whilst navigating in said River. . . . At no time do any vessels use said pile cluster to load or unload cargo or passengers, said pile cluster being incapable of so being used and incapable of being used for any commerce on land and incapable of being used for any purpose except in the operation, maintenance and navigation of vessels in navigable water and in aid of their navigation or in aid of commerce on water, and having no relation or connection with land or land commerce."

The damaged piles constituted no part or extension of the shore as wharves, bridges and piers do. Although

driven into the bottom of the river and attached in that way only to the land, they were completely surrounded by navigable water and were used exclusively as aids to navigation. We think injuries to them by a ship come fairly within the principle approved by *The Blackheath,* 195 U. S. 361, and *The Raithmoor,* 241 U. S. 166. See *Hughes on Admiralty,* 2d ed., § 100.

The District Court erred in denying jurisdiction, and its decree must be reversed.

Reversed.

THE BALTIMORE AND OHIO RAILROAD *v.* THE CITY OF PARKERSBURG.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 305. Argued March 19, 1925.—Decided April 13, 1925.

1. This Court has not jurisdiction of an appeal from the Circuit Court of Appeals where the jurisdiction of the District Court was invoked solely on the ground of diversity of citizenship. P. 36.
2. A Maryland railway corporation, having purchased at foreclosure the property and franchise of a West Virginia corporation, declaring, pursuant to West Virginia statutes, that it "would become a corporation as to said property" by the name of the West Virginia corporation, and having become also the sole stockholder of the latter, sued a West Virginia municipality to enforce an alleged exemption of the property from taxes. *Held,* that the District Court had no jurisdiction, whether the plaintiff were treated as in effect the West Virginia corporation, suing as property owner, or as the Maryland corporation suing as stockholder, since in the latter case the West Virginia corporation would be an indispensable party plaintiff, and in either case diversity of citizenship would be lacking. P. 38.

296 Fed., 74, reversed.

REVIEW of a decree of the Circuit Court of Appeals which reversed a decree of the District Court in favor of the Railroad in a suit to enjoin the City from levying taxes on certain railroad property. The writ of certiorari was granted.

Mr. Frank W. Nesbit, with whom *Messrs. James W. Vandervort* and *Mason G. Ambler* were on the briefs, for appellant.

Messrs. R. B. McDougle and *F. P. Moats,* for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was commenced in the Circuit Court of the United States for the District of West Virginia in 1894. The plaintiff is the Baltimore & Ohio Railroad, alleged to be a Maryland corporation; the defendant is the City of Parkersburg, a West Virginia corporation. The relief sought was to enjoin the levying of taxes assessed upon certain railroad property. The federal jurisdiction was invoked solely on the ground of diversity of citizenship. A temporary injunction issued upon the filing of the bill. In 1895, the case was heard upon demurrer to the bill and upon a motion to dissolve the injunction. In 1897, a decree was entered, which overruled the demurrer, but made no order respecting the injunction. Within 30 days thereafter an answer was filed by leave. Then the cause stood without further action for 23 years. In 1921 activities were resumed leisurely. In 1923, upon demurrers and motions, the District Court for the Northern District of West Virginia (to which the case had been transferred pursuant to § 290 of the Judicial Code) entered a final decree for the plaintiff. The decree was reversed by the Circuit Court of Appeals. 296 Fed. 74. The railroad appealed to this Court. It also filed a petition for a writ of certiorari, consideration of which was postponed until the hearing on the appeal.

The decision in both lower courts was rendered on the merits. These we have no occasion to consider. There is no right of appeal to this Court, because the jurisdiction of the trial court was invoked solely on the ground

of diversity of citizenship. Judicial Code, § 128. The writ of certiorari is granted. But, as the bill does not show that the trial court had jurisdiction of the controversy, the decree of the Circuit Court of Appeals must be reversed with directions to remand the cause to the District Court.

The claim asserted by the bill is this. In 1855, the Northwestern Virginia Railroad Company, a corporation organized under the laws of Virginia, acquired from the Town of Parkersburg an exemption from, or commutation of, municipal taxes on certain property within its limits. In 1863, the railroad and the municipality became domestic corporations of West Virginia, upon the organization of that State. In 1865 the property and franchises of the railroad were purchased by the Baltimore & Ohio at a foreclosure sale. Pursuant to the statutes of West Virginia then in force, the Baltimore & Ohio declared "that it would become a corporation as to said property, by the name of the Parkersburg Branch Railroad Company." The immunity from taxation asserted in the bill was claimed as an incident of the property acquired on foreclosure, and also as having been conferred by ordinances adopted, and contracts made with the Parkersburg Branch Railroad. The levy seems to have been made upon property of that company. It was a West Virginia corporation.[1] The bill sought to enforce its right. The capacity in which the Baltimore & Ohio sued to enforce the right to immunity was not stated clearly in the bill. Apparently it sued either in its capacity as

[1] Code of Virginia 1860, Title 18, c. 61, §§ 28, 29; Constitution of West Virginia (1863), Art. 11, § 8; Baltimore & Ohio R. R. Co., Corporate History (1922), Vol. 1, pp. 243, 247. See *Chesapeake & Ohio Ry. Co.* v. *Miller*, 114 U. S. 176, 182, 185; and Acts of West Virginia, 1891, c. 32, p. 57; 1889, c. 23, p. 81; 1887 (extra session), c. 73, p. 218; 1883, c. 12, p. 13; 1882, c. 97, § 30, p. 277; 1881, c. 17, § 72, p. 237, § 82, p. 240; 1877, c. 106, p. 138; 1872–3. c. 88, § 23, p. 228, c. 227, § 16, p. 724; 1865, c. 73, p. 62.

owner (sole stockholder) of the West Virginia corporation or on the theory that, as to the property purchased on forclosure, it became itself the Parkersburg Branch Railroad Company. In neither view did the trial court have jurisdiction of the controversy.

If the plaintiff sued as the corporate owner of the property, that is, as the Parkersburg Branch Railroad Company, but under the name of the Baltimore & Ohio, the trial court was without jurisdiction as a federal court, because both the Branch Railroad and the defendant were West Virginia corporations, and hence the controversy was wholly between citizens of the same State. If the Baltimore & Ohio sued as the Maryland corporation, owner of all the stock in the Parkersburg Branch Railroad Company, the trial court was without jurisdiction of the controversy, because the latter corporation, an indispensable party plaintiff, was not joined. Compare *Davenport* v. *Dows,* 18 Wall. 626. And it could not have been joined. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77. For then one of the plaintiffs would have been a citizen of West Virginia; there would no longer have been complete diversity of citizenship; and the jurisdiction of the trial court would have been ousted.

So far as appears, the Branch Railroad was neither merged in, nor consolidated with, the Baltimore & Ohio. Nor was there a compulsory domestication of the latter in West Virginia. *Martin's Administrator* v. *Baltimore & Ohio R. R.,* 151 U. S. 673. We have, therefore, no occasion to consider the questions involved in *St. Louis & San Francisco* v. *James,* 161 U. S. 545; *Louisville, New Albany & Chicago Ry.* v. *Louisville Trust Co.,* 174 U. S. 552; *Southern Ry.* v. *Allison,* 190 U. S. 326, 337; *Missouri Pacific Ry.* v. *Castle,* 224 U. S. 541. Compare *Memphis & Charleston R. R.* v. *Alabama,* 107 U. S. 581; *Patch* v. *Wabash R. R.,* 207 U. S. 277.

It would seem that the District Court must, upon the remand of the case to it, enter a decree of dismissal. But,

as the question whether the trial court had jurisdiction does not appear to have been considered by either of the lower courts and was not discussed by the parties here, our direction to the Circuit Court of Appeals is to remand the case to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* THE DEPARTMENT OF PUBLIC WORKS OF THE STATE OF WASHINGTON, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 371. Argued March 10, 11, 1925.—Decided April 13, 1925.

1. A judgment of a state supreme court sustaining an order of a state commission which fixed intrastate railroad rates, and overruling the railroad's claim that the rates were confiscatory and based on arbitrary findings of fact unsupported by evidence, *held* reviewable by writ of error. P. 42.
2. An administrative order fixing railroad rates upon a finding without evidence or made upon evidence that clearly does not support it, is an arbitrary act against which courts will afford relief. P. 44.
3. In a hearing to determine rates for several carriers on intrastate transportation of logs in carload lots, the average haul of which by each carrier was 32 miles, the carriers introduced persuasive evidence that existing rates did not yield any return on the property employed nor defray the operating costs of the traffic and its proportionate taxes; but the state administrative body, without attacking the proof or attempting to show by reasonably specific and direct evidence what the actual operating costs of the particular traffic were to the several carriers, lowered the rates on the basis of a composite figure, created largely from data in the carriers' reports and their exhibits in the case, representing the weighted average operating cost per thousand gross-ton-miles of all revenue freight carried on the carriers' railroad systems, including main line and branch line freight, interstate and intrastate, car-

load and less than carload, indiscriminately—*Held* that this was a fundamental error and a denial of due process of law. P. 42.

4. The invalidity of an order arbitrarily lowering rates which the evidence shows are confiscatory is not avoided by making it for an experimental period. P. 45.

125 Wash. 584, reversed.

ERROR to a judgment of the Supreme Court of Washington affirming an order of the Department of Public Works, in a suit brought by the above named and three other railroads to set the order aside.

Mr. C. W. Bunn, for plaintiffs in error.

Mr. F. M. Dudley, with whom *Mr. O. W. Dynes* was on the brief, for Chicago, Milwaukee & St. Paul Railway Company.

Messrs. Raymond W. Clifford and *Scott Z. Henderson,* for defendants in error. *Mr. John H. Dunbar,* Attorney General of the State of Washington, and *Mr. Stephen V. Carey,* were on the brief.

Messrs. George T. Reid and *Lorenzo B. da Ponte* were on the brief, for Northern Pacific Railway Company; *Messrs. Frederic G. Dorety* and *Thomas Balmer* for the Great Northern Railway Company; and *Messrs. Arthur C. Spencer* and *William A. Robbins* for the Oregon-Washington Railroad & Navigation Company.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The intrastate transportation of saw logs in car load lots constitutes a large part of all of the intrastate freight traffic in Washington on each of the four transcontinental railroad systems by which much of that service is performed.[1] Prior to federal control the rates had, with

[1] These are the Northern Pacific, the Great Northern, the Chicago, Milwaukee and St. Paul, and the Oregon-Washington of the Union Pacific System.

few exceptions, been initiated from time to time by individual tariffs of the several carriers. In 1918 the Director General of Railroads made a horizontal increase of 25 per cent. In 1920, after the decision in *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220, a further increase of 25 per cent. was authorized by the Public Service Commission of the State. Complaint was made that some of the rates as so raised were excessive and discriminatory; and that the rate structure lacked uniformity.

On December 28, 1920, the Public Service Commission instituted a proceeding before itself for the purpose of investigating the log rates and making such order thereon as the facts found should warrant. Hearings were duly had in which shippers and the four transcontinental carriers participated. Much evidence was introduced. The carriers insisted that the existing rates were unremunerative. They also filed, during the hearings, a joint tariff embodying the higher rates which they deemed reasonable. A suspension order issued; and the two proceedings were consolidated. On February 1, 1922, the Department of Public Works (by which the functions of the Commission had come to be exercised) made a report in which it found that the existing rates were highly remunerative. Thereupon it entered an order which, among other things, abrogated all the intrastate log tariffs then in force; cancelled the suspended joint tariff filed by the carriers; and established a uniform distance tariff applicable to these railroads, to remain in effect during an experimental period of twelve months, or until further order of the Department. The tariff so prescribed reduced greatly the rates theretofore prevailing. It was estimated that the revenues of the several carriers from this traffic would be lessened from 15 to 37 per cent. and that additional losses in revenue would result from changes prescribed concerning minimum loadings.

This suit was brought by the carriers against the Department, in the Superior Court of Thurston County, to

set aside the order on the ground, among others, that it deprived them of property in violation of the due process clause of the Fourteenth Amendment. The findings of fact upon which the order proceeded were attacked as arbitrary and unsupported by the evidence. The prescribed rates were assailed as confiscatory. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585. Upon the giving of bonds the court superseded and suspended the order, except in so far as it cancelled the joint tariff of higher rates filed by the carriers.[2] After full hearing the court entered a final decree denying the relief sought. This was affirmed by the Supreme Court of the State, three judges dissenting. 125 Wash. 584. The case is here under § 237 of the Judicial Code as amended. A motion to dismiss on the ground that the judgment is not reviewable on writ of error was postponed to the hearing on merits. The motion is denied. *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679, 683. As to the merits, many errors are assigned. It will be sufficient to consider one.[3]

The log traffic is limited substantially to the section of the State lying west of the Cascade Mountains. The average length of its haul on each of these roads is not more than 32 miles. The three principal carriers pre-

[2] On May 16, 1922, the Interstate Commerce Commission entered an order reducing Washington interstate rates, *Reduced Rates, 1922,* 68 I. C. C. 676. Thereupon the Department of Public Works made, on June 22, 1922, a corresponding reduction in the intrastate log rates, but it provided specifically that, in view of the pending litigation, this order should not apply to the carriers here involved. Second Annual Report of the Department of Public Works, p. 70, Appendix G.

[3] The character of the proceeding in the state court and the provisions of law applicable thereto are set forth in *Oregon R. R. & Navigation Co.* v. *Fairchild,* 224 U. S. 510. It was conceded, as was there held, that the legal proceeding prescribed by the State affords an adequate opportunity for testing by judicial review the lawfulness of the order complained of.

sented evidence tending to show that their existing rates were so low as not to yield any return upon the property employed in the business; and that the rates did not defray fully the operating costs of the traffic and its proportion of the taxes payable. This evidence was in character persuasive. It was fairly specific, direct, and comprehensive. If the facts warranted, the shippers and the public officials might, of course, have shown by evidence of similar character that the carriers' evidence was inherently untrustworthy; or it might have been overcome by more persuasive evidence to the contrary. Little attempt was made to show that any testimony introduced by the carriers was inherently untrustworthy. Little conflict with the evidence of the carriers was developed by the evidence as to specific facts introduced for the shippers and the public. Apparently necessary inferences from specific facts established by the carriers were not explained away. The Department's findings concerning operating costs rested largely upon deductions from data found in published reports of the carriers and in their exhibits filed in this case. Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems and made that figure a basis for estimating the operating cost of the log traffic in Washington.[4] This was clearly erroneous.

A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32

[4] The figure taken for the Oregon-Washington was the average cost per 1,000 gross ton miles of that company—not of the whole Union Pacific system. The lines of the Oregon-Washington are located in three States with an aggregate of 2,218 miles of road.

miles. In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul [5]; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, car load and less than car load, are counted alike. The Department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion.

The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent, *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 288, or mere error in reasoning upon evidence introduced, does not invalidate an order. But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached. An order based

[5] On the Northern Pacific the average length of haul of all its intrastate traffic in Washington was 99 miles; of all its traffic in Washington, interstate and intrastate, 142 miles; of all its traffic on the whole system, 334 miles. Compare *Shepard* v. *Northern Pacific Ry.*, 184 Fed. 765, 781–2.

upon a finding made without evidence, *The Chicago Junction Case,* 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process. Compare *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 348. The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the principle of awaiting the result of an experimental period for untried rates have no application here. *Willcox* v. *Consolidated Gas,* 212 U. S. 19; *Northern Pacific Railway* v. *North Dakota,* 216 U. S. 579; *Cedar Rapids Gas Light* v. *Cedar Rapids,* 223 U. S. 655; *Louisville* v. *Cumberland Telephone Co.,* 225 U. S. 430, 436; *Brush Electric Co.* v. *Galveston,* 262 U. S. 443.

Reversed.

MID-NORTHERN OIL COMPANY *v.* J. W. WALKER, AS TREASURER, JOSEPH M. DIXON, GOVERNOR, AND C. T. STEWART, SECRETARY, OF THE STATE OF MONTANA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 256. Argued March 9, 1925.—Decided April 13, 1925.

1. Assuming that a private corporation engaged in producing oil from public lands as lessee of the United States under the Leasing Act of February 25, 1910, is a governmental agency, means or instrumentality such that an annual license tax measured by a

percentage of the gross value of the annual production can not without the consent of Congress be imposed by the State in which the operations are conducted,—*held* that consent was given by the act, § 32, in the proviso "That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." P. 48.

2. *Ejusdem generis* is a rule of construction, to be used to ascertain the intent of the law-makers and not to subvert it when ascertained. P. 49.

65 Mont. 414; 68 *id.* 550, affirmed.

ERROR to a judgment of the Supreme Court of the State of Montana sustaining a state license tax in a suit brought by the Oil Company to enjoin its enforcement.

Mr. Frederick D. Anderson, with whom *Messrs. Charles S. Thomas* and *Donald Campbell* were on the brief, for the plaintiff in error.

No license, occupation or privilege tax can lawfully be imposed by a State upon a governmental agency, means or instrumentality. The plaintiff in error, acting as a lessee of oil and gas lands from the United States, is a governmental agency, means or instrumentality. The disposal of public lands by governmental oil and gas lease is the performance of a trust by the United States and an exercise of governmental power such as cannot be controlled or interfered with by the States. The Montana tax lays such a burden or interference as to render it invalid.

The Act of February 25, 1920, (The Leasing Law) does not by its terms grant to the State the power to impose the License Tax in question. The statute confirms the existing rights of the States. It adds nothing to them. The right to tax the governmental agency, means or instrumentality is inconsistent with the whole purpose and object of the leasing law and is not conferred

by it. The phrase "other rights" refers to property of an intangible or special nature subject to a property tax. The proviso clause in § 32 is introduced out of abundant caution to remove all doubt of the intention of Congress. Assuming the language of § 32 to be uncertain and doubtful, it cannot confer the right to tax operations of plaintiff in error. The history of the legislation shows that Congress intended the distribution of royalties to be in lieu of the extensive right of taxation belonging to the States under the public mining laws.

Messrs. C. E. Pew, L. A. Foot, Attorney General of the State of Montana, and *A. H. Angstman,* Assistant Attorney General, were on the brief for defendants in error.

Mr. Justice Sutherland delivered the opinion of the Court.

This suit was brought by the Oil Company to enjoin the enforcement of an annual license tax imposed by a state statute (Montana Revised Codes, 1921, §§ 2397–2408) [1] upon persons producing petroleum, etc., equal to one per centum of the gross value of the oil produced during the year. The statute, as applied to the company, is assailed as invalid, upon the ground that the company, by assignment of the original leases, is a lessee of the United States of certain public lands entered as homesteads but not yet granted by patent, upon which it

[1] 2398. Oil license tax. Every person engaging in or carrying on the business of producing, within this state, petroleum, . . . must, for the year 1921, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the state of Montana, license tax for engaging in and carrying on such business, in an amount equal to one per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year; . . .

is engaged in prospecting for and producing crude petroleum, under the provisions of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, and, therefore, "is a governmental agency, means or instrumentality whose operations cannot be taxed by the state." The state supreme court held otherwise. 65 Mont. 414; 68 Mont. 550.

Whether the company under its leases is an agency, means or instrumentality of the United States, or in the absence of congressional consent would be outside the reach of state taxation, we need not stop to consider, since we are of opinion that the authority of the state exists in virtue of such consent. Section 32 (41 Stat. 450) of the act contains the following proviso: "*Provided,* That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

The contention on behalf of the company is that this proviso, which saves from the effect of any possible adverse construction of the act, rights of the states "which they may have," relates to, and is confirmatory of, *existing* rights only,—that is to say, rights existing when the act was passed. But we find nothing in the body of the act which, by any stretch of meaning, purports to detract from or render less certain any such preexisting rights; and, in that view, the theory advanced fails for want of material upon which to operate. It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which, being in no way challenged or affected, stood in no need of being saved. The more natural view, and the one we adopt, is that Congress, having provided for leasing the public lands to private corporations and persons whose

property, income, business and occupations ordinarily were subject to state taxation, meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned. In other words, the purpose of Congress was to remove altogether from the field of controversy, among other questions, the very question which is here presented, and to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property, although arising from, and in respect of their taxable rights, although exercised under, the act, without regard to the origin thereof or to the interest of the United States in the lands or leases.

Further, it is said that the enumeration of particular objects of taxation causes it to be necessary to limit the general words, "or other rights," to things of the same nature in accordance with the doctrine of *ejusdem generis;* and that, thus limited, the right or privilege of carrying on a business or following an occupation is not included. These general words follow the more particular words, "improvements [and] output of mines," and are followed by the equally general words, "property or assets," the entire clause being "improvements, output of mines, or other rights, [other] property, or [other] assets." The doctrine invoked is a rule of construction, to be used as an aid in the ascertainment of the intention of the lawmakers, and not for the purpose of subverting such intention when ascertained. Here, the enumeration of taxable things, including the general classes, property and assets, is so comprehensive that nothing remains to which the phrase in question can apply, unless to rights like the one here taxed; and to construe it as contended would,

in effect, therefore nullify it altogether. *Mason* v. *United States,* 260 U. S. 545, 553–554. No doubt, what Congress immediately had in mind was the necessity of making it clear that, notwithstanding the interest of the government in the leased lands, the right of the states to tax improvements thereon and the output thereof should not be in doubt; but the intention likewise to save the authority of the states in respect of all other taxable things is made evident by the addition of the three general categories, "other rights, property or assets." We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.

Decree affirmed.

NAMPA & MERIDIAN IRRIGATION DISTRICT *v.* BOND, PROJECT MANAGER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 135. Argued March 6, 1925.—Decided April 13, 1925.

1. When an irrigation system has been completed under the Reclamation Act, subsequent construction of a drainage system to remove injurious consequences of its normal operation on the lands included is chargeable to maintenance and operation rather than to construction, and § 4 of the Reclamation Extension Act, preventing increase of construction charges when once fixed except by agreement between the Secretary of the Interior and a majority of water-right applicants and entrymen affected, does not apply. P. 53.
2. This is consistent with attributing to construction the cost of drainage provided for in the original plan because the need for it was existent or foreseen. P. 54.
3. Where lands of an Idaho irrigation district were included in a federal reclamation project under a contract obliging the Government to furnish water and construct drainage works within the district, which was done and the cost assessed as a construction

charge against all the project water users, the district agreeing that the project lands in the district should pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the project, *Held* that the project lands within the district were liable with the other project lands to bear, as an operation and maintenance charge, the cost of providing drainage for project lands outside the district which were being ruined by seepage water from the operation of the irrigation system. P. 53.

283 Fed. 569; 288 *id.* 541, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill by which the Irrigation District sought to enjoin an official of the federal Reclamation Service and a water users' association from withholding water from lands within the District for nonpayment of maintenance and operation charges.

Messrs. H. E. McElroy and *Will R. King* for appellant. *Mr. Fremont Wood* was also on the brief.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Assistant Attorney General Ira K. Wells* were on the brief, for Bond.

Mr. J. D. Eldridge for Payette-Boise Water Users' Association, Ltd.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant is an irrigation district organized as a public corporation under the laws of Idaho. In 1915, its supply of water being insufficient to irrigate the lands of all its members, it entered into a contract with the United States, at that time engaged in the construction of the Boise irrigation project, for water to irrigate the unsupplied lands and for the construction of a drainage system

within the district. The district undertook to represent these lands in their relations to the government and collect from their owners and pay over to the government construction installments and operation and maintenance charges. The drainage system was constructed in accordance with the contract and the cost thereof, after deducting the amount chargeable to the old water right non-project lands within the district, was paid by the United States as a construction expense and, with other costs of construction, was charged ratably against all the project lands, being 40,000 acres within and 100,000 acres outside the district. After the construction cost, including this drainage, had been fixed by the government, it became necessary to drain project lands outside the district because they were being ruined for agricultural uses by the steadily rising ground level of seepage water due directly to the operation of the irrigation system. Thereupon, the Secretary of the Interior authorized the construction of a drainage system for these lands, the cost to be charged to operation and maintenance, and to be borne ratably by all the water users upon project lands both within and without the district. Appellant contended that this expenditure was not properly chargeable to operation and maintenance but was an additional charge for construction, which appellant could not be required to collect and pay over under § 4 of the Reclamation Extension Act of August 13, 1914, c. 247, 38 Stat. 686, 687, which provides that no increase in construction charges shall be made after the same have been fixed except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected thereby. It was insisted further that appellant would be precluded by state law from collecting the charges from owners of non-project lands, because they were not benefited. The government having threatened that unless the charges were paid it would shut off the sup-

ply of water from the project lands within the district, appellant brought this suit to enjoin such action. The federal district court dismissed the bill, 283 Fed. 569; and its decree was affirmed by the circuit court of appeals. 288 Fed. 541. Both courts held that the cost was a proper charge as an operating expense and that the project lands in the district were liable for their proportionate part.

The contract with the district, among other things, provides: "The project lands in the district shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project. . . ." We agree with the courts below that the charge in question fairly comes within this provision.

Section 4 of the Reclamation Extension Act, *supra,* prevents an increase in the *construction* charges to be imposed upon the water users without the consent of a majority of them after the amount thereof has been fixed. But this is far from saying that, after the completion of the irrigation system in accordance with the original plan in respect of which the construction charges were fixed, should the need arise to remedy conditions brought about by the *use* of the system, the government must bear the expense if a majority of the water users withhold their consent. Expenditures necessary to construct an irrigation system and put it in condition to furnish and properly to distribute a supply of water are chargeable to construction; but when the irrigation system is completed, expenditures made to maintain it as an efficient going concern and to operate it effectively to the end for which it was designed, are, at least generally, maintenance and operating expenses. The expenditure in question was not for extensions to new lands or for changes in or additions to the system made necessary by faulty original construction in violation of contractual or statutory obligations, *Twin Falls Co.* v. *Caldwell,* 272 Fed. 356, 369;

266 U. S. 85, but was for the purpose of overcoming injurious consequences arising from the normal and ordinary operation of the completed plant which, so far as appears, was itself well constructed. The fact that the need of drainage for the district lands, already existing or foreseen, had been supplied and the cost thereof charged to all the water users as a part of the original *construction*, by no means compels the conclusion that an expenditure of the same character, the necessity for which subsequently developed as an incident of operation, is not a proper *operating* charge. The same kind of work under one set of facts may be chargeable to construction and under a different set of facts may be chargeable to maintenance and operation. See *Schmidt* v. *Louisville C. & L. Ry. Co.*, 119 Ky. 287, 301–302. For example, headgates originally placed are charged properly to construction; but it does not follow that if an original headgate be swept away, its replacement, though requiring exactly the same kind of materials and work, may not be charged to operation and maintenance.

Appellant says the lands within the district are not benefited by the drainage in question; and, if a direct and immediate benefit be meant that is quite true. But it is not necessary that each expenditure for maintenance or operation considered by itself shall directly benefit every water user in order that he may be called upon to pay his proportionate part of the cost. If the expenditure of today does not especially benefit him, that of yesterday has done so or that of tomorrow will do so. The irrigation system is a unit, to be, and intended to be, operated and maintained by the use of a common fund to which all the lands under the system are required to contribute ratably without regard to benefits specifically and directly received from each detail to which the fund is from time to time devoted.

This conclusion, we think, fairly accords with the principle established by the supreme court of the state in

Colburn v. *Wilson,* 24 Ida. 94, 104; and we see no merit in the contention that under the state law a ratable part of the cost of this drainage cannot be assessed by the district upon the project lands within its limits because they are not benefited thereby. The cost of draining the district project lands was met by a charge imposed in part and proportionately upon the lands in the project outside the district. If now, when the latter need like protection, the district lands are called upon to assume an equivalent obligation, it requires no stretch of the realities to see, following from such an equitable adjustment, a benefit on the whole shared by both classes of lands alike. But in any event, since we find that the expenditure in question properly is chargeable to operation and maintenance, appellant is liable under the express terms of its contract.

Decree affirmed.

DUFFY, COLLECTOR OF INTERNAL REVENUE *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 129. Argued March 13, 16, 1925.—Decided April 13, 1925.

1. Expenditures made by a corporate lessee, as required by the lease, to create additions to the leased property and not for upkeep, are not maintenance and operation expenses deductible from its gross income of the tax year in which made, within the meaning of § 12 (a) Subd. "First," of the Revenue Act of 1916, but are betterments under Subd. "Second" of that section,—capital investment, subject to annual allowances for exhaustion or depreciation. P. 62.
2. Neither are such payments for betterments and additions, though made by the lessee pursuant to the lease, deductible under § 12 (a), Subd. "First" as "rentals or other payments" required to be made as a condition to the continued use or possession of

property etc., since "rental" is there used in the usual sense implying a fixed sum, or property amounting thereto, payable at stated times for the use of property, and "other payments" means payments *ejusdem generis* with rentals, such as taxes, insurance, etc. P. 63.

289 Fed. 354, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a recovery in the District Court of money paid under protest as income tax.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, for petitioner. *The Solicitor General* was on the brief.

All of the disbursements made by the taxpayer upon the premises occupied under the long-term leases are capital expenditures, and the only deduction allowable under the Revenue Act of 1916 is an annual deduction for depreciation. Technically speaking, of course, it is true that so far as the leases just mentioned are concerned the taxpayer is a lessee. But this does not mean that the payments made were rental, within the purview of § 12 (a). Indeed the admitted facts surrounding these particular leases conclusively show that the expenditures made upon these demised premises are capital investments, and, under the express terms of the Revenue Act of 1916, are not deductible in the year made, the only deduction allowed being for annual depreciation. *Union Pac. R. R. Co.* v. *United States,* 99 U. S. 402; *Ill. Cent. R. R. Co.* v. *Interstate Comm. Comm.* 206 U. S. 441; *United States* v. *Central Pac. R. R. Co.* 138 U. S. 84; *Kemper Military School* v. *Crutchley,* 274 Fed. 125; *Grand Rapids, etc., Ry. Co.* v. *Doyle,* 245 Fed. 792; *Union Hollywood Water Co.* v. *Carter,* 238 Fed. 329; *Walker* v. *Gulf & I. Ry. Co.* 269 Fed. 885; *Grant* v. *Hartford, etc., R. R. Co.* 93 U. S. 225; *Haw. C. & S. Co.* v. *Tax Assessor,* 14 Haw. Rep. 601; *People* v. *Wilson,* 121 N. Y. App. Div. 376; *Highland Ry. Co.* v. *Balderston,*

2 Gr. Br. Tax Cas. 485; *Clayton* v. *Newcastle Corp.* 2 Gr. Br. Tax Cas. 416.

All of the disbursements made for additions and betterments upon the properties leased from the city of New York are capital expenditures, hence are not deductible in the year made under § 12 (a) of the Revenue Act of 1916 from the gross income for that year, but the cost should be spread over the term of the lease and an aliquot part deducted annually. A disbursement was made by the taxpayer in 1916 for the construction of a new pier, located on property covered by a lease from the city to the taxpayer by assignment. The improvement is of a permanent nature. It was not an outlay for the maintenance of property. It is a capital asset from which the taxpayer will derive the benefit of increased pier facilities, resulting in increased revenues. Read in the light of this construction of § 12 (a), which its language undeniably supports, article 140 of Regulations 33 (revised) is a reasonable regulation, affording as it does an equitable relief to a taxpayer who, for the purpose of increasing his business capacity, makes extensive improvements upon leased property, by allowing a deduction for capital expenditures upon a prorated basis, which he otherwise would not be entitled to, unless the payment was required to be made in order to continue in possession of the premises. Moreover, this executive construction of § 12 (a), as shown by the regulations, was known to Congress when it enacted § 234 (a) of the Revenue Act of 1918, which is almost identical with § 12 (a) of the Revenue Act of 1916, and in effect constitutes a reënactment of that section. This reënactment, therefore, is an approval or ratification on the part of Congress of such construction. *United States* v. *Falk,* 204 U. S. 143; *United States* v. *Hermanos y Compania,* 209 U. S. 337; *Komada* v. *United States,* 215 U. S. 392; *National Lead Co.* v. *United States,* 252 U. S. 140.

The items expended for dredging, while small in amount, are controlled by the above principles. They have been held to constitute capital expenditures. *Ounsworth* v. *Vickers,* Ltd. 3 K. B. 267; *Dumbarton Harbour Board* v. *Cox,* Scot. Cas. 162, 56 Scot. L. Reporter 122.

Mr. Charles E. Miller, for respondent.

While the word "including" may "merely specify particularly that which belongs to the genus" it may also be used as a word of enlargement and have the sense of "also" and of "in addition," *Montello Salt Co.* v. *Utah,* 221 U. S. 452, 462, 464, and it is frequently so used by Congress. *United States* v. *Pierce,* 147 Fed. 199.

Adopting this latter sense of the word, the Act of 1916 may be read as permitting a corporation to deduct, first, the ordinary and necessary expenses paid in maintenance and operation of its business and property, and second, rentals or other payments required to be made as a condition to the continued use or possession of property. And, since a tax act must be construed against the Government and in favor of the citizen, this act must be so construed.

This being so, it follows that the Railroad Company is entitled to deduct the amounts involved here if they were (1) rentals, or (2) payments required to be made as a condition to the continued use or possession of the property, and (3) the Railroad Company had not taken or was not taking title to the properties involved and had no equity in them.

The expenditures involved here were rentals, *Miller* v. *Gearin,* 258 Fed. 225; Regulations, Commissioner Int. Rev., 1916, Art. 140—payments required to be made as a condition to the continued use or possession of property. Attributing to the word condition its usual and natural

significance, it is evident that the statute permits the deduction of any payments the failure to make which would entitle the landowner to terminate the use or possession of the property. *42 Broadway Co.* v. *Anderson,* 209 Fed. 991 (reversed by this court upon another ground, 239 U. S. 69).

The Railroad Company had not taken, or was not taking, title to the properties and had no equity in them. The words "to which the corporation has not taken or is not taking title, or in which it has no equity," did not appear either in the Corporation Tax Act of 1909 or in the Income Tax Act of 1913. They were included in the Revenue Act of 1916 as the result of a recommendation of the Secretary of the Treasury, made after the decisions of the lower courts in *42 Broadway Co.* v. *Anderson, supra;* Benders Federal Revenue Law, 1916, p. 64. The purpose of the amendment proposed by the Secretary of the Treasury was to distinguish "between the interest due on liens and mortgages and any payment made in the nature of rentals or charges consituting in the ordinary sense an expense of the business." See report, Secretary of the Treasury, fiscal year ending June 30, 1915, p. 99.

The genesis of the phrase, therefore, suggests that in using the word "equity," Congress had in mind the equity of redemption, which is defined as the remaining interest belonging to one who has pledged or mortgaged his property. "Equity" means equitable ownership, and even if it be possible to give it a broader interpretation, it is the duty of the court to construe it most strongly against the Government. *Gould* v. *Gould,* 245 U. S. 151.

The Railroad Company is entitled to deduct the whole of such expenditures from its gross income for the year 1916. Since the expenditures involved here are of the kind which may be deducted, it is clear that the statute,

by express words, permits the deduction of all of such expenditures made within the year. There is no hint in the statute that the payments which may be deducted are to be prorated. The words of the statute are "all . . . paid within the year." *Mutual Benefit Co.* v. *Herold,* 198 Fed. 199; *United States* v. *Christine Oil & Gas Co.* 269 Fed. 458; *Southern Pac. R. Co.* v. *Muenter,* 260 Fed. 837. The Government seeks to support the contention that the expenditures involved here should be prorated by the regulation of the Commissioner of Internal Revenue. It is settled that the power to make administrative rulings does not include the power to legislate, *United States* v. *George,* 228 U. S. 14, and that such a regulation to be valid must be consistent with the statute under which it is made. *International Railroad Company* v. *Davidson,* 257 U. S. 506, 514. See also *Maryland Casualty* v. *United States,* 251 U. S. 342, 349 and cases cited.

Mr. Justice Sutherland delivered the opinion of the Court.

During the year 1916, respondent, as lessee, was in possession of and operating certain railroads and branches in New Jersey and Pennsylvania. The leases were for terms of 999 years and bound respondent to maintain and keep the leased property in good order and repair and fit for efficient use. Each provided that in the event of a default in that respect the lease might be terminated by the lessor. At the same time, respondent had leases of certain piers from the City of New York for various terms with the privilege of renewal, not to exceed in any case 30 years in all. One such lease required respondent to acquire and pay for the interests of private owners in an old pier and to construct a new one in its place. It provided that, if the cost should be less than $2,750,000, respondent was to pay in addition to rent 5½% on the

difference between that amount and the actual cost; but if the cost should be more than $2,750,000 respondent was to be credited on its annual rental with 5½% on such difference for 39 years, in which event the term was to be extended under a formula not necessary to be repeated. Respondent agreed to maintain the premises and structures thereon, or to be erected thereon, in good and efficient repair. The city was authorized to terminate the lease at any time after 10 years, but in such case agreed to pay to respondent such reasonable sum as might be fixed by arbitration. Other leases required respondent to do such dredging as the commissioner of docks considered necessary, and still others, to build extensions to the leased piers. All the leases provided that the city could terminate them if respondent failed to pay rent or failed otherwise to observe the covenants or agreements.

In the year 1916, respondent expended, under the railroad leases, for additions and betterments and, under the pier leases, for the several purposes therein set forth, the aggregate sum of $1,659,924.33, of which $1,525,308.72 was for the acquisition of the private rights in the old pier and the construction of the new one.

In submitting its income tax return for that year, respondent sought to deduct these various expenditures from its gross income under § 12 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 767–769, which provides, in the case of a corporation, that annual net income shall be ascertained by deducting from the gross amount thereof, among other things,—

"First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

The collector refused to allow the deductions, and respondent, under protest, paid the amount of the increased assessment due to such refusal, and brought this action to recover it. Its contention is that the expenditures were "rentals or other payments" within the meaning of the provision above quoted, and that the whole amount constitutes an allowable deduction for the year 1916. On the other hand, the government contends that the disbursements were capital expenditures and that the only permissible deduction is an annual allowance under § 12 (a) subd. Second, 39 Stat. 768,[1] for "depreciation"; but, if the expenditures are to be regarded as additional rentals or other payments within the meaning of § 12 (a) subd. First, the amount must be prorated, under a regulation of the Treasury Department, over the life of the improvements or the life of the lease, whichever is the shorter. The federal district court gave judgment for respondent, which was affirmed by the circuit court of appeals, 289 Fed. 354; and the case is here on certiorari. 263 U. S. 693.

Clearly the expenditures were not "expenses paid within the year in the maintenance and operation of its [respondent's] business and properties;"[2] but were for

[1] Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business . . . *Provided,* That no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: . . .

[2] Perhaps a critical analysis of the detailed statement found in the record might reveal items of minor importance which are of this character, or which might be classed as "rentals or other payments"; but since no point appears to be made in respect of such a differentiation we do not consider it.

additions and betterments of a permanent character, such as would, if made by an owner, come within the proviso in subd. Second, "that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property, etc." They were made, not to keep the properties going, but to create additions to them. They constituted, not *upkeep,* but *investment;*— not maintenance or operating expenses, deductible under subd. First, § 12 (a), but capital, subject to annual allowances for exhaustion or depreciation under subd. Second.

Nevertheless, do such expenditures come within the words "rentals or other payments required to be made as a condition to the continued use or possession of property?" We think not. The statement of the court below that it was conceded by both parties that the expenditures were "additional rentals" is challenged by the government and does not seem to have support in the record. The term "rentals," since there is nothing to indicate the contrary, must be taken in its usual and ordinary sense, that is, as implying a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property. *Dodge* v. *Hogan,* 19 R. I. 4, 11; 2 Washburn, Real Property (6th ed.) § 1187; and in that sense it does not include payments, uncertain both as to amount and time, made for the cost of improvements or even for taxes. *Guild* v. *Sampson,* 232 Mass. 509, 513; *Garner* v. *Hannah,* 13 N. Y. Super. Ct. 262, 266–267; *Bien* v. *Bixby,* 41 N. Y. Supp. 433, 435; *Simonelli* v. *Di Errico,* 110 N. Y. Supp. 1044, 1045. Expenditures, therefore, like those here involved, made for betterments and additions to leased premises, cannot be deducted under the term "rentals," in the absence of circumstances fairly importing an exceptional meaning; and these we do not find in respect of the statute under

review. Nor do such expenditures come within the phrase " or other payments," which was evidently meant to bring in payments *ejusdem generis* with " rentals," such as taxes, insurance, interest on mortgages, and the like, constituting liabilities of the lessor on account of the leased premises which the lessee has covenanted to pay.

In respect of the 999 year leases, the additions and betterments will all be consumed in their use by the lessee within a fraction of the term, and, as to them, allowances for annual depreciation will suffice to meet the requirements of the statute. In the case of the pier leases, the improvements may and probably will outlast the term, and, as to them, deductions may more properly take the form of proportionate annual allowances for exhaustion.

The judgment below cannot be sustained except for $37,781.54, the amount of a conceded overpayment, with interest thereon as allowed by the trial court.

Judgment reversed and cause remanded with instructions to modify the judgment in conformity with this opinion.

INDUSTRIAL ASSOCIATION OF SAN FRANCISCO, ET AL. *v.* UNITED STATES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 365. Argued March 10, 1925.—Decided April 13, 1925.

For the purpose of freeing the local building industry from domination by trade unions, numerous building contractors and dealers in building materials in San Francisco combined to establish, in effect, the " open shop " plan of employment, by requiring builders who desired building materials of certain specified kinds to obtain permits therefor from a Builders' Exchange, and by refusing such permits to those who did not support the plan. *Held* that the

combination did not violate the Sherman Anti-Trust Act, because

(1) Its object was confined to a purely local matter and interference with interstate commerce was neither intended nor desired. P. 77.

(2) The materials for which permits were required were all produced in California, except one kind as to which permits were required only after they had entered the State and become commingled with the common mass of local property, so that their interstate movement and commercial status had ended. P. 78.

(3) Any interference with the free movement of supplies from other States was incidental, indirect and remote, due merely to lack of demand for such supplies upon the part of builders who, through being unable to purchase the local permit materials, were unable to go on with their jobs. P. 80.

(4) Instances in which it was alleged that persons in other States were directly prevented or discouraged from shipping into California were either not proven, or were related to a practice abandoned long before the suit was instituted, with no probability of renewal, or were sporadic and doubtful and of so little weight as evidence of the conspiracy alleged as to call for application of the maximum *de minimis non curat lex.* P. 83.

293 Fed. 925, reversed.

APPEAL from a decree of the District Court enjoining the appellant associations, corporations and individuals from conduct found to violate the Anti-Trust Act.

Mr. H. H. Phleger, with whom *Messrs. O. K. McMurray, Chauncey F. Eldridge* and *George O. Bahrs* were on the briefs, for appellants.

The evidence shows that certain of the defendants, participants in a local industrial controversy, refused to sell certain state-produced materials and certain supplies which had ceased to be articles in interstate commerce, to those aligned on the opposite side of the industrial controversy; that such refusals were made in San Francisco; that the materials were to be used in San Francisco and vicinity; that there was no intent to affect

interstate commerce, to fix prices or to stifle competition, and that the refusals had in fact no such effect. The defendants contend that this evidence does not establish a violation of the Act for the following reasons:

1. The agreement was not intended to restrain interstate trade; it was not intended to fix prices or restrain competition; it had no commercial or trade purpose.

2. Its effect on interstate commerce was secondary, remote, incidental and slight, if there was any effect at all.

3. The situs and effect of the restraint, if any, were local.

4. The defendants were themselves direct participants in the industrial controversy and committed no unlawful acts.

5. The restraint upon interstate commerce, if any, was not unreasonable.

Participants in an industrial conflict, confined to a single city and vicinity, may refuse to sell building materials in that city, to their opponents for use in that city, and if there is no intent to restrain interstate commerce, and if any effect thereon is slight, incidental and remote, there is no violation of the Anti-Trust Act. The Act condemns only those combinations which directly and unduly restrain interstate commerce. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377–400; *United States* v. *Union P. R. Co.,* 226 U. S. 61.

To come within the inhibitions of the Act, we must find: A restraint of interstate commerce; direct restraint of that commerce; and undue restraint of that commerce. *United States* v. *Knight,* 156 U. S. 1; *Swift & Co.* v. *United States,* 196 U. S. 375; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457; *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604. In these cases the court has limited the application of the Act to agreements which exercise

a direct effect upon interstate commerce and where the intent or "dangerous probability" is to restrict that commerce. The principles marking the limits of direct and undue restraint of interstate commerce receive further illustration from a consideration of the cases in this court under the Anti-Trust Act dealing with labor disputes, a group which may conveniently be termed the *Labor Cases*. *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex Co.* v. *Deering,* 254 U. S. 443; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344. See *United Mine Workers of America* v. *Pennsylvania,* 300 Fed. 965; *Finley* v. *United Mine Workers of America,* 300 Fed. 972, 979; *United Leather Workers* v. *Herkert & Meisel Trunk Co., supra.*

In order that a restraint of trade shall be obnoxious to the Act, it must constitute an "undue" restraint. *United States* v. *Standard Oil,* 221 U. S. 1. The decisions of this court have made it clear that agreements which result in the restraint of intrastate, as distinguished from interstate, commerce are not within the Act, and that the court acquires no jurisdication over that part of a combination or agreement which relates to commerce wholly within a State by reason of the fact that the combination also covers commerce which is interstate. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211.

As to the refusal to sell in San Francisco for use in San Francisco, small quantities of lime and plaster produced in other States, it is equally clear that such refusals did not constitute a violation of the Act. The goods at the time of the refusals had ceased to be in interstate commerce. *Illinois Cent. Ry.* v. *De Fuentes,* 236 U. S. 157; *Pub. Util. Comm. of Kansas* v. *Landon,* 249 U. S. 236. The materials here are not like the cattle in the *Swift Case* or in *Stafford* v. *Wallace* (258 U. S. 495)—not in the current of interstate commerce; the tran-

sit had stopped for all time. The materials were at their ultimate destination, never more to move out into interstate commerce. *Brown* v. *Huston,* 114 U. S. 622.

The decree is vague, indefinite and uncertain and does not set forth the acts or transactions which are forbidden. It is a sweeping injunction to obey the law and puts the whole conduct of the defendants at the peril of a summons for contempt. As to some of the defendants, the evidence wholly fails to show any participation in any of the acts or things complained of or any connection therewith. The court therefore committed error in entering its decree against such defendants.

Mr. Augustus T. Seymour, Assistant to the Attorney General, with whom *Messrs. Henry Anderson Guiler* and *C. Stanley Thompson,* Special Assistants to the Attorney General, were on the brief, for the United States.

The object sought to be accomplished by the defendants was unlawful. The purpose was to take away from employers the right to employ men upon any other terms than those of the so-called American Plan. Every employer who joined the combination stripped himself for the time being of the right to run his job upon such terms as he pleased.

The constitutional right of an employer to dispense with the services of an employee because of his membership in a labor union was recognized by this court in *Adair* v. *United States,* 208 U. S. 161, where an Act of Congress was held to be an arbitrary interference with the liberty of contract which no government could legally justify in a free land. This case was followed in the case of *Coppage* v. *Kansas,* 236 U. S. 1. The court expressly limited its consideration to agreements made voluntarily and without coercion or duress and which had no reference to interference with the rights of third parties or the general public (p. 20). In the case of *Hitchman Coal*

& Coke Co. v. *Mitchell,* 245 U. S. 229, 250, it was held that the plaintiff was acting within its lawful rights in employing its men only on terms of continuing non-membership in the United Mine Workers of America, and that both employers and employees have an interest which is entitled to the protection of the law in the freedom of the former to exercise without interference or compulsion his judgment as to whom he shall employ. The present is just such a case where the defendants joined in a combination to compel third persons and strangers to submit to certain limitations in their employment of labor. The elements of combination and coercion are both present.

The means employed by the defendants to accomplish their object directly restrained interstate commerce. The effect of the combined trade controlled was a threat to manufacturers of building materials outside of the State which was intended to, and which did in fact, restrain them from shipping building materials to "black listed" dealers and contractors and "ineligibles."

Nor was the cooperation of contractors in adopting the American Plan voluntary. They were forced to adopt that plan under penalty of not obtaining permits and not obtaining building material. They were required to sign pledges of allegiance to the conspiracy. That such an agreement is in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact.

The real contention of appellants is that the defendants did not intend to restrain interstate commerce and that their acts did not involve any unreasonable and undue restraint of such trade or commerce. That contention presents a question of fact, the solution of which must be arrived at by a consideration of the evidence. The principle, however, is clearly established that any combination which seeks to compel third persons and strangers not to engage in a course of trade except upon con-

ditions which the members of the combination impose is an agreement in restraint of trade within the meaning of the Sherman Anti-Trust Act. *Gompers* v. *Buck's Stove & Range Co.* 221 U. S. 418; *Loewe* v. *Lawlor,* 208 U. S. 274; *Eastern States Retail Lumber Dealers Assn.* v. *United States,* 234 U. S. 600; *Montague* v. *Lowry,* 193 U. S. 38; *Duplex Co.* v. *Deering,* 254 U. S. 443. The very circulation of information among the manufacturers located in States other than California of the names of contractors and builders or dealers who were not operating upon the American Plan or who refused to pledge themselves to operate upon that plan, was intended to have the natural effect of causing such manufacturers to withhold sales and shipments from the concerns so listed. The obstruction and restraint of a scheme like this were illustrated in *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433, which did not involve a question of interstate commerce. See *Federal Trade Comm.* v. *Raymond Co.,* 263 U. S. 565.

The real gist of the conspiracy here was the use of force to coerce manufacturers outside of the State to withhold the materials manufactured by them from anyone within the State who did not submit to the will of the conspirators. The power of defendants is shown by a stipulation in the record that 90 per cent of the new building work in San Francisco was being done by members of the defendant. Under the decisions above cited, it was enough if the natural tendency of the acts done by the defendants was to cause the manufacturers from without the State to withhold shipments from builders and contractors who refused to operate upon the American Plan. The vice of defendants' plan was in preventing building materials being distributed in the natural course of trade. The restraint on interstate commerce was material. In determining whether interstate commerce is involved in this case it is not necessary to con-

sider the decisions of this court in *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604. The distinction between those cases and one like the present case was pointed out in the opinion of *Montague* v. *Lowry,* 193 U. S. 38, at page 48, and in *Stafford* v. *Wallace,* 258 U. S. 495, at page 524. Nor is it important to consider cases like *Coe* v. *Errol,* 116 U. S. 517; *Kidd* v. *Pearson,* 128 U. S. 1; *Leisy* v. *Hardin,* 135 U. S. 110, 116, and other decisions which draw the line where interstate commerce commences and where it ends. See *Binderup* v. *Pathe Exchange,* 263 U. S. 291. The cases of *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, and *United Leatherworkers International Union* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, are both distinguishable from this case by the fact that the restraints involved in them related to the prevention of manufacture as distinguished from interference with the distribution of commodities after they had been manufactured.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit by the United States against a number of voluntary associations, corporations and individuals, charging them with engaging, and threatening to continue to engage, in a conspiracy to restrain trade and commerce in building materials among the several states, in violation of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. The bill prays for an injunction restraining the further execution of the alleged conspiracy, for a dissolution of certain of the associations as illegal, and for other relief. After a hearing, the federal district court declined to dissolve any of the appellants or interfere with their general activities, but entered a decree enjoining them specifically from (a) requiring any permit for the pur-

chase, sale or use of building materials or supplies produced without the State of California and coming into that state in interstate or foreign commerce; (b) making, as a condition for the issuance of any permit for the purchase, sale or use of building materials or supplies, any regulations that will interfere with the free movement of building materials, plumbers' or other supplies produced without the state; (c) attempting to prevent or discourage any person without the state from shipping building materials or other supplies to any person within the state; or (d) aiding, abetting or assisting, directly or indirectly, individually or collectively, others to do any of the foregoing matters or things. 293 Fed. 925. A reversal of this decree is sought upon the ground, mainly, that the evidence wholly fails to show any contract, combination or conspiracy in restraint of interstate or foreign trade or commerce, or a violation in any respect of the provisions of the Anti-Trust Act. Other grounds assigned, in view of the conclusion we have reached, we put aside as unnecessary to be considered.

That there was a combination and concerted action among the appellants, is not disputed. The various agreements, courses of conduct and acts relied upon to establish the case for the government arose out of a long continued controversy,—or, more accurately, a series of controversies,—between employers engaged in the construction of buildings in San Francisco, upon the one side, and the building trade unions of San Francisco, of which there were some fifty in number with a combined membership of about 99% of all the workmen engaged in the building industries of that city, upon the other side.

Prior to February 1, 1921, the unions had adopted and enforced, and were then enforcing, many restrictions bearing upon the employment of their members, which the employers, and a large body of other citizens, considered to be unreasonable, uneconomic and injurious to

the building industries, resulting, it was asserted, in decreased production, increased cost and generally retarded progress. Among the restrictions complained of, were rules limiting the number of apprentices, limiting the amount of work, limiting or forbidding the use of labor-saving devices, and interfering with the legitimate authority of the employer. The plumbers' union, for example, enforced the following, among others: no union plumber, whatever the emergency, was permitted to work on non-union material or to work overtime on Saturday without permission of the union; detailed reports were required showing the number of fixtures set each day, and men who exceeded the standard fixed by the union were disciplined; the time which any employer was permitted to stay on a job was limited to two hours a day; as many men as the union saw fit could be ordered on a job regardless of the wishes of the employer. Among the restrictions imposed by the painters' union were these: wide brushes with long handles for roof painting were prohibited, and it was required that all such work should be done with a small brush; certain labor-saving devices were prohibited; and union painters declined to paint non-union lumber.

The unions rigidly enforced the "closed shop,"—that is, they denied the right of the employer to employ any workman, however well qualified, who was not a member of a San Francisco union; and this applied to a member of a labor union in another locality, who, moreover, practically was precluded from joining a San Francisco union by reason of the cost and onerous conditions imposed. They were confederated under the name of the Building Trades Council, by means of which their combined power was exerted in support of the demands and policies of each, until they had acquired a virtual monopoly of all kinds of building trade labor in San Francisco, and no building work of any consequence could be done in that

city, except in subordination to these demands and policies.

Early in 1921, serious differences having arisen between the unions and the employers in respect of wages, hours and working conditions, an agreement for arbitration was made and a board of arbitrators selected. The board, after a hearing, made a tentative award reducing the scale of wages for the ensuing six months. Challenging the authority of the board to reduce wages, the unions refused to be bound by the award and repudiated and abandoned the arbitration. Strikes ensued; efforts to bring the strikers back to work failed; and building operations in San Francisco practically came to a stand-still. Thereupon, in an endeavor to find a solution of the difficulty, mass-meetings were held by representative citizens in large numbers and from all walks of life. At these meetings it was resolved that the work of building must go forward, and that if San Francisco mechanics refused to work, others must be employed from the outside. Funds were raised and placed in the hands of a committee of the San Francisco Chamber of Commerce, and, under its direction, workmen were brought in from the outside with promises of employment at the wages fixed by the arbitrators. Subsequently, the Industrial Association of San Francisco was organized to take the place of the committee and carry on its work. The strikers, however, returned to work, and for a time no objection was made to the employment of nonunion workmen. But later, demands were made by certain of the unions for the discharge of all non-union workmen and the restoration of the "closed shop." These demands were disregarded, and there was another strike. A boycott was instituted and acts of violence against persons and property committed. In the meantime, one of the appellants, the Builders Exchange of San Francisco, with a membership of more than one thousand building contractors and deal-

ers in building materials, in coöperation with the Industrial Association and other appellants, devised and put into effect what is called the "American plan."

The basic requirement of the plan was that there should be no discrimination for or against an employee on account of his affiliation or non-affiliation with a labor union, except that at least one non-union man in each craft should be employed on each particular job as an evidence, it is suggested, of good faith. In effect, the "American plan" and the "open shop" policy are the same.

The principal means adopted to enforce the plan was the "permit system," the object of which was to limit sales of certain specified kinds of materials to builders who supported the plan. To render this restriction effective, the person concerned was required to obtain a permit from the Builders Exchange, specifying the kinds and quantities of materials to be furnished and the particular job on which they were to be used. The materials specified were cement, lime, plaster, ready-mixed mortar, brick, terra cotta and clay products, sand, rock and gravel. Substantially all of these were California productions and were deliberately selected for that reason, in order to avoid interference with interstate commerce. The only material exception was plaster, which was brought in from the outside, but consigned to local representatives of the manufacturers or to local dealers in San Francisco, and brought to rest in salesrooms and warehouses and commingled with other goods and property, before being subjected to the permit rule. A suggestion was made at one time that, if necessary, the rule would be extended to all other materials used in the building trades; but it does not appear that this was done. It is said that lath of various kinds, wallboard and Keene cement also were put under the rule; but we think the record discloses that, in fact, this was never agreed upon or carried into effect.

There is evidence of efforts to extend the "American plan" to other cities and states. Permits were extensively withheld in respect of buildings where the "American plan" was not adopted or not enforced. Builders and contractors were constantly urged to observe the plan and were warned that failure to do so would result in a denial of future permits. A check was kept upon shops and building jobs by inspectors, and daily reports were made as to whether the plan was being observed. Whenever it appeared in any case that the plan was not being lived up to, a warning letter was sent out. Under appropriate by-laws, members of organizations subscribing to the plan who violated it were fined and in some instances expelled; and other methods, not necessary to be recited, in part persuasive and in part coercive, were adopted and enforced in order to secure a thoroughgoing maintenance of the plan.

With the conflict between the policy of the "closed shop" and that of the "open shop," or with the "American plan," *per se,* we have nothing to do. And since it clearly appears that the object of the plan was one entirely apart from any purpose to affect interstate commerce, the sole inquiry we are called upon to make is whether the means employed to effectuate it constituted a violation of the Anti-Trust Act; and, in the light of the evidence adduced, that inquiry need be pursued little beyond a consideration of the nature of the permit system, what was done under it, and the effect thereof upon interstate commerce.

The bases of the decree, which, in the opinion of the court below, were established, may be briefly and categorically stated as follows:

1. Permits were required for the purchase of building materials and supplies produced in and brought from other states into California.

2. Permits, even if limited to California produced materials, nevertheless, interfered with and prevented the

free movement of building materials and supplies from other states into California.

3. Persons in other states were directly prevented or discouraged from shipping building materials and supplies into California.

It will be well, *in limine*, to emphasize certain clearly established general facts, in the light of which these grounds must be considered. Interference with interstate trade was neither desired nor intended. On the contrary, the desire and intention was to avoid any such interference, and, to this end, the selection of materials subject to the permit system was substantially confined to California productions. The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, "for the sake of which the several specific acts and courses of conduct were done and adopted." *Swift and Company* v. *United States,* 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are "ample to supply a full local motive for the conspiracy." *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, 411.

But it is not enough that the object of a combination or conspiracy be outside the purview of the act, if the means adopted to effectuate it directly and unduly obstruct the free flow of interstate commerce. The statute is not aimed alone at combinations and conspiracies which contemplate a restraint of interstate commerce, but includes those which directly and unduly cause such restraint in fact. See *American Column Co.* v. *United*

States, 257 U. S. 377, 400; *Eastern States Lumber Ass'n.* v. *United States,* 234 U. S. 600, 613.

It remains to apply these principles, in the light of the facts, to the several grounds above stated, upon which the decree rests.

First: That permits were required for the purchase of materials produced in and brought from other states. To the extent that this may imply that permits were required in respect of building materials or supplies produced outside the State of California and shipped into the state, it is not sustained by the evidence. The record contains two letters signed by the president of the Builders Exchange to the effect, in one, that there "are added," and, in the other of later date, that "it is now necessary to add to the permit system," other materials than those in the enumerated list; and the person addressed in the second is asked to govern himself accordingly. But the positive, uncontradicted evidence is that, in fact, permits were required for the originally listed materials and for nothing else. While about twenty-eight thousand permits in all were issued, there is a significant absence of evidence that any of them so issued related to other than such listed materials. Upon the proof, we reasonably cannot accept the view that these letters are enough to show a departure from the declared and established purpose of the movement on the whole to avoid interference with interstate trade by confining the permit system substantially to California produced articles.

It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commer-

cial status had ended. This situation is utterly unlike that presented in the *Swift Case, supra,* where, the only interruption of the interstate transit of live stock being that necessary to find a purchaser at the stockyards, and this the usual and constantly recurring course, it was held (pp. 398–399) that there was thus constituted "a current of commerce among the States," of which the purchase was but a part and incident. The same is true of *Stafford* v. *Wallace,* 258 U. S. 495, 516, which likewise dealt with the interstate shipment and sale of live stock. The stockyards, to which such live stock was consigned and delivered, are there described, not as a place of rest or final destination, but as "a throat through which the current flows," and the sale as only an incident which does not stop the flow but merely changes the private interest in the subject of the current without interfering with its continuity. In *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309, a commodity produced in one state was consigned to a local agency of the producer in another, not as a consummation of the transit, but for delivery to the customer. This court held that the intermediate delivery did not end, and was not intended to end, the movement of the commodity, but merely halted it "as a convenient step in the process of getting it to its final destination."

But here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and ended the authority of the federal government under the commerce clause of the Constitution. What next was done with it, was the result of new and independent arrangements.

In respect of other materials of the character of those on the selected list, brought from other states, it is enough to say that the quantities were not only of little comparative consequence but it is not shown that they were subjected to the permit rule.

Second: That the permit requirement for California produced materials interfered with the free movement of materials and supplies from other states. No doubt there was such an interference, but the extent of it, being neither shown nor perhaps capable of being shown, is a matter of surmise. It was, however, an interference not within the design of the appellants, but purely incidental to the accomplishment of a different purpose. The court below laid especial stress upon the point that plumbers' supplies, which for the most part were manufactured outside the state, though not included under the permit system, were prevented from entering the state by the process of refusing a permit to purchase other materials, which were under the system, to anyone who employed a plumber who was not observing the "American plan." This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote,—precisely such an interference as this court dealt with in *United Mine Workers* v. *Coronado Co., supra,* and *United Leather Workers* v. *Herkert,* 265 U. S. 457.

In the *Coronado Case* there was an attempt on the part of the owners of a coal mine to operate it upon the "open shop" basis. The officers and members of a local miners' union, thereupon, engaged in a strike, which was carried on with circumstances of violence resulting in the destruction of property and the injury and death of persons. A

conspiracy and an intent to obstruct mining operations were established, and it was proved that the effect thereof was to prevent a part of the product of the mine from going into interstate commerce. It was held that this would not constitute a conspiracy to restrain such commerce, in the absence of proof of an intention to restrain it or proof of such a direct and substantial effect upon it, that such intention reasonably must be inferred. It was pointed out that there was nothing in the circumstances or declarations of the parties to indicate that the strikers had in mind any interference with interstate commerce or competition, when they engaged in the attempt to break up the plan to operate the mines with non-union labor, and, conceding that the natural result would be to keep the preponderating part of the output of the mine from being shipped out of the state, the effect on interstate commerce was not of such substance that a purpose to restrain interstate commerce might be inferred.

In the *United Leather Workers Case* there was a strike, accompanied by illegal picketing and intimidation of workers, to prevent, and which had the effect of preventing, the continued manufacture of goods by a trunk company. It was held that this was not a conspiracy to restrain interstate commerce within the Anti-Trust Act, even though the goods, to the knowledge of the strikers, were to be shipped in interstate commerce to fill orders already received and accepted from the company's customers in other states, since there was no actual or attempted interference with their transportation to, or their sale in, such states. There is in this case a complete review of the prior decisions on the subject, upon which the Court concludes (p. 471):

"This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of

its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce. . . .

"We concur with the dissenting Judge in the Circuit Court of Appeals when, in speaking of the conclusion of the majority, he said: 'The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce.'"

In its essential features, the present case is controlled by this reasoning. If an executed agreement to strike with the object and effect of closing down a mine or a factory, by preventing the employment of necessary workmen, the indirect result of which is that the sale and shipment of goods and products in interstate commerce is prevented or diminished, is not an unlawful restraint of such commerce, it cannot consistently be held otherwise in respect of an agreement and combination of employers or others to frustrate a strike and defeat the strikers by keeping essential domestic building materials out of their hands and the hands of their sympathizers, because the means employed, whether lawful or unlawful, produce a like indirect result. The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.

The Government relies with much confidence upon *Loewe* v. *Lawlor,* 208 U. S. 274, and *Duplex Co.* v. *Deering,* 254 U. S. 443; but the facts there and the facts here were entirely different. Both cases, like the *Coronado* and the *United Leather Workers* cases and the present case, arose out of labor disputes; but in the former cases, unlike the latter ones, the object of the labor organizations was sought to be attained by a country-wide boycott of the employer's goods for the direct purpose of preventing their sale and transportation in interstate commerce in order to force a compliance with their demands. The four cases and the one here, considered together, clearly illustrate the vital difference, under the Sherman Act, between a direct, substantial and intentional interference with interstate commerce and an interference which is incidental, indirect, remote, and outside the purposes of those causing it.

Third: That persons in other states were directly prevented or discouraged from shipping into California. In respect of the alleged instances of direct interference with interstate sales and shipments, the evidence is sharply conflicting, with the preponderance in most cases, we think, on the side of appellants. In many of them the interferences had no connection with the "American plan" or the system and efforts employed to effectuate it, but were in furtherance of independent trade policies or other isolated and disconnected purposes. One such case was that of the Golden Gate Building Material Company, consisting of five plastering contractors, where the basis of the refusal to accept orders for supplies was a protest by certain dealers that the company was buying for individual use and not for resale, and had been formed merely to obtain dealers' prices. A class of interferences strongly pressed in argument was that in respect of plumbing supplies, practically all of which were manufactured outside of the State of California. Lists of plumbing con-

tractors who were not observing the "American plan" were sent to the plumbing supply houses, and some of them refused to sell materials to such contractors. That there was, at least, a sympathetic connection between this action and the "American plan" may be assumed, although plumbing supplies were not within the scope of the permit list. However this may be, and whatever may have been the original situation, the practice was abandoned long before the present suit was instituted, and nothing appears by way of threat or otherwise to indicate the probability of its ever being resumed. Under these circumstances, there is no basis for present relief by injunction. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 444–445.

By the foregoing process of elimination, the interferences which may have been unlawful are reduced to some three or four sporadic and doubtful instances, during a period of nearly two years. And when we consider that the aggregate value of the materials involved in these few and widely separated instances, was, at the utmost, a few thousand dollars, compared with an estimated expenditure of $100,000,000 in the construction of buildings in San Francisco during the same time, their weight, as evidence to establish a conspiracy to restrain interstate commerce or to establish such restraint in fact, becomes so insignificant as to call for the application of the maxim, *de minimis non curat lex.* To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states, to a situation so equivocal and so lacking in substance, would be to cast doubt upon the serious purpose with which it was framed.

The decree of the court below must be reversed and the cause remanded with instructions to dismiss the bill.

Decree reversed.

Counsel for Parties.

BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY *v.* VAN PELT

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 160. Argued January 6, 1925.—Decided April 13, 1925.

1. The first Cummins Amendment, to § 20 of the Act to Regulate Commerce, concerning the duty of carriers to issue receipts or bills of lading for interstate freight and their liability for loss or damage, provides: "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." *Held* that the words "carelessness or negligence" qualify the whole clause; "damaged" should be read "damage" and the comma after "unloaded" should be omitted. P. 87.
2. Thus read, carelessness or negligence is an element of each case of loss, damage or injury included in the clause, and in such case carriers are not permitted to require notice or filing of claim as a condition precedent to recovery. P. 91.
3. In an action against an express company for damages due to delay, the shipper, not having given notice and filed a claim, as required by the uniform express receipt, must prove the delay was due to the carrier's carelessness or negligence. P. 91.

205 App. Div. 332, reversed.

CERTIORARI to a judgment of the New York Supreme Court, Appellate Division, affirming a judgment for damages based on delay of an express company in transporting and delivering a carload of eggs.

Mr. K. E. Stockton, with whom *Mr. Charles W. Stockton* was on the brief, for petitioner.

Messrs. Selig Edelman and *Ralph Merriam* for respondent. *Messrs. Lamar Hardy* and *Louis C. White* were on the briefs.

Messrs. H. S. Marx and *A. M. Hartung* filed a brief as *amici curiae,* by special leave of Court.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

February 23, 1918, at Louisville, Kentucky, respondent's assignor delivered to the Adams Express Company, a carload, consisting of 522 cases of fresh eggs, for transportation to New York City, there to be delivered to Harold L. Brown Company. The shipment was so delivered, March 4, 1918. This action was brought to recover damages for loss in market value due to delay in transportation. At the trial, respondent contended that the express company was bound to make delivery of the eggs within a reasonable time, which he claimed to be not more than 30 hours. It was shown that the price of eggs in New York declined between the time respondent claimed delivery to consignee should have been made and the time when it was made. The trial court directed a verdict in favor of respondent. A judgment was entered thereon. Petitioner appealed. It was affirmed by the Appellate Division. 205 App. Div. 332. Leave to appeal to the Court of Appeals of New York was denied. This court granted certiorari. 263 U. S. 697.

The case involves the construction of a provision of the Act of Congress of March 4, 1915, known as the first Cummins Amendment, c. 176, 38 Stat. 1196, 1197, amending § 20 of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 386, as amended by § 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 593, 595. Chapter 176 requires any common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the lawful holder thereof for any loss, damage or injury to such property, and contains certain provisos, the last two of which are: "*Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation,

or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." At the time of the delivery of the property for transportation, the express company issued and delivered a receipt or bill of lading therefor, which contained the following: " Received from Ky. Creameries the shipment hereinafter listed, subject to the Classification and Tariffs in effect on the date hereof, which shipment the Company agrees to carry upon the terms and conditions of the Uniform Express Receipt in effect on date of shipment." Section 7 of the uniform receipt contains the following: " Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." (Official Express Classification No. 25, filed May 18, 1917. I. C. C. A–2130.)

No claim was made or filed within four months after the delivery of the property to the consignee. We are required to decide whether the case is one where notice or filing of claim may be required as a condition precedent to recovery. If the first clause of the above quoted pro-

vision stood alone, the rule established would be clear. But the purpose of the second clause is to except some cases from the application of the general rule and to provide that as to them no notice of claim nor filing of claim shall be required. The language and structure of the second clause is so inapt and defective that it is difficult to give it a construction that is wholly satisfactory.* The Appellate Division held that the requirement of the receipt for the filing of claims within four months after delivery was prohibited by law, and was without force or effect. The court quoted from its opinion in *Bell* v. *New York Central Railroad,* 187 App. Div. 564, 566: "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to wit, (1) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call nontransit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a nontransit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement that suit be instituted within two years." Respondent supports this construction. But we think it is not satisfactory. The language does not require such a classification. The court suggests no rea-

* See *Hailey* v. *Oregon Short Line R. Co.,* 253 Fed. 569; *Gillette Safety Razor Co.* v. *Davis,* 278 Fed. 864; *Conover* v. *Wabash Railway,* 208 Ill. App. 105; *Conover* v. *Baltimore & Ohio Southwestern R. Co.,* 212 Ill. App. 29; *Bell* v. *New York Central R. R.,* 187 App. Div. 564; *Henningsen Produce Co.* v. *American Ry. Express,* 152 Minn. 209; *St. Sing* v. *Express Co.,* 183 N. C. 405; *Cunningham* v. *Missouri Pacific R. Co.,* (Missouri) 219 S. W. 1003; *Lissberger* v. *Bush Terminal R. Co.,* 197 N. Y. S. 281; *Allen* v. *Davis,* (South Carolina), 118 S. E. 614.

son for such a division, and there seem to be no substantial considerations supporting it. Apparently, no effect is given the phrase, "by carelessness or negligence."

The petitioner contends that the word "delay" is to be read with "while being loaded or unloaded." This would make two classes of claims excepted from the general rule. One would include claims for loss due to delay or damage while being loaded or unloaded. The other would include those for damage in transit due to carelessness or negligence. But it is not apparent why claims for loss, damage or injury due to delay in transit should not be included in the same class as claims for damages due to delay while being loaded or unloaded. And no good reason is shown for the elimination of the element of carelessness or negligence from the definition of one class, while including it in the definition of the other.

It must be assumed that Congress intended to make the classification on a reasonable basis having regard to considerations deemed sufficient to justify exceptions to the rule. The element of carelessness or negligence is important. There are such differences between liability without fault and that resulting from negligence that Congress upon good reasons might permit carriers to require notice and filing of claim within the specified times where the carrier is without fault, and forbid such a requirement in the cases referred to where the loss results from the carrier's negligence. Notice and filing of claim warns the carrier that there may be need to make investigations which otherwise might not appear to be necessary; and if notice of claim is given and filing of claim is made within a reasonable time it serves to enable the carrier to take timely action to discover and preserve the evidence on which depends a determination of the merits of the demand. As to claims for damages not due to negligence, in the absence of notice, there may be no reason

for anticipating demand or to investigate to determine the fact or extent of liability. But as to damages resulting from carelessness or negligence, it reasonably may be thought that the carrier has such knowledge of the facts or has such reason to expect claim for compensation to be made against it that the carrier should not be permitted to exact such notice and filing of claim as a condition precedent to recovery. No other basis of classification seems as well supported in reason as the element of carelessness or negligence. And that basis is substantially sustained by the language of the clause. The elimination of the final "d" in "damaged" and the omission of the comma after "unloaded" would make the clause read as follows: "*Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The context does not permit the use of the word "damaged" or allow any meaning to be given to it. Its presence makes a grammatical defect and embarrasses interpretation. It seems obvious that the word "damage" was intended. That word is in harmony with the context as well as with the probable intention of Congress. The final "d" may be eliminated. The intention of the law-maker constitutes the law. *Stewart* v. *Kahn,* 11 Wall. 493, 504. See *Smythe* v. *Fiske,* 23 Wall. 374, 380. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute. *Oates* v. *National Bank,* 100 U. S. 239, 244. Having found that the word "damage" was intended to be used, the court applies the rule that, "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter,

and a thing which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers." *People* v. *Utica Insurance Co.*, 15 Johns. 358, 381; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The comma after the word "unloaded" is not entitled to have any weight as evidence of the legislative intention as against the considerations supporting the extension of the qualifying effect of the words "by carelessness or negligence" to all claims referred to in the second clause. "Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. 522, 527.

We hold that the second clause must be read as above indicated, that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that, in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery. See *Hailey* v. *Oregon Short Line R. Co.*, 253 Fed. 569.

No notice of claim having been given and no claim having been filed as required by the uniform express receipt, it was incumbent upon the respondent to show loss, damage or injury due to delay by carelessness or negligence of the company. The carload of eggs was delivered to the company at Louisville, February 23, and was delivered by the company to the consignee at New York, March 4. It was shown that the car was taken out of Louisville, February 23, on a train of the Pennsylvania Railroad Company, and that it should have gone to Pittsburg without transfer. There was no other evidence in respect of the intended or actual movement of the car. There was evidence tending to show that the ordinary time of a passenger train on the Pennsylvania Railroad

between Louisville and New York was 25 or 26 hours. But there was no evidence that such shipments usually moved, or that this shipment could have moved, on any train making that time, or to show the time usually made by trains upon which such shipments were or could be moved. There was no evidence to show what was the customary or usual time for the transportation and delivery of such shipments. The trial judge held that such reasonable time was not more than 30 hours. We think the evidence was not sufficient to sustain that finding or to show what was a reasonable time for such transportation and delivery. It follows that there was nothing to give rise to any inference or presumption that failure to deliver at destination within 30 hours was due to negligence or to support a finding that there was any loss or damage due to delay caused by carelessness or negligence of the company. The evidence of market value of such eggs in New York City was as follows. February twenty-fifth, 53 cents per dozen; February twenty-sixth, 52 to 53 cents; March first, 36 cents; March second, 35.5 to 36 cents; March fourth, 36.5 cents. The eggs in question were sold March 4,—some for 35 cents, some for 35.5, and the rest for 36.5 per dozen. There was no evidence of market value at any other time. The court directed a verdict in favor of respondent for $3,396.26, the difference between the amount for which the eggs were sold March 4 and their value calculated at 53 cents per dozen, the price prevailing February 25, with interest. The date when the eggs should have been delivered to consignee and the market value at that time were essential to respondent's case. In the absence of either, the amount of the loss, if any, cannot be determined. The judgment given cannot be sustained.

Reversed and remanded for further proceedings not inconsistent with this opinion.

CENTRAL UNION TRUST COMPANY OF NEW YORK *v.* ANDERSON COUNTY, TEXAS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 178. Argued January 16, 1925.—Decided April 13, 1925.

1. An ancillary suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy related to property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. P. 96.
2. A bill brought by a trustee for railway bond holders against the railway, a county, a city, state officials and citizens to enjoin further assertion of claims that the general offices, shops, and round houses of the railway must be kept at the city; *held,* within the jurisdiction of the District Court as ancillary to and dependent on a pending suit brought by the trustee against the railway to foreclose the mortgage. *Id.*

Reversed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. S. B. Dabney and *Mr. H. M. Garwood,* for appellant, submitted.

Mr. Nelson Phillips, with whom *Messrs. Murphy W. Townsend, A. G. Greenwood,* and *A. M. Barton* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The complaint in this case was filed as ancillary to and dependent on a suit for the foreclosure of a mortgage on railroad properties. On the motion of defendants, the district court held that it had no jurisdiction and dismissed the cause. This is an appeal from that decree. The question of jurisdiction alone is certified. Judicial Code, § 238.

In 1911, the International & Great Northern Railway Company was organized, and acquired under mortgage foreclosure sale all the property of the International & Great Northern Railroad Company. At the time of the purchase, the railway company made a mortgage of all its properties to appellant. The latter brought suit in equity against the railway company to foreclose the mortgage, and, August 10, 1914, the court appointed receivers who took possession of and operated the property. May 17, 1915, the court entered a decree of foreclosure, providing that, if the company failed to pay the mortgage debt, $12,908,461.06, with interest, the property should be sold. Pursuant to the decree, all the property, consisting of 1106 miles of railroad, all money, claims and assets in the hands of the receiver, was sold for $5,000,000, subject to the lien of a first mortgage and other existing obligations, as well as such obligations as the court thereafter should fix. By decree of August 10, 1922, the court confirmed the sale and directed the execution of a deed to the International-Great Northern Railroad Company.

June 5, 1922, before the sale, appellant filed this complaint. The defendants were the railway company, Anderson County, Texas, the county judge, the clerk of the county court, the city of Palestine in that county, its mayor, and certain of its citizens as representatives of all similarly situated. The complaint alleges as follows. The defendants, except the railway company, were asserting that in 1872 and 1875 contracts were made with the predecessors of the railway company which, taken with an act of the legislature of Texas of 1889, amended in 1899, operated to require the original contracting companies and all successors in title forever to maintain the general offices, shops and roundhouses at Palestine. In 1912, the defendants had sued the railway company in the state district court and obtained a decree requiring it forever to keep its general offices, shops and roundhouses at Pales-

tine.* Although, at the time of bringing suit, defendants had knowledge of the existence of the mortgage, they failed to make plaintiff a party to the suit. They insist that the decree is *res adjudicata* and binding against plaintiff and any purchaser under the foreclosure sale; and they threaten, if it is not observed by the purchaser, to enforce the decree with penalties. It is impossible to maintain the general offices, shops and roundhouses at Palestine without great loss and injury to and burden on the railroad property. The claims of defendants, if maintained, will cause a net loss in operating the railroad of not less than $500,000 per year, and thereby diminish the value of the property by not less than $3,000,000, and constitute a cloud and burden on the title and value of the property. The alleged contracts of 1872 and 1875 were never made; and if made, never became binding on the successors of the corporations with whom they were made, and are not binding upon plaintiff or any purchaser under the foreclosure decree. Defendants, without equity or right, are clouding the title and burdening the property to the great injury of plaintiff, its trust, and any purchaser of the property. The suit is brought in aid of the principal cause and the decree of foreclosure and for the benefit of the plaintiff and any purchaser under the decree, and for the purpose of determining whether the claims of Anderson County, Palestine and its citizens are valid in law or equity. By appropriate provisions in the decree of May 17, 1915, foreclosing the mortgage and authorizing the sale, and in the decree of August 10, 1922, confirming the sale and directing conveyance to the purchaser, the court retained jurisdiction to determine any

* The act above referred to is now Articles 6423, 6424 and 6425, Revised Statutes of Texas. The substance of the statutory provisions and litigation is disclosed by the decisions in the case, which are reported, repectively, in 150 S. W. 239; 106 Texas 60; 174 S. W. 305; 246 U. S. 424.

questions affecting the title to the property or that are germane to the purpose or substance of this suit. Plaintiff prays that the court forever enjoin defendants from asserting, or in any court attempting to enforce, their claims that such offices, shops and roundhouses shall be kept at Palestine, and that it decree the railroad property to be free from the burden and cloud of such claims.

If the complaint discloses a controversy that is ancillary to and dependent on the foreclosure suit, the district court had jurisdiction. The rule permitting third persons to come into suits in federal courts to enforce their claims in respect of property there impounded is stated in *Hoffman* v. *McClelland,* 264 U. S. 552, 558: "It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary." Ancillary suits are not limited to those initiated by persons who desire to come in and have their rights determined. Such a suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy having relation to the property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. See *Compton* v. *Jesup,* 68 Fed. 263, 284. Street, Fed. Eq. Pr. § 1248.

The provision of the decree of May 17, 1915, retaining jurisdiction, extended to all questions not determined and reserved the right to resell the property in case the pur-

chaser should fail to make any payment on account of purchase price within a specified time after the order requiring it. The decree of August 10, 1922, confirming the sale, retained jurisdiction over the property with reference to all claims against the railway company and to enforce payment of any judgment therefor out of the property sold. It reserved all questions relating " to suits now pending in this Court in this cause, or affecting the property above dealt with . . . for further hearing and determination . . ." In view of the reservations in these decrees, the sale and delivery of the railroad properties to the purchaser did not deprive the court of jurisdiction over the property or terminate plaintiff's right to carry on this suit. *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54; *Julian* v. *Central Trust Co.,* 193 U. S. 93, 111; *Smith* v. *Missouri Pacific R. Co.,* 266 Fed. 653.

Taking the allegations of the complaint to be true, the maintenance of the general offices, shops and roundhouses at Palestine burdens and restricts operation, requires great and unnecessary expenditures and correspondingly diminishes the value of the railroad. If, as asserted in the complaint, the claims and insistence of the defendants are groundless, plaintiff had a right to have the property sold free from such burdens and restrictions. The controversy has direct relation to the operation, use and value of the railroad property, and must be held to be ancillary to and dependent on the foreclosure suit. The district court had jurisdiction and should have heard and determined the merits.

Decree reversed.

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THE UNITED STATES *v.* FLANNERY ET AL., EXECUTORS OF THE ESTATE OF JAMES J. FLANNERY, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

No. 527. Argued January 12, 1925.—Decided April 13, 1925.

1. The Revenue Act of 1918 provided that net income should include "gains" derived from sales or dealings in property, §§ 212 (a), and 213 (a); that there should be allowed as deductions "losses" sustained during the taxable year "incurred in any transaction entered into for profit," § 214 (a); and that "for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property . . . the basis shall be—(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and (2) In the case of property acquired on or after that date, the cost thereof." § 202 (a). *Held:*

(*a*) That the provisions of the act in reference to the gains derived and the losses sustained from the sale of property acquired before March 1, 1913, were correlative, and that whatever effect was intended to be given to the market value of property on that date in determining taxable gains, a corresponding effect was intended to be given to such market value in determining deductible losses;

(*b*) That the Act of 1918 imposed a tax and allowed a deduction to the extent only that an actual gain was derived or an actual loss sustained from the investment, and the provision in reference to the market value on March 1, 1913, was applicable only where there was such an actual gain or loss, that is, that this provision was merely a limitation upon the amount of the actual gain or loss that would otherwise have been taxable or deductible. *Goodrich* v. *Edwards,* 255 U. S. 527; *Walsh* v. *Brewster, Id.* 536. P. 100.

2. Decisions of this Court affecting the business interests of the country should not be disturbed except upon the most cogent reasons. P. 105.

59 Ct. Cls. 719, reversed.

APPEAL from a judgment of the Court of Claims allowing recovery of an income tax paid under protest.

The Solicitor General, with whom *Messrs. Nelson T. Hartson,* Solicitor of Internal Revenue, and *Frederick W. Dewart,* Special Attorney, were on the brief, for the United States.

Mr. Edward S. Burling, with whom *Mr. Spencer Gordon* was on the brief, for appellees.

Messrs. Richard W. Hale and *Reginald H. Smith* filed a brief as *amici curiae,* by special leave of Court.

Messrs. Sanford Robinson, Arthur Ballantine and *Bernhard Knollenberg,* also filed a brief as *amici curiae,* by special leave of Court.

Mr. Justice Sanford delivered the opinion of the Court.

James J. Flannery bought, prior to March 1, 1913, certain corporate stock for less than $95,175. Its market value on March 1, 1913 was $116,325. He sold it in 1919 for $95,175, that is, for more than cost. He died in March, 1920. The executors of his estate in returning his income for the year 1919 deducted, as a loss, the difference between the market value of the stock on March 1, 1913, and the price received. The Commissioner of Internal Revenue disallowed the loss claimed, and an additional tax was assessed. The executors paid this under protest, and thereafter, a claim for refund having been denied, brought this action in the Court of Claims to recover the amount paid. Judgment was rendered in their favor. 59 Ct. Cls. 719.

The question presented is whether, under the income tax provisions of the Revenue Act of 1918,[1] a deductible loss was sustained by the sale of the stock in 1919 for more than it had cost, by reason of the fact that on March 1,

[1] Act of Feb. 24, 1919, c. 18, Title II, 40 Stat. 1057.

1913, between the dates of purchase and sale, it had a market value greater than the sale price.

This Act provided that net income should include "gains" derived from sales or dealings in property, §§ 212 (a), 213 (a); that there should be allowed as deductions "losses" sustained during the taxable year "incurred in any transaction entered into for profit", § 214 (a); and that "for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property . . . the basis shall be—(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and (2) In the case of property acquired on or after that date, the cost thereof . . ." § 202 (a).

The United States contends that under § 214 (a) there was no deductible loss whatever unless the taxpayer had sustained an actual "loss" in the entire transaction by selling the property for less than it had cost; and that the effect of § 202 (a) was merely that if such an actual loss had been sustained in selling property acquired before March 1, 1913, only so much thereof could be deducted as was sustained after the latter date, that is, the difference between the market value on that date and the sale price.

The executors contend, on the other hand, that § 202 (a) established the market value of such property on March 1, 1913, as the sole basis for ascertaining the loss sustained, without regard to its actual cost; and that if such market value was higher than the sale price, this conclusively determined that there had been a deductible "loss" in the transaction, and fixed the amount thereof at the difference between the market value on that date and the sale price.

It is clear, in the first place, that the provisions of the Act in reference to the gains derived and the losses sustained from the sale of property acquired before March 1, 1913, were correlative, and that whatever effect was intended to be given to the market value of property on

that date in determining taxable gains, a corresponding effect was intended to be given to such market value in determining deductible losses. This conclusion is unavoidable under the specific language of § 202 (a) establishing one and the same basis for ascertaining both gains and losses.

Taking this as a premise, we think that the question of determining taxable gains is concluded, in accordance with the contention of the Government, by the decisions of this Court in *Goodrich* v. *Edwards,* 255 U. S. 527, and *Walsh* v. *Brewster,* 255 U. S. 536. These cases, which were decided in 1921, arose under the income tax provisions of the Revenue Act of 1916.[2] That Act provided, as did the Act of 1918, that the "gains" derived from sales or dealings in property should be included in net income[3], and also that the losses actually sustained in transactions entered into for profit should be allowed as deductions.[4] In the Act of 1916, however, the provisions for the ascertainment of the gains derived and losses sustained from the sale of property were not contained, as in the Act of 1918, in one provision, but in separate clauses of the same tenor and effect as the combined provision in the Act of 1918. Section 2 (c) provided that: "For the purpose of ascertaining the gain derived from the sale or other disposition of property . . . acquired before" March 1, 1913, "the fair market price or value of such property as of" March 1, 1913, "shall be the basis for determining the amount of such gain derived." The correlative clause relating to the ascertainment of loss was in precisely the same language except that the words "the loss" and "loss sustained" were used instead of the words "the gain" and "gain derived."[5]

[2] Act of Sept. 8, 1916, c. 463, 39 Stat. 756.

[3] § 2 (a).

[4] § 5 (a) Fifth.

[5] § 5 (a) 4th.

In *Goodrich* v. *Edwards, supra,* in the second transaction involved, the taxpayer had acquired in 1912 certain corporate stock of the then value of $291,600. Its market value on March 1, 1913, was only $148,635.50. He sold it in 1916 for $269,346.25, being $22,253.75 less than its value when acquired, but $120,710.75 more than its value on March 1, 1913. A tax was assessed on the latter amount, which was sustained by the trial court. The Government confessed error in this judgment. After reciting this fact and setting forth the pertinent provisions of the Act, this court, in reversing the judgment, said: "It is . . . very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that *gains* are derived therefrom by the vendor, and we therefore agree with the Solicitor General that since no gain was realized on this investment by the plaintiff in error no tax should have been assessed against him. Section 2(c) is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property."

This case was followed by *Walsh* v. *Brewster, supra.* In the first transaction there involved the taxpayer had purchased bonds in 1899 for $191,000, which he sold in 1916 for the same amount. Their market value on March 1, 1913, was $151,845. A tax was assessed on the difference between the latter amount and the selling price, namely, $39,155. This tax was held invalid, under the authority of *Goodrich* v. *Edwards,* on the specific ground that "the owner of the stock did not realize any gain on his original investment by the sale in 1916." In the second transaction involved the taxpayer had purchased certain bonds in 1902 and 1903 for $231,300, which he sold in 1916 for $276,150. Their market value on March 1, 1913, was $164,480. A tax was assessed upon the difference between the selling price and the market value of

the bonds on March 1, 1913. It was held, however, that "since the gain of the taxpayer was only the difference between his investment of $231,300 and the amount realized by the sale, $276,150," under the authority of *Goodrich* v. *Edwards,* "he was taxable only on $44,850," the difference between the purchase and sale prices.

These decisions are equally applicable to the Act of 1918. There is no difference in substance between the language of the two Acts in respect to the ascertainment of the gain derived or loss sustained from the sale of property acquired before March 1, 1913; and the correlative nature of these two provisions is emphasized in the Act of 1918 by their combination in one and the same sentence. As it was held in these decisions that the Act of 1916 imposed a tax to the extent only that gains were derived from the sale, and that the provision as to the market value of the property on March 1, 1913, was applicable only where a gain had been realized over the original capital investment, so we think it should be held that the Act of 1918 imposed a tax and allowed a deduction to the extent only that an actual gain was derived or an actual loss sustained from the investment, and that the provision in reference to the market value on March 1, 1913, was applicable only where there was such an actual gain or loss, that is, that this provision was merely a limitation upon the amount of the actual gain or loss that would otherwise have been taxable or deductible.

We cannot sustain the contention that the decision in *Goodrich* v. *Edwards* is not entitled to controlling weight in the matter of deductible losses because of the Government's confession of error, or because it involved the question of taxable gains, as to which it is said, that under a different construction of the Act a grave constitutional question would have arisen which could have no application to the question of deductible losses. The decision shows that it was not based on the confession of error or

on any constitutional question, but upon the conclusion that, as a matter of construction, it was "very plain" that the statute imposed a tax upon the proceeds of sales "to the extent only that gains are derived therefrom by the vendor." [6] The language of the opinion is specific and unambiguous; it embodied the reasoned judgment of the court as to the proper construction of the Act; and it applies equally to the construction of the similar provisions of the Act of 1918, relating to gains and losses alike.

This was recognized by the Treasury Department, which promptly amended its former Regulations by incorporating therein "the rule announced by the Supreme Court in the cases of *Goodrich* v. *Edwards* and *Walsh* v. *Brewster* respecting the basis for the determination of taxable gains or deductible losses in the case of property acquired prior to March 1, 1913, and sold or disposed of subsequent thereto." 23 T. D. 763, 764. To the same effect is the opinion thereafter given to the Secretary of the Treasury by the Attorney General in reference to taxable gains and deductible losses under both of the Acts. 33 Op. Atty. Gen. 291. And, it may be noted, a like construction has been independently given by the courts of New York, without reference to any constitu-

[6] It distinctly appeared from the Solicitor General's brief that the confession of error was not made because of any constitutional question, to which he made only an incidental reference, but because he was "forced to the conclusion" that, as a matter of construction of the Act, it was clear that it imposed a tax only on the "gains" derived from the sale of property, and that § 2(c) could have "no application until it is first ascertained, by comparing the purchase and selling prices, that there had been an actual gain." And this was followed by the statement that in the Government's view the similar provision relating to losses must be construed in the like manner, "that is, it must first be ascertained by comparing the purchase and selling price that a loss on the entire transaction has been sustained."

tional question, to the Income Tax Law of that State, in which the provisions relating to gains derived and losses sustained from the sale of property, are a substantial transcript of those of the Act of 1918, except that January 1, 1919, is substituted for March 1, 1913; this construction being embodied in a series of decisions, the first of which, relating to taxable gains, was written before those in *Goodrich* v. *Edwards* and *Walsh* v. *Brewster* were announced. *People ex rel. Klauber* v. *Wendell,* 196 App. Div. 827, affirmed, without opinion, 232 N. Y. 549; *People ex rel. Keim* v. *Wendell,* 200 App. Div. 388; *Re Application of Bush,* 206 App. Div. 800.

It is unnecessary to consider in detail, as in a matter of first impression, various contentions urged in behalf of the executors in respect to the construction that should be given to the provisions of the Act of 1918 in reference to deductible losses. For the reasons stated we think that the question should be resolved according to the earlier decisions; and nothing has been suggested which disposes us to depart from them now. Decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons. *National Bank* v. *Whitney,* 103 U. S. 99, 102.

Since Flannery sustained no actual loss in the transaction in question, having sold the stock for more than it had cost, his executors were not entitled to the deduction which they claimed because it was sold at less than its market value on March 1, 1913.

The judgment of the Court of Claims is accordingly

Reversed.

Mr. Justice McReynolds and Mr. Justice Sutherland dissent.

McCAUGHN, COLLECTOR OF INTERNAL REVENUE, *v.* LUDINGTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 733. Argued January 12, 1925.—Decided April 13, 1925.

Decided upon the authority of *United States* v. *Flannery, ante,* p. 98. 1 Fed. (2d) 689, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court (290 Fed. 604) recovered by Ludington in an action for money paid under protest as income tax.

The *Solicitor General,* with whom *Messrs. Robert P. Reeder* and *Frederick W. Dewart* were on the brief, for petitioner.

Mr. William D. Guthrie, with whom *Messrs. Hugh Satterlee, William R. Perkins* and *Ralph B. Evans* were on the briefs, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case arises under the income tax provisions of the Revenue Act of 1918,[1] and presents another aspect of the question relating to deductible losses sustained from the sale of property acquired before March 1, 1913, which was involved in *United States* v. *Flannery,* just decided, *ante,* p. 98.

Ludington bought, prior to March 1, 1913, certain corporate stock for $32,500. Its market value on March 1, 1913, was $37,050. He sold it in 1919 for $3,866.91, which was $28,633.09 less than its purchase price, and $33,-

[1] Act of Feb. 24, 1919, c. 18, Title II, 40 Stat. 1057.

183.09 less than its market value on March 1, 1913. In his income tax return he deducted the latter sum as the amount of his loss on the sale of the stock. The Commissioner of Internal Revenue reduced the amount of the deduction to the actual loss of $28,633.09, and assessed an additional tax against him. He paid this tax under protest, and, after the usual preliminary procedure, brought this suit against the Collector in a federal District Court in Pennsylvania to recover the amount so paid. Judgment was entered for the defendant. 290 Fed. 604. This was reversed by the Court of Appeals. 1 Fed. (2d) 689. And this writ of certiorari was granted. 266 U. S. 599.

The case is governed by the decision in *United States* v. *Flannery, supra.* It was there held, on the authority of *Goodrich* v. *Edwards,* 255 U. S. 527, and *Walsh* v. *Brewster,* 255 U. S. 536, that the Act allowed a deduction to the extent only that an actual loss was sustained from the investment, as measured by the difference between the purchase and sale prices of the property. It follows that, as the actual loss to Ludington in the entire transaction was the difference between the purchase and selling prices, that is, $28,633.09, he was only entitled to deduct this amount, and not the difference of $33,183.09 between the market value on March 1, 1913 and the selling price. This is in exact correspondence with the decision in *Walsh* v. *Brewster, supra,* in reference to the second transaction there involved, in which it was held that the taxable gain derived from the sale of property was only the difference between the purchase and selling prices, and not the difference between the market value on March 1, 1913 and the selling price.

So under the Income Tax Law of New York, which, as pointed out in *United States* v. *Flannery,* is a substantial transcript of the Revenue Act of 1918, except that January 1, 1919 is substituted for March 1, 1913, it was

specifically held, in a case precisely similar to the present, that the loss deductible by the taxpayer was limited to the difference between the purchase and selling prices, although on January 1, 1919 the property had a higher value than when it was purchased, and the loss if computed from that date would have been greater than when computed from the purchase price. *People ex rel. Keim* v. *Wendell,* 200 App. Div. 388.

The judgment of the District Court is accordingly affirmed, and that of the Circuit Court of Appeals

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND dissent.

STATE OF NEW MEXICO *v.* STATE OF COLORADO

IN EQUITY

No. 12, Original. Decree Entered April 13, 1925.

Decree adjudging that the bill of New Mexico be dismissed and the cross bill of Colorado be sustained; declaring the true boundary between the two States; appointing and instructing a commissioner to run, locate and mark the same, subject to approval of the Court; with provisions for transmitting copies of the commissioner's report and map, when filed, to the governors of the two States, defining the time for objections and exceptions, providing for possible vacancy in the commissionership, and equally dividing the costs of suit.

Announced by Mr. JUSTICE SANFORD.

This cause having been heard and submitted, and the Court having considered the same and announced its conclusions in an opinion delivered January 26, 1925, [267 U. S. 30],

It is ordered, adjudged and decreed:

1. The bill of the State of New Mexico is dismissed, and the cross-bill of the State of Colorado is sustained.

2. The true and lawful boundary between the State of New Mexico and the State of Colorado consists of the following connecting lines: (a) The line extending westwardly from what is known as the Preston Monument, marking the intersection of the thirty-seventh parallel of north latitude with the Cimarron Meridian (the one-hundred and third) of longitude west from Greenwich, to what is known as the Macomb Monument, as the said line was surveyed and marked in the year 1900 by Levi S. Preston, deputy surveyor, while engaged, under the direction of the Surveyor General for New Mexico, in retracing and re-marking between said Cimarron Meridian and Macomb Monument the line that had been surveyed in the year 1874 by John J. Major, astronomer and surveyor, under the direction of the Commissioner of the General Land Office; and (b) The line extending westwardly from said Macomb Monument to the intersection of said parallel of latitude with the one-hundred and ninth meridian of west longitude, as the said line was surveyed and marked in the year 1868 by Ehud N. Darling, surveyor and astronomer, under the direction of the Commissioner of the General Land Office; *Provided that,* pursuant to the consent of the parties hereto, the line surveyed and marked in the year 1917 by Wm. C. Perkins, surveyor, under the direction of the Commissioner of the Land Office, as a restoration of the said Darling line between the 203rd mile corner and Astronomical Monument No. 8 of the Darling survey, shall be taken and deemed to be the true location of the portion of the Darling line thus restored.

3. Arthur D. Kidder, cadastral engineer, is designated as a commissioner to run, locate and mark the boundary between the two States as determined by this decree. In running the same the said Preston and Darling lines shall be retraced and restored in accordance with the marks of the original surveys upon the ground and the approved

field notes thereof on file in the General Land Office, copies of which are incorporated in the printed record in this cause, except that as to the portion of the said Darling line restored by said Perkins, the line marked by said Perkins shall be followed.

4. The boundary shall be marked by establishing permanent monuments thereon, suitably marked and at appropriate distances. All corners and monuments established by said Darling that were destroyed or obliterated by Howard B. Carpenter, surveyor, in accordance with the direction of the Commissioner of the General Land Office, in making a survey of the boundary in the years 1902 and 1903, shall be restored; and all new corners and monuments that were established by said Carpenter on his survey, shall be destroyed.

5. The commissioner shall include in his report a description of the monuments established by him and of the courses and distances between them. He shall file with his report the field notes of his survey and a map showing the boundary line as run and marked by him; also two copies of his report and map.

6. Before entering upon his work the commissioner shall take and subscribe an oath to perform his duties faithfully and impartially. He shall prosecute the work with diligence and dispatch, and shall have authority to employ such assistants as may be needed therein; and he shall include in his report a statement of the work done, the time employed and the expenses incurred.

7. The work of the commissioner shall be subject in all its parts to the approval of the Court. The copies of the commissioner's report and map shall be promptly transmitted by the clerk to the Governors of the two States; and exceptions or objections to the commissioner's report, if there be such, shall be presented to the Court, or, if it be not in session, filed with the clerk, within forty days after the report is filed.

8. If, for any reason, there occurs a vacancy in the commissionership when the Court is not in session, the same may be filled by the designation of a new commissioner by the Chief Justice.

9. All the costs of the cause, including the compensation and expenses of the commissioner, shall be borne in equal parts by the State of New Mexico and the State of Colorado.

MAY, AS TRUSTEE IN BANKRUPTCY OF GEO. W. COWEN CO., INC., BANKRUPT, *v.* HENDERSON, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 126. Argued March 5, 1925.—Decided April 13, 1925.

Within four months prior to the filing of the petition in bankruptcy against it, the bankrupt made a general assignment for the benefit of creditors to two trustees, one of whom, H., was the president of a bank to which the assignor was then indebted on a promissory note, and with which it carried a deposit account. The account was transferred, after the assignment, to the names of the trustees, as such, and afterwards augmented by deposits of money collected by them in carrying on the assignor's business. Partly before the date of the bankruptcy petition and partly thereafter, H., having control of the account, caused it to be applied to the note, with the tacit consent of the other assignee. The bank, as well as the assignees, had executed the creditors' agreement under which the assignment was made, providing for a *pro rata* distribution among all creditors and expressly extending the time of payment of all indebtedness of the assignor for the period of one year. *Held,* that the assignees were properly directed by the Bankruptcy Court, in a summary proceeding, to pay over to the trustee in bankruptcy an amount equal to the deposits, including the part paid the bank before the filing of the petition as well as the part paid thereafter. P. 115.

289 Fed. 192, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals, on petition to revise, reversing a judgment entered

by the District Court summarily in a bankruptcy proceeding, which required the present respondents to pay over a sum of money to the trustee in bankruptcy.

Mr. H. A. Jacobs, with whom *Messrs. Henry G. W. Dinkelspiel, G. B. Blanckenburg* and *Martin J. Dinkelspiel* were on the briefs, for petitioner.

Mr. A. A. DeLigne, with whom *Mr. Archibald M. Johnson* was on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

This is a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review its action (reported 289 Fed. 192) on a petition to revise an order of the District Court confirming the order of a referee in bankruptcy, summarily directing the respondents to pay over a sum of money to the trustee in bankruptcy.

On September 15, 1920, prior to but within four months of the filing of the petition, the bankrupt made to respondents, Henderson and Scannell, a general assignment for the benefit of creditors. At the time of the assignment the assignor was indebted on a promissory note in the sum of $15,000 to the Fort Sutter National Bank, of which respondent Henderson was president, and in which the assignor carried a deposit account. The referee found, on sufficient evidence, that the respondents accepted the trust under the assignment to them and continued the business of the assignor until the appointment of the receiver in bankruptcy on November 4, 1920, the petition in bankruptcy having been filed on October 9, 1920. In the meantime, the deposit account of the assignor with the bank, with the knowledge and assent of the assignees, was changed from the name of the assignor to the names of the assignees, as " trustees," and further deposits were from time to time made by them to the

credit of the account, in the course of their management of the business of the assignor. The assignor was duly adjudicated a bankrupt and, thereafter, the trustee in bankruptcy petitioned the Bankruptcy Court for an order directing the respondents, as assignees, to account for and pay over all moneys received by them from the date of the assignment to the date of the appointment of the receiver. Proceedings on the petition resulted in the order of the District Court directing respondents to pay over to the trustee an amount which would have stood to the credit of the assignees in their deposit account with the bank had the account not been closed in the following manner:

On September 30, 1920, ten days before the filing of the petition, the deposit account of the assignees with the bank was debited with the sum of $4,516.43, which amount was credited on the note of the bankrupt held by the bank, and on October 13, 1920, subsequent to the filing of the petition, and on various dates thereafter to and including October 25, 1920, further debits were made in the account which were credited on the note. These credits, including the first mentioned, amounted to the sum of $12,883.81, which was the amount directed to be paid over by respondents by order of the District Court. These debits and credits were made by direction of the respondent, Henderson, who throughout the period in question acted as one of the assignees and was also president of the bank. Although there was no explicit finding on the subject, the debits appear to have been made with the tacit assent of Scannell, the other assignee, who in any event appears to have left the management of the financial operations of the assignees to Henderson and made no objection or protest with respect to this use of the account standing to his credit as an assignee. We think that the finding of the Circuit Court of Ap-

peals that this application of the bank deposit on the note of the bankrupt constituted a "partial payment of the note as fully as if the assignees had given their check or withdrawn the money from the bank and paid it over the counter" is correct, and that both the assignees must be held legally responsible for this result. Where one of two co-trustees assents to a breach of trust by the other without objection, he is legally chargeable with liability for the breach. *Bermingham* v. *Wilcox,* 120 Cal. 467, 472; *Adair* v. *Brimmer,* 74 N. Y. 539; *Matter of Niles,* 113 N. Y. 547; *Hill* v. *Hill,* 79 N. J. Eq. 521.

The referee found that respondent Henderson was at all times from September 24, 1920, until the appointment of the receiver in bankruptcy, in control of the assignees' deposit account; and that he was the only officer of the bank who at any time exercised any control over the account, and that as president of the bank he at all times until the filing of the referee's report, had personal control of the funds deposited in the account; that the original ledger sheet of the bank showing the account standing in the names of the respondents as assignees, was destroyed by officials of the bank some time after the filing of the petition in bankruptcy and then an attempt was made to restore this account to the name of the bankrupt by rewriting the ledger sheets. He also found that on and after September 24, 1920, both the respondents and the Fort Sutter National Bank, which with respondents had on that date executed the creditors' agreement under which the assignment to respondents for the benefit of creditors was made, had actual knowledge of the insolvent condition of the bankrupt.

On the petition to revise, the Circuit Court of Appeals held that, when the money on deposit with the bank was applied on the note of the bankrupt, "the money passed into the possession and under the control of the bank and out of the possession and beyond the control of the re-

spondents . .; that the funds in the bank are not the funds of the president nor are they subject to his order and control, and an order directing him to pay over the money is not an order against the bank and is not binding upon the bank." The court accordingly held that the bank, which was not a party to this proceeding, held the funds received by it in its own right adversely to any claim of the assignees or the trustee in bankruptcy and could not be reached by a summary proceeding and it reversed the judgment and order of the District Court.

It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a Bankruptcy Court. *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *First National Bank of Chicago* v. *Chicago Title & Trust Co.,* 198 U. S. 280; *Gailbraith* v. *Vallely,* 256 U. S. 46. But property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the Bankruptcy Court. *White* v. *Schloerb,* 178 U. S. 542; *Mueller* v. *Nugent,* 184 U. S. 1; *Babbitt* v. *Dutcher,* 216 U. S. 102; *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1. Such is the rule with respect to assignees for the benefit of creditors within four months of filing of the petition. *In re Stewart,* 179 Fed. 222; *In re Rathman,* 183 Fed. 913; *In re Neuburger, Inc.,* 240 Fed. 947; *In re Diamond's Estate,* 259 Fed. 70, 74, and see *Bryan* v. *Bernheimer,* 181 U. S. 188. See *Louisville Trust Co.* v. *Comingor* and *Gailbraith* v. *Vallely, supra,* where, however, the jurisdiction was defeated by the adverse claim of the assignee arising before the filing of the petition; and see *Randolph* v. *Scruggs,* 190 U. S. 533, as to the nature of the title of the assignee for the benefit of creditors when bankruptcy ensues. See also *Taubel, etc. Co.* v. *Fox,* 264 U. S. 426, 433 and note. Courts of Bankruptcy do not permit themselves to be

ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller* v. *Nugent, supra; Schweer* v. *Brown,* 130 Fed. 328, 195, U. S. 171; *Hebert* v. *Crawford,* 228 U. S. 204; *In re Ellis Bros. Printing Co.,* 156 Fed. 430. It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.,* 126 Fed. 875; *In re Rudnick & Co.,* 158 Fed. 223; *In re Ransford,* 194 Fed. 658; *Michaelis* v. *Lindeman,* 196 Fed. 718.

The petition upon which this proceeding was intitiated was in the usual form and prayed that the respondents be required to account for all moneys and properties coming into their hands as assignees or trustees under the assignment for the benefit of creditors. Such was their duty. Having assumed to take possession of the property of the bankrupt for its account, it was their legal duty to turn the property or its proceeds over to the trustee in bankruptcy or to account for their inability to do so by showing either a disposition of it in performance of a legal duty assumed toward the bankrupt or the bankrupt's trustee or by clothing themselves with the protection of a claim adverse to the bankrupt which was not merely colorable. As found by the Court, respondents came into the possession of moneys of the bankrupt which were by them placed on deposit to their credit as trustees or assignees for the benefit of creditors. The result of this transaction was that neither the bank nor the assignees held any specific money for account of the bankrupt and its creditors. They were creditors of the bank and the bank was their debtor. *Marine Bank* v. *Fulton Bank,* 2 Wall. 252; *Phoenix Bank* v. *Risley,* 111 U. S. 125. We are not therefore dealing with money in the possession

of the assignees or the bank in any literal sense, but the credit as a mere chose in action was held by the assignees for account of the bankrupt and they were bound to account for its proper disposition as for any other property coming into their hands.

The several amounts debited to the account, with the assent or connivance of the assignee subsequent to the filing of the petition, fall clearly within the rule that, as to property in the hands of the bankrupt or held by others for his account, "The filing of the petition is a caveat to all the world and in fact an attachment and an injunction." *Mueller* v. *Nugent, supra; Lazarus* v. *Prentice,* 234 U. S. 263; *Knapp & Spencer Co.* v. *Drew,* 160 Fed. 413; *In re Denson,* 195 Fed. 854; *In re Leigh,* 208 Fed. 486; *Gunther* v. *Home Ins. Co. et al.,* 276 Fed. 575; *Matter of R. & W. Skirt Co. et al.,* 222 Fed. 256; *Reed* v. *Barnett Nat. Bank,* 250 Fed. 983; and see *Acme Harvester Co.* v. *Beekman Lum. Co.,* 222 U. S. 300. See *Babbitt* v. *Dutcher,* 216 U. S. 102. In consequence, any person acquiring an interest in property of the bankrupt or his assignees for the benefit of creditors, adverse to the creditors, after the filing of a petition with notice of it, may be directed to surrender the property thus acquired by summary order of the Bankruptcy Court. *In re Denson, supra; In re Rudnick, supra;* and see *White* v. *Schloerb, supra.*

The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made directing repayment of the money to the trustee in bankruptcy. *Knapp & Spencer Co.* v. *Drew; In re Leigh; Matter of R. & W. Skirt Co., supra; In re Columbia Shoe Co.,* 289 Fed. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing

of the petition. *Michaelis* v. *Lindeman,* 196 Fed. 718; *Reed* v. *Barnett Nat. Bk., supra.* See *Farmers & Mechanics Bank* v. *Wilkinson, Trustee,* 266 U. S. 503. Any other rule would leave the Bankruptcy Court powerless to deal in an effective way with those holding property for the bankrupt who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. *Bryan* v. *Bernheimer,* 181 U. S. 188, 196.

We do not think, however, that respondents stand in any better position with respect to the first debit of $4,516.43 which was made a few days before the filing of the petition. The creditor's agreement, under which respondents were appointed assignees, and which was signed by them and by the Sutter National Bank, provided for only a pro rata distribution among creditors and expressly extended the time of payment of all indebtedness of the bankrupt for one year from the date of the creditors' agreement, which was dated September 15, 1920. The findings of the referee and the supporting evidence leave no doubt that Henderson, who with the assent of the co-assignee, Scannell, was in active control of the account both as an assignee for the benefit of creditors and for the bank as its president, directed this and all later debits to be made in the account, in fraud of the rights of creditors whom he assumed to represent.

There cannot, we think, be any pretense that the bank could assert a lien or counterclaim before the filing of the petition, in the face of its extension of its note by the creditors' agreement (*Fifth National Bank* v. *Lyttle,* 250 Fed. 361; *Heyman* v. *Third National Bank,* 216 Fed. 685), or at any time, in view of its transfer of the account to trustees for the benefit of creditors under the agreement signed by it. *Fitzgerald* v. *Bank,* 64 Minn. 469; *Lynman* v. *Bank,* 98 Me. 448. The findings of the referee and the evidence leave no doubt that the surrender or abandonment of their bank account to the bank by the assignees

and its attempted application by the bank to the payment of its note was collusive and without any substantial basis of legal right. At most it was a clumsy, ineffectual and fraudulent effort to divert the funds of the bankrupt to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors, of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy, is an adverse claim which cannot be adjudicated in a summary proceeding (*Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Galbraith* v. *Vallely,* 256 U. S. 46), we think the rule cannot be extended to a case such as this where the claim is merely colorable and on its face made in bad faith and without any legal justification.

Nor is it any answer to such a proceeding that the diverted assets are no longer under the control of the assignees. They do not discharge the duty to account by showing that they assented to a cancellation of their bank account as assignees, and its application on an indebtedness of the bankrupt to the bank. The duty of a fiduciary to account for property entrusted to his care is fulfilled by delivery of the property, but if he has put it out of his power to deliver it, he may nevertheless be compelled to account for its worth. *United States* v. *Dunn et al., post,* p. 121. He is subject to the summary order of the Bankruptcy Court to restore the property to the bankrupt's estate. If he has sold it or mingled it with his own, he may be compelled by summary order to restore the value of the property thus wrongfully diverted. *In re Denson, supra,* and see *Bryan* v. *Bernheimer, supra,* at p. 197.

For that reason it is not necessary for us to enquire into the legal consequences which flow from the findings of the referee tending to show that the bank account was at all times under the control of Henderson, acting in

the dual capacity of assignee of the debtor and president of the creditor bank, or to ascertain whether such a situation falls within the rule that one acting in one capacity, subject to a summary order of the court, may not relieve himself from the duty to pay over money on a summary order by setting up that, although the money is still under his control, he holds it in a different capacity. See *Smith* v. *Longbottom & Son,* 142 Fed. 291. We rest our decision rather on the duty of assignees, for the benefit of creditors, to account in a summary proceeding for the property which they have received within four months of the bankruptcy and to make restitution of the value of the property of the bankrupt which they have dissipated without a colorable claim of right.

On the argument, respondents relied upon numerous cases in the District Courts and Circuit Courts of Appeals to the effect that the court will not in a summary proceeding make an order requiring a bankrupt to pay over money to his trustee unless the bankrupt's ability to comply therewith is plainly and affirmatively shown. *American Trust Co.* v. *Wallis,* 126 Fed. 464; *In re Berman,* 165 Fed. 383; *In re Sax,* 141 Fed. 223; *In re Goldfarb Brothers,* 131 Fed. 643; *Epstein* v. *Steinfeld,* 210 Fed. 236; *In re Nisenson,* 182 Fed. 912; *In re Stern,* 215 Fed. 979. But we think that a bankrupt who is shown to have turned over generally his assets and property to the receiver or the trustee in bankruptcy, is in a different situation from one not a bankrupt who is under a duty to account in a summary proceeding. A court of bankruptcy should not make useless orders. If the bankrupt has turned over his property generally to the Bankruptcy Court and is not shown to possess or control the specific property which is the subject of summary order, there may be a presumption that any order will be groundless. No such presumption obtains with respect to respondents. They have not shown that they are insolvent or in other

respects are unable to comply with the order of the District Court.

The judgment of the District Court was proper. The judgment of the Circuit Court of Appeals is

Reversed.

UNITED STATES *v.* DUNN ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 120. Argued March 13, 1925.—Decided April 13, 1925.

1. Parties who take a lease of a ward's property under a secret agreement with the guardian making the lease that it shall inure in part to his personal benefit, hold the lease, and if that be transferred to a purchaser, hold the proceeds they acquire from it, as trustees *ex maleficio* for the ward without regard to whether the ward was actually damaged by the fraud of the guardian. P. 130.
2. In such cases, the ward may, at his option, follow the fraudulently diverted trust *res* until it reaches the hands of a *bona fide* purchaser for value, or claim the proceeds of the sale or other disposition of it in the hands of the person who fraudulently acquired it from the fiduciary and in the hands of that person's donees. P. 132.
3. A suit to establish an equitable claim to specific property may be prosecuted to subject the proceeds of that property to the trust, if it develop in the course of the trial that the defendant has conveyed it away in violation of his equitable duty to the plaintiff. P. 133.
4. The guardian of an Indian leased his ward's land partly in consideration of a secret interest for himself agreed to by his lessees; and afterwards, in a compromise between the lessees and one who had obtained a lease of the same land from the Indian's curator, the guardian's lease was executed by the curator also and, having been approved by a County Court and by the Secretary of the Interior, was assigned to a corporation, shares of which were issued to the respective lessees and parties claiming under them, the assignment of the lease being the sole consideration for the shares distributed to the lessees of the guardian. *Held,* (*a*) that a suit by the United States, on behalf of

the Indian, to set the lease aside or for alternative relief, could be prosecuted to reach the shares, or the proceeds thereof, in the hands of the fraudulent lessees and their donees, including shares bought by these lessees from the guardian, even though relief could not be had as against the corporation and *bona fide* purchasers for value; and (*b*) that an agreement by the plaintiff after defeat in the District Court, not to prosecute the appeal as against the corporation and *bona fide* shareholders, did not prevent this relief as against the others. P. 135.

5. In a suit praying relief from the execution and legal effects of a lease because it was procured by the fraud of the lessees, the lessees can not, while claiming under it and holding the benefits derived from it, deny the authority of the lessor to make it. P. 135.
6. One who claims the benefit derived from a breach of trust in which he actively participated and who shows no prejudice from a delay of six years in bringing suit to compel him to account, can not complain of laches. P. 136.

288 Fed. 158, reversed in part; affirmed in part.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill brought by the United States, on behalf of a full-blooded Choctaw Indian, a minor, to cancel for fraud an oil and gas lease on the Indian's land in Oklahoma, or, in the alternative, to affix a trust on shares held by defendants in a corporation, also a defendant, to which the lease had been assigned.

Messrs. Walter A. Ledbetter and *W. W. Dyar,* Special Assistants to the Attorney General, for the United States. The *Solicitor General* was on the briefs.

Messrs. George S. Ramsay and *William G. Davisson,* for appellees. *Messrs. William B. Johnson, Hugh W. McGill, Edgar A. de Meules,* and *Villard Martin* were on the briefs.

Eaves was the duly appointed, qualified, legal and acting curator or guardian of the estate, and as such was the only person empowered by law to execute an oil lease

on the land in question. Two separate and distinct guardianships or curatorships cannot exist at the same time for one and the same person. Eaves was not only *de jure* curator, because he actually occupied the office and exercised the authorities of a curator. The lease executed by Eaves, curator, to Mullen, under the order and confirmation of the County Court of Love County, was valid and binding subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

The execution of a lease on the same land to Dunn and Gillam by a pseudo guardian, no matter how fraudulently obtained, created no actionable wrong in favor of the ward against the lessees under such lease, in the absence of evidence that the ward suffered some injury thereby. Dunn and Gillam, occupying no fiduciary relationship to the ward, and having obtained nothing by virtue of the Thomas lease, cannot be held to be trustees of any property or rights or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of coercing Mullen into a compromise agreement whereby they obtained from Mullen, and not from the ward, an interest in the lease. The fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we should treat the lease as having been executed solely by Eaves, as curator.

It was immaterial to the Department and to the parties whether Thomas joined in the Eaves lease to Mullen or Eaves joined in the Thomas lease to Dunn and Gillam,

that being a mere formality, it being the intention of all parties that if the Thomas lease was good Mullen should have an interest therein and if the Eaves lease was good, then Dunn and Gillam should have an interest in that lease.

Two things must concur to constitute actionable fraud—inequitable conduct and injury. In other words, fraud and damage must concur before a court of equity will grant any relief against a judicial sale. The lease required court approval and partakes of the nature of a judicial sale. Story's Eq. Juris., 14th ed. Vol. 1, §§ 289 and 290; *Bigby* v. *Powell,* 25 Ga. 244; *Rock, etc., Ry. Co.,* v. *Wells,* 61 Ark. 354, 54 Am. St. Rep. 216; *Shultz* v. *Shultz,* 36 Ind. 323; *Hartford Fire Ins. Co.,* v. *Meyer,* 30 Neb. 135; *Mass. Benefit Life Ass'n.* v. *Lohmiller,* 74 Fed. 23; *Ableman* v. *Roth,* 12 Wis. 81; *Hockaday* v. *Jones,* 56 Pac. 1054; *Wilson* v. *Shipman,* 34 Neb. 573. There must not only be fraud, but there must be damage or injury. In other words, it must be shown that it would be inequitable and unjust for the judgment to be enforced, *Felt* v. *Bell,* 10 Am. & Eng. Dec. in Equity, 35.

Defendants are not estopped to deny the authority of Thomas to act as guardian. Injury is a necessary element of a valid estoppel, and neither the appellant nor its ward is injured by showing that Thomas had no authority, nor is the lessee injured.

The appellant was guardian of the full blooded Indian, and had full power to compromise this case, especially with the approval of the Court of Appeals, which was given. *Tiger* v. *West'n Inv. Co.* 221 U. S. 286; *United States* v. *Kagama,* 118 U. S. 375–384; *Heckman* v. *United States,* 224 U. S. 444. The appellant, being vested with complete authority to institute the suit and control the litigation, has the concomitant power to compromise the case. *Thompson* v. *Maxwell Land Grant & Ry. Co.,* 168 U. S. 451.

Upon the discovery of the alleged fraud, the United States had one of two remedies: A suit in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc.; or an action for damages to recover the value of the lease at the time it was fraudulently obtained. Black, Rescission & Cancellation (2d ed.), 561.

The plaintiff can not have both of these remedies, and was required to elect which remedy it would pursue, and, having elected to pursue the remedy in equity for rescission, it is bound thereby, *Shappirio* v. *Goldberg,* 192 U. S. 232. It can not have a judgment for damages or for the stock of any particular stockholder, *Wilson* v. *New United States Cattle Ranch,* 73 Fed. 994; *Shappirio* v. *Goldberg, supra; Supreme Council, etc.,* v. *Lippincott,* 134 Fed. 284.

The appellant, with or without the written consent of some of the parties, can not change its action in the Court of Appeals so as to ask for another and different relief against some of the parties not joining in the compromise.

The lease, being an entirety, can not be split up by various suits to cancel against various interested defendants. While an injured party may sue one or all the joint tort feasors for damages, there can be only one suit to cancel a lease, and the compromise and settlement of the suit is an affirmance and ratification of the lease as an entirety and terminates the cause of action against everyone. I Story, Eq. Juris., (14th ed.,) Vol. 1, § 291. If with knowledge of the fraud the party exacts performance or performs himself he condones the fraud, *McLean* v. *Clapp,* 141 U. S. 429; *Grymes* v. *Sanders,* 93 U. S. 55; *Burk* v. *Johnson,* 146 Fed. 209; *Kingman* v. *Stoddard,* 85 Fed. 740; *Simon* v. *Goodyear Metallic Rubber Shoe Co.* 105 Fed. 574.

It appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Com-

pany and certain of its stockholders whereby certain stockholders, with the consent and approval of appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to participate.

The Government, by entering into the compromise contract whereby the corporate funds were to be used for the special benefit of a part of the stockholders to the exclusion of other stockholders, made itself a party to the fraud and cannot, with good grace, further prosecute this action at law or otherwise. The Government does not come into this court with clean hands. See *State of Iowa* v. *Carr,* 191 Fed. 257–266; *United States* v. *Walker,* 139 Fed. 409.

If the compromise with the Bull Head Oil Company did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913; and, full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit. *Burnes* v. *Burnes,* 137 Fed. 800.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal from the United States Circuit Court of Appeals for the Eighth Circuit from so much of its decree as affirms a decree of the District Court of the United States for the Eastern District of Oklahoma dismissing the bill of the plaintiff—the appellant here. 288 Fed. 158.

Suit was begun to cancel an oil and gas lease of forty acres of land, given to appellees, Dunn and Gillam, by Thomas, guardian, and signed by Eaves, curator, of Allie Daney, a minor, full-blood Choctaw Indian. Both Thomas and Eaves claimed the right to represent the minor and to lease her land. Eaves was appointed cura-

tor of the minor by the United States Court for the Southern District of the Indian Territory in November, 1905, and, on admission of the Territory of Oklahoma and the Indian Territory to statehood as the State of Oklahoma, that court transmitted the curatorship record to the County Court of Love County. Thomas was appointed guardian by the County Court of LeFlore County in July, 1911. On August 18, 1913, Eaves executed a lease of the premises in question to one Mullen, which lease was approved by the County Court of Love County. On the same day, Thomas, as guardian, executed a lease of the same premises to Dunn and Gillam, which lease was approved by the County Court of LeFlore County. The two leases came to the Indian Superintendent for his recommendation for approval by the Secretary of the Interior at about the same time. This developed a controversy between Mullen on the one hand and Dunn and Gillam on the other as to whether Thomas or Eaves properly represented the minor and had legal authority to enter into a lease of the minor's lands. A compromise was finally effected between the contesting parties whereby Eaves added his signature as curator to the lease which had been given by Thomas to Dunn and Gillam and acknowledged it. At the same time the Bull Head Oil Company, a corporation and one of the defendants, was organized. The Thomas lease was assigned to it under an agreement that the lessees would take for their respective interests in the leasehold, equal shares of stock. The capital of the Bull Head Oil Company was fixed at $18,000, of which 8,000 shares of the capital stock of the Company, having a par value of $8,000, were issued to Mullen, the lessee under the Eaves lease, and 8,000 shares were issued to Dunn, as trustee, for account of the lessees under the Thomas lease and those claiming under them. The remainder of the capital stock was reserved and issued for other corporate purposes.

The bill of complaint joined as defendants the Bull Head Oil Company, Dunn and Gillam and their wives and Mullen and others who were stockholders of the Company. It charged that the Thomas lease was voidable because, as alleged, Thomas, the guardian, had been induced to execute the lease by a secret agreement with Dunn and Gillam to the effect that a one-fourth interest in the lease was to be transferred by them to a third person for the personal benefit of Thomas. The bill prayed that the minor, Allie Daney, be decreed to be the owner in fee of the lands described in the Thomas lease; that the defendants be adjudged to have no interest therein and that they be required to account for the oil and gas taken from the land and for the money received by them as the proceeds of the oil and gas so taken and, in the alternative, if for any reason the court should adjudge that the lease of the premises could not be cancelled, then that the defendant stockholders be adjudged the holders of said stock respectively in trust for the minor, and that the plaintiff be awarded the custody thereof for her use and benefit and that the defendants who are or at any time have been stockholders of the Bull Head Oil Company be required to account for all money received by them respectively either as dividends or as proceeds of sale of their stock.

On trial the court found that a part of the consideration moving Thomas, as guardian, to execute the lease to Dunn and Gillam was a one-fourth interest in the lease transferred by them pursuant to a secret agreement with the guardian to a third person for the personal use and benefit of Thomas. The trial court further found that Eaves, as curator, by subscribing his name to the Thomas lease, with the approval of the County Court of Love County and with the approval of the Secretary of the Interior, gave legal validity to that lease; that such action of Eaves was free from the legal effect of the fraud of

Thomas and of Dunn and Gillam, and that by the transfer of the lease to the Bull Head Oil Company in exchange for its issue of capital stock, the full legal ownership of the lease was thereupon vested in the Bull Head Oil Company free from any legal effect of the fraud in the execution of the original lease by Thomas, the guardian. The court also found that of the shares of stock acquired by Gillam as a result of the compromise entered into with Dunn and Gillam by Mullen, 3,266⅔ shares, of which his wife Mrs. Gillam, a party defendant, held 1,266⅔ shares, were sold by them to one Hamon, a party defendant, for the sum of $75,000 and that Hamon was an innocent purchaser for value of the stock; that the defendant T. H. Dunn still retained his holdings in the stock of the Company. There was also a finding that certain shares of the Dunn and Gillam stock transferred by them respectively to Mrs. Dunn and Mrs. Gillam, were so transferred without consideration. Upon the basis of these findings the court entered its decree in favor of the defendants and dismissed the case.

After the entry of the decree of the District Court the plaintiff, acting by the Secretary of the Interior, entered into an agreement, approved by the Secretary and an Assistant Attorney General, with all the defendants other than the defendants Dunn and his wife and the defendants Gillam and his wife, whereby it was stipulated that, in any appeal which the United States should take from the decision of the District Court in this cause, "the United States would neither ask nor insist upon a reversal of the said cause, or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn [wife of T. H. Dunn], J. Robert Gillam and Mrs. J. Robert Gillam and that it will not insist upon any judgment impressing a Trust upon any of the stock in the

Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded."

Both the District Court and the Circuit Court of Appeals found, and the appellees do not question the correctness of the finding, that the Thomas lease to Dunn and Gillam was procured by fraud; nor can it be questioned on this record that the claim of Dunn and Gillam to rights under the Thomas lease was the only basis and consideration moving from them for the compromise agreement by them with Mullen, claiming under the Eaves lease, which resulted in Dunn and Gillam together receiving in exchange for their interest in the lease, 8,000 shares of the capital stock of the Bull Head Oil Company as the fruits of their fraudulent enterprise. Of this stock Dunn and his wife still hold a substantial amount. Gillam and his wife have converted the stock held by them into cash by sale of it to an innocent purchaser, and the leasehold itself, by the action of Dunn and Gillam, has been transferred to the Bull Head Oil Company and has been adjudged by the decree of the District Court to be beyond the reach of the plaintiff and the plaintiff's ward, and the plaintiff in error has abandoned its appeal from that part of the decree.

There is thus presented the narrow question whether the appellees, Dunn and wife and Gillam and wife, against whom this appeal is now prosecuted, may retain the fruits of this fraudulent course of conduct, immune from attack in a court of equity. The court below rested its decision on the ground that the compromise settlement entered into with the defendants, some of whom were stockholders of the Bull Head Oil Company, other than the appellees against whom this appeal is prosecuted, had the effect of confirming the Thomas lease and,

if the appellant had the right to continue the litigation against Dunn and Gillam, that right is based on their alleged fraudulent conduct and is a claim for damages on account of the fraud, and since there was no evidence that the lease was granted for an inadequate return, there was no basis for an award of legal damages to the appellant.

Undoubtedly in an action at law for fraud or deceit, since the action sounds in damage, the plaintiff must prove damage to establish a right to recover. If Dunn and Gillam had retained the lease which they fraudulently obtained from Thomas, as guardian, the plaintiff could, at its option, either have brought suit in equity against them for the cancellation of the lease, or for damages against the guardian, or possibly also at law for damages against Dunn and Gillam, and on familiar principles any relinquishment of plaintiff's right to cancel the lease would necessarily have limited plaintiff to a right of recovery for damages. But such is not the situation here presented. The grant of the lease by Thomas, the guardian, to Dunn and Gillam with a secret agreement that the guardian should be jointly interested in the lease with Dunn and Gillam, was a fraud upon the ward, rendering the whole transaction voidable at the option of the ward or those legally representing her. It is not necessary in such a situation in order to establish the right to relief to show that the beneficiary was damaged by the fraudulent conduct of the trustee. It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more. *Michoud et al.* v. *Girod et al.,* 4 How. 503, 533; *Wardell* v. *Railway Co.,* 103 U. S. 651, 658; *Thomas* v. *R. R. Co.,* 109 U. S. 522; *Burns* v. *Cooper,* 140 Fed. 273, 277; *Mastin* v. *Noble,* 157 Fed. 506, 509; *New York Central & H. R. R. R.* v. *Price,* 159 Fed. 330, and *Lane & Co.* v. *Maple Cotton Mill,* 232 Fed. 421, 423.

Dunn and Gillam did not retain their interest in the lease which they had fraudulently acquired. They transferred it, together with the secret interest of Thomas, the guardian in the lease, to the defendant the Bull Head Oil Company in exchange for stock in that corporation. They then acquired by purchase from Thomas, for the sum of $3,500 and an automobile, his interest in the stock of the corporation. Some of the stock which they acquired by this transaction was turned over to their wives who, the court found, took as donees, and some of it was retained and is now held by appellees, and some of it has been transferred by them to innocent purchasers for value. In such a situation, equity adopts the salutary rule that he who fraudulently traffics with a recreant fiduciary shall take nothing by his fraud. The ward or the beneficiary of a trust may, at his option, follow the trust *res* fraudulently diverted until it reaches the hands of an innocent purchaser for value, or he may, at his option, claim the proceeds of the sale or other disposition of the trust *res* in the hands of him who fraudulently acquired it of the fiduciary.

The legal principles governing the right to follow trust funds diverted in breach of the trust were succinctly and accurately stated by Turner, L. J., in *Pennell* v. *Deffell,* 4 DeGex, M. & G. 372, 388, as follows:

"It is an undoubted principle of this court that as between a *cestui qui trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether it is in its original or its altered state, continues to be subject to or affected by the trust."

To the same effect are *Oliver et al.* v. *Piatt,* 3 How. 333, 401; *Lane* v. *Dighton,* Amb. 409; *Ex parte* v. *Dumars,* Atkyns, 232, 233; *Taylor* v. *Plummer,* 3 Maule & Selwyn,

562, 571; *Cobb* v. *Knight,* 74 Me. 253; *People* v. *California Safe Deposit & Trust Co.,* 175 Cal. 756; *Hubbard* v. *Burrell,* 41 Wis. 365.

The rule is the same as against a fraudulent vendee who has exchanged the property purchased for other property. *American Sugar Refining Co.* v. *Fancher,* 145 N. Y. 552.

The rule is the same with respect to the proceeds of property tortiously misappropriated and found in the hands of the tort feasor or his transferee with notice. *Newton* v. *Porter,* 69 N. Y. 133.

Dunn and Gillam, when they fraudulently acquired the Thomas lease by the corrupt action of the guardian, which action they actively induced, became trustees *ex maleficio* of the lease, and as such trustees they became equitably bound to hold the lease for the benefit of the ward or, in the event of a sale or other disposition of it, to hold its proceeds upon a like obligation. Any other rule would enable the fraudulent recipient of trust property, acquired through a breach of trust, to render himself immune to the remedial action of equity by the simple expedient of transferring the trust *res* thus acquired to an innocent purchaser for value, or otherwise placing it beyond the reach of the defrauded beneficiary of the trust. Nor are they in any better situation with respect to the stock which they acquired by purchase from Thomas with full knowledge that it was a part of the proceeds of the lease fraudulently acquired from the guardian and by them fraudulently transferred to the Oil Company. Not being innocent purchasers, they took it impressed with the trust to which the lease itself was subject. *Newton* v. *Porter, supra.*

The plaintiff's bill was framed in conformity to the rule as we have stated it. It prayed cancellation of the lease in the hands of the Bull Head Oil Company, the transferee of Dunn and Gillam; "but if for any reason the

Court shall hold" that the lease could not be cancelled, then it prayed that the stockholders be adjudged to hold the stock in trust for the plaintiff. The District Court having decreed that the leasehold itself could not be followed into the hands of the Bull Head Oil Company, the plaintiff was not barred from claiming the proceeds of the lease in the form of stock or money in the hands of those stockholders who were not innocent purchasers for value, and the pleadings were appropriately framed to that end. Suit to establish an equitable claim to specific property does not bar a recovery of the proceeds of that property if it develops in the course of the trial that the defendant has conveyed it away in violation of his equitable obligation to the plaintiff. *Taylor* v. *Kelly,* 3 Jones, Eq. 240; *Haughwout* v. *Murphy,* 22 N. J. Eq. 531–547; *Valentine* v. *Richardt,* 126 N. Y. 273; *Sugg* v. *Stowe,* 5 Jones Eq. 126; *Siter's Appeal,* 26 Pa. 178; *Frick's Appeal,* 101 Pa. 485; *Bartz* v. *Paff,* 95 Wis. 95. See also *Jervis* v. *Smith,* 1 Hoffman's Chancery Rep. 470; *Daniel's* v. *Davison,* 16 Vesey 249; and 1 Sugden on Vendors, 277.

In *Valentine* v. *Richardt, supra,* suit was brought in equity to cancel a conveyance of real estate for fraud. The alleged fraudulent grantee, and his grantee and a subsequent mortgagee, were made parties defendant, and the relief demanded was that the two conveyances and the mortgage be declared void and that they be surrendered up and cancelled, and for such further and other relief as might be just. On the trial the court found that the first conveyance was procured by fraud, but that the second conveyance and the mortgage were taken in good faith for value, and the complaint was dismissed as to them. It was held that the first grantee was a trustee of the property *ex maleficio;* that the bill might be retained against the first grantee and that the plaintiff might, in equity, secure a money judgment for the value of the land, *not as damages,* but as a substitute for the land it-

self, and that, under the frame of the bill and prayer, the court had power to render any judgment consistent with the facts alleged and proved; a principle of decision which we think is exactly applicable to the present case. See also *Mooney* v. *Byrne,* 163 N. Y. 86.

The compromise agreement entered into by plaintiff with defendants other than Dunn and Gillam was not technically a confirmation of the lease. It was both in form and in substance only an abandonment of an appeal from a decree of the court, adjudging an indefeasible title to the lease to be in the defendant corporation. The practical effect was to enable the other stockholders, at a price, to lessen the danger of being involved in the fraud by their probable guilty knowledge of it. But even if it were deemed to be a confirmation of the lease, such a confirmation is not inconsistent with a recovery of the proceeds of the lease from Dunn and Gillam and those claiming under them, nor, as has been pointed out, does it bar a recovery of the proceeds. Indeed, a recovery of the proceeds of the assignment of the lease by Dunn and Gillam could be predicated only on a confirmation of the transfer which would bar a recovery of the leasehold itself. *Bonner* v. *Holland,* 68 Ga. 718; *Cavieux* v. *Sears,* 258 Ill. 221; *Beltencourt* v. *Beltencourt,* 70 Ore. 384, 396.

Nor do we find it necessary to consider the question whether Eaves, the curator, or Thomas, the guardian, properly represented the minor, or whether either of them possessed exclusively the power to dispose of the property of the minor, or to determine the precise legal effect of the addition of Eaves' signature to the Thomas lease. Thomas, under whom Dunn and Gillam claim, assumed to act as guardian in the disposition of his ward's property. Dunn and Gillam dealt with him in that capacity. On common law principles they cannot deny the legal capacity in which their lessor purported to act in executing the lease under which they claim. *Clary* v. *Ferguson,* 8

Porter 501; *Pouder* v. *Catterson,* 127 Ind. 434; *Wolf* v. *Holten,* 92 Mich. 136; 104 Mich. 108; *Parker* v. *Raymond,* 14 Mo. 535; *Steel* v. *Gilmour,* 77 App. Div. (N. Y.) 199, 203; *Steuber* v. *Huber,* 107 App. Div. (N. Y.) 599; *Shell* v. *West,* 130 N. C. 171; *Caldwell* v. *Harris,* 4 Humphrey 24; Tiffany Landlord & Tenant, § 78 h & j. This is the rule adopted by the statute of Oklahoma. See § 5247 Compiled Statutes of Oklahoma, 1921; *Avery* v. *VanVoorhis,* 42 Okla. 232, 241. In a suit founded upon the very existence of the lease and praying relief from its execution and legal operation because procured by the fraud of the lessees, the lessees cannot claim under the lease, hold the benefits derived from it, and, at the same time deny the power and authority of the lessor to execute it.

We can perceive no reason why a doubtful or uncertain claim of Dunn and Gillam to the leasehold, sufficient nevertheless to constitute the consideration for the compromise contract with Mullen (*Blount* v. *Wheeler,* 199 Mass. 330; *Zoebisch* v. *VonMinden,* 120 N. Y. 406; *Dredging Co.* v. *Hess,* 71 N. J. L. 327) could not become the subject matter of a trust arising *ex maleficio* from the fraud of Dunn and Gillam and, upon principles already referred to, it follows that if Dunn and Gillam could not resist a bill to compel the cancellation of the lease, they cannot now resist the prayer that they account for the proceeds of the lease acquired by their sale of it and which are the direct fruits of their fraud.

A period of about six years elapsed between the giving of the Thomas lease and the filing of the bill. The defendants neither pleaded nor have they urged laches as a defense; nor do we find in the record any adequate basis for denying relief on that ground. One who claims the benefit derived from a breach of trust in which he actively participates and who shows no prejudice resulting from the delay in bringing suit to compel him to account

cannot complain of laches. See *Insurance Company* v. *Eldridge,* 102 U. S. 545, 548.

We hold that Dunn and Gillam were constructive trustees of whatever interest they acquired in the Thomas lease and of the proceeds derived from the transfer thereof to the Bull Head Oil Company, whatever its form, whether stock or money, and that they and all defendants claiming under them, other than innocent purchasers for value, may in equity be compelled to account to the plaintiff for such proceeds, for the benefit of the minor.

The decree of the Circuit Court of Appeals, with respect only to the defendants T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion; as to the other defendants the appeal was barred by the agreement entered into by the appellant with them and as to them the decree of the Circuit Court of Appeals is affirmed.

So ordered.

Reversed, in part; *affirmed,* in part.

STEBBINS AND HURLEY, AS EXECUTRIX AND EXECUTOR OF THE WILL OF WATKINSON, DECEASED *v.* RILEY, CONTROLLER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 227. Argued March 9, 1925.—Decided April 13, 1925.

1. The California Inheritance Tax Law of 1917, § 2, sub-div. 10, by providing that in determining the market value of the property transferred, for the purpose of fixing the amount of tax, no deduction should be made of the Federal Estate Tax, (assessed upon the whole estate,) resulted in a much larger proportionate tax on the succession to the residuum of an estate when the estate was large than when it was small, though the residuary bequest and

the residuary estate were equal in each instance. *Held* consistent with the due process and equal protection clauses of the Fourteenth Amendment. P. 140.

2. There are two elements in the transfer of a decedent's estate, exercise of the legal power to transmit at death and privilege of succession, and both may be made the basis of classification in a single state taxing statute, so that the amount of tax which a legatee shall pay may be made to depend both on the total net amount of the decedent's estate subject to the jurisdiction of the State and passing under its inheritance and testamentary laws, and the amount of the legacy to which the legatee succeeds under those laws. P. 144.

191 Cal. 591, affirmed.

ERROR to a judgment of the Supreme Court of California sustaining, on review, a judgment of the Superior Court confirming an assessment of inheritance taxes.

Mr. Carey Van Fleet, with whom *Messrs. Joseph G. De Forest, Sidney M. Ehrman, Maurice E. Harrison, William M. Madden, Lloyd M. Robbins* and *Luther Elkins* were on the brief, for plaintiffs in error.

Mr. Ralph W. Smith, Inheritance Tax Attorney for California, with whom *Messrs. Wesley E. Marten, Dion R. Holm, Arthur W. Brouillett, Erwin P. Werner* and *Adrian C. Stanton* were on the brief, for defendant in error.

Messrs. Martin Saxe, Samuel P. Goldman, Charles R. McSparren and *William F. Unger,* filed a brief as *amici curiae* by special leave of court.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on a writ of error to the Supreme Court of California to review the determination of that court upholding the constitutionality of the Inheritance Tax Act of the State of California enacted in 1917, particularly Subdivision 10 of § 2 of the Act, which prescribes the

method of determining the market value of the property transferred, for the purpose of fixing the amount of the tax. Subdivision 10 of § 2 reads as follows:

"In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the Government of the United States."

The decedent left a gross estate exceeding $1,800,000, on which the federal Estate Tax amounted to the sum of $128,730.08. In fixing the amount of inheritance tax due to the State of California upon the residuary legacies, the state Tax Appraiser, acting pursuant to the provisions of Subdivision 10 of § 2, did not deduct the amount of federal Estate Tax. In consequence the total amount of state tax assessed upon the residuary estate was $26,-205.75 greater than it would have been had the federal Estate Tax been deducted from the residuum of the estate before fixing the amount of the state tax. The Superior Court of San Francisco County having jurisdiction in the premises confirmed the tax, and the Supreme Court of California, on writ of error, held that the tax was in accordance with the laws and the constitution of California and was not a denial of due process or equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. *Stebbins* v. *Riley,* 191 Cal. 591.

It is urged here that the California Inheritance Tax Act of 1917 is a succession tax; that the provision of the taxing law requiring that there shall be no deduction of the federal tax in fixing the fair value of the legacy on which the state tax is levied is an arbitrary discrimination bearing no relation either to the persons succeeding to the decedent's estate or to the amount which the taxpayer takes by succession, and that it is accordingly a taking of property without due process of law, and, because of the inequalities in the amount of the tax result-

ing from the application of the taxing statute to successions, there is a denial of the equal protection of the laws. On the other hand, it is urged that the so-called "right" of acquiring property by devise or descent, is not a property right but a mere privilege, the creature of state law, and the authority which confers it may impose conditions upon its exercise; that in consequence the State may tax the privilege, discriminating not only between the status of those who inherit and the amounts which they thus acquire, but discriminating likewise between inheritances or legacies of like amount which are transmitted from estates of varying size, if the discrimination is based upon or bears some reasonable relation to the size of the whole estate transmitted on the death of the decedent. In presenting this aspect of the case, it was argued by the appellant, on the one hand, that there was a natural right to inheritance entitled to the protection of the due process clause of the Fourteenth Amendment, and by the appellee, on the other, that the legislative authority could deny wholly the privilege of inheritance and consequently could place unlimited burdens upon it.

There is much in judicial opinion to suggest that a State may impose any condition it chooses on the privilege of taking property by will or descent, or, indeed, that it may abolish that privilege altogether, and, for this reason, that a State is untrammeled in its power to tax the privilege. See *Mager* v. *Grima,* 8 How. 490; *United States* v. *Perkins,* 163 U. S. 625; *Knowlton* v. *Moore,* 178 U. S. 41, at page 55; *Campbell* v. *California,* 200 U. S. 87, at page 94.

But we do not find it necessary to discuss the issue thus raised, for it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless, as

was said in *Dane* v. *Jackson,* 256 U. S. 589, 599, the taxing statute "results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoilation under the guise of exerting the power of taxing.'" Citing *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S. 232, 237; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 615; *Wagner* v. *Baltimore,* 239 U. S. 207, 220.

The subject matter of an inheritance taxing statute may be either the transmission, or the exercise of the legal power of transmission, of property by will or descent, (*United States* v. *Perkins,* 163 U. S. 625, 629; *Plummer* v. *Coler,* 178 U. S. 115, 125; *New York Trust Co.* v. *Eisner,* 256 U. S. 345), or it may be the legal privilege of taking property by devise or descent (*Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Knowlton* v. *Moore,* 178 U. S. 41; *Campbell* v. *California,* 200 U. S. 87.)

Even assuming that a State does not, under the Constitution of the United States, possess unlimited power to curtail the power of disposition of property at death or the privilege of receiving it by way of inheritance, there is nevertheless no constitutional guarantee of equality of taxation. The power of the States to discriminate in fixing the amount and incidence of taxation upon inheritances is undoubted. A State may levy a tax upon the power to dispose of property by will, graduated by the size of the legacy, and it may grant exemptions. See *Plummer* v. *Coler, supra; Keeney* v. *Comptroller of N. Y.,* 222 U. S. 525. It may discriminate between property which has not borne its full share of taxation in the testator's lifetime and other property passing to the same class of transferees. *Watson* v. *State Comptroller,* 254 U. S. 122. It may fix a graduated succession tax, even though the amount of tax assessed does not vary in pro-

portion to the amount of the legacy received by persons of the same class. *Magoun* v. *Illinois Trust & Savings Bank, supra.* It may fix a succession tax which imposes a tax upon inheritances to brothers and sisters and not on those to daughters-in-law and sons-in-law. *Campbell* v. *California, supra.*

The guarantee of the Fourteenth Amendment of the equal protection of the laws is not a guarantee of equality of operation or application of state legislation upon all citizens of a State. As was said in *Magoun* v. *Illinois Trust & Savings Bank, supra,* at page 293:

"It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. *Magoun* v. *Illinois Trust & Savings Bank, supra; F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412.

"It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only,

and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S. 232, at p. 237.

It is not necessary that the basis of classification should be deducible from the nature of the thing classified. It is enough that the classification is reasonably founded in the "purposes and policies of taxation." *Watson* v. *Comptroller,* 254 U. S. 122. It is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion. *Campbell* v. *California, supra.*

Unquestionably the operation of Subdivision 10 of § 2 of the California Inheritance Act of 1917 now under consideration may result in inequalities in the incidence of taxation. The requirement that the federal Estate Tax shall not be deducted in fixing the state Inheritance Tax imposes a much larger proportionate tax on the succession to a residuum of a large estate than a smaller estate, although the residuary estate and the residuary legacy be equal in each instance.

The plaintiffs in error base their argument that this is a denial of the equal protection of the laws on the assumption that the California Inheritance Tax must be dealt with exclusively as a tax upon succession, and that, since the privilege of receiving residuary legacies of like amounts by persons of like relationship is subjected to unequal taxation, the inequality depending upon the size of the estate from which the legacy is received, there is an arbitrary discrimination and a denial of the equal protection of the laws. It is true that the inheritance tax law of California in force before the adoption of the law of 1917 repealing it, was held by the Supreme Court of

California to be a succession tax. *Estate of Miller,* 184 Cal. 674. That statute contained no express provision prohibiting the deduction of federal estate taxes before fixing the state tax on legacies, and that court held, adopting the principle of construction applied in *Knowlton* v. *Moore, supra,* that the true effect of the California Inheritance Tax Act, being that of a tax on succession, the federal tax must be deducted in order to determine the amount on which the state tax should be based. It is true, too, that the California Inheritance Tax Act of 1917 provides for a graduated tax dependent upon the size of the legacy and discriminates between different classes of persons receiving the legacy, provisions which are characteristic of laws levying the tax upon successions. But § 2 of that Act expressly imposes the tax "upon the *transfer* of any property" of the character described in the Act, and Subdivision 3 of § 1 of the Act provides that the word "transfer" as used in this Act shall be "taken to include the passing of any property or any interest therein" in the manner provided in the Act. Subdivision 10 of § 2, which is new, in its practical operation, makes the amount of the tax dependent to some extent upon the amount of the decedent's estate which passes, since the federal Estate Tax which under that provision may not be deducted in fixing the state tax is assessed upon the whole estate. To that extent the statute establishes a classification based on the amount of the estate passing under the power of disposition at the time of death, as well as the classification, based upon the amount of the legacy received, contained in other provisions of the taxing law.

There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed,

may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single taxing statute, so that the amount of tax which the legatee shall pay may be made to depend both on the total net amount of the decedent's estate subject to the jurisdiction of the State and passing under its inheritance and testamentary laws and the amount of the legacy to which the legatee succeeds under those laws. Such a classification is not, on its face, unreasonable. The discrimination is one which bears a substantial relationship to the exercise of the power of disposition by the testator. It is one of the elements in the transfer which is made the subject of taxation. The adoption of the discrimination does not preclude the assumption that the legislature, in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it, and we can find in it no basis for holding the statute unconstitutional.

It is urged by appellants that the decision of this Court in *Knowlton* v. *Moore, supra,* is in conflict with the conclusion here reached. We do not so read the opinion in that case. It was there held that an act of Congress fixing a graduated tax upon legacies was within the taxing power of the United States. In construing that law, however, the question arose whether the progressive rate of tax which it imposed upon legacies or distributive shares of decedent's estate, should be measured, not separately by the amount of each legacy or distributive share, but by the total amount of the estate transmitted. This Court held that inasmuch as the statute laid down no express rule determining the question, it would adopt the construction which produced the least inconvenience and inequality to taxpayers, and that the tax should therefore be measured and apportioned according to the amount of each individual legacy rather than the amount of the whole estate. The question was one of construction only

and not of constitutional power. Here the construction of the taxing act is not open to question. Its meaning and application have been determined by the Supreme Court of California and by its determination we are bound. We hold that in enacting it the legislature did not exceed its constitutional power.

Affirmed.

STANDARD OIL COMPANY OF NEW JERSEY *v.* SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 197. Argued January 19, 1925.—Decided April 20, 1925.

1. The Federal Control Act did not authorize an action in tort by the owner of a vessel against the Director General of Railroads for her loss through collision while operated by the Director General P. 154.
2. Where the Director General, under his contract with the owner for the use and upkeep of transportation properties taken over under the Federal Control Act, made a settlement including an allowance for a vessel lost by collision during operation by the Director General, *held* that the common law rule that one who accepts satisfaction from one of two joint tort-feasors can not recover from the other was inapplicable to extinguish the claim of the owner against the owner of the other vessel in pending limitation of liability proceedings to which both owners and the Director General were parties. *Id.*
3. Upon an appeal in admiralty there is a trial *de novo* opening the whole case, so that a party is not bound by the decree below through failure to join in the appeal. P. 155.
4. In the absence of a market value, such as is established by contemporaneous sales of like property in the ordinary way of business, the damages to which the injured party is entitled in admiralty for the loss of a vessel is that amount which, considering all the circumstances, probably could have been obtained for her on the date of the collision—the sum that in all probability would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. P. 155.

5. Cost of reproduction as of the date of valuation is evidence to be considered but neither that, nor that less depreciation, is the measure or the sole guide; value is the thing to be found, and there should be a reasonable judgment of this based on a proper consideration of all relevant facts. P. 156.
6. In view of changed prices, *held* that original cost of a vessel was not a useful guide to her value when lost. P. 157.

292 Fed. 560, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals modifying a decree of the District Court (266 Fed. 570; 285 id. 617) in proceedings for limitation of liability, in admiralty. The District Court found that both the petitioner's vessel and that of the Southern Pacific Company were at fault, and fixed the damages of the latter. The Circuit Court of Appeals found petitioner's vessel alone at fault and increased the damages. For preliminary proceedings in this Court, see 263 U. S. 681, 696; 265 U. S. 569.

Messrs. John M. Woolsey and *William H. McGrann* for petitioner.

The settlement made between the Director General of Railroads and the Southern Pacific Company, by payment to the latter of the value of the Proteus in exchange for a release, constituted a satisfaction of the claim of the Southern Pacific Company in respect of the loss of the Proteus. Any allowance that can now be made herein for the loss of the Proteus can only be for a payment to the Director General of such an amount, not exceeding the amount thus paid by him in settlement, as will represent the value of the Proteus.

When two tort-feasors by their concurrent negligence have caused an injury to a third person, they are jointly and severally liable to him under the salutary doctrine laid down in the overwhelming majority of the courts of this country. *The Atlas,* 93 U. S. 302, at page 318; *Boyer* v. *Sturgis,* 24 How. 122; *Colegrove* v. *N. Y. N. H.*

& H. R. R. Co., 20 N. Y. 492; *Carlton* v. *Boudar*, 118 Va. 521; *Walton, Witten & Graham* v. *Miller*, 109 Va. 210; *Feneff* v. *Boston & Me. Ry.*, 196 Mass. 575; *Cuddy* v. *Horn*, 46 Mich. 596; *Drown* v. *New Eng. T. & T. Co.*, 80 Vt. 1; *Slater* v. *Mersereau*, 64 N. Y. 138; *Corey* v. *Havener*, 182 Mass. 250; *McClellan* v. *St. Paul M. & M. Ry.*, 58 Minn. 104; *Reynolds* v. *Kansas City*, 180 Mo. App. 138; *City of Louisville* v. *Heitkemper's Adm'x*, 169 Ky. 167; *The Ira M. Hedges*, 218 U. S. 264.

There is not any doubt that, under the law as laid down by this Court, the Southern Pacific Company, as the innocent owner, could have sued either the Standard Oil Company or the Director General for the negligent sinking of the Proteus and recovered full damages from either tort-feasor, or it could have sued them jointly and recovered a moiety of its damages from each in the first instance, with a right over against the other tort-feasor for any deficiency not paid by the respondent against whom execution first issued. But once it had received from one of the tort-feasors full satisfaction for its loss, as it has done here, it could not pursue the other tort-feasor for further damages for the excellent reason that it would not have any cause of action left. *The Beaconsfield*, 158 U. S. 303, 307; *The Atlas, supra; Lovejoy* v. *Murray*, 3 Wall. 1; *Jennings* v. *Dolan*, 29 Fed. 861; *Albright* v. *McTighe*, 49 Fed. 817; *United States* v. *Murphy*, 15 Fed. 589; 1 Williston Contracts, § 334, 338a; 26 Harv. L. R., 658; 34 Harv. L. R., 442; 12 Harv. L. R., 66; *Seither* v. *Philadelphia Transaction Co.*, 125 Pa. St. 397.

That leaves the equities of contribution to be worked out between the Director General and the Standard Oil Company. The right of contribution in such a case "belongs to the substantive law of the admiralty." *The Ira M. Hedges, supra; Erie R. R. Co.* v. *Erie & Western Trans Co.*, 204 U. S. 220.

It is settled law that there is a new trial in admiralty on appeal to the Circuit Court of Appeals or on certiorari to

this Court. *Reid* v. *Fargo,* 241 U. S. 544; *Watts* v. *Unione Austriaca,* 248 U. S. 9; *The John Twohy,* 255 U. S. 77. We must look, therefore, at the facts, as now developed on the new evidence taken in this Court. Now that the Southern Pacific Company has been cut out of the case by the satisfaction of its claim, the only question left is what allowance the Director General should have in the collision adjustment in respect of the Proteus. The Director General did not appeal and, therefore, we submit, cannot be allowed more than the District Court allowed as the value of the Proteus. Cf. *The Beaconsfield,* 158 U. S. 303, 310. Certainly there is not any question but that the largest claim which he can now possibly make is for reimbursement to the extent of the amount which he had paid to his bailor in settlement of his contract obligation to make the bailor whole. Cf. *Vermilye* v. *Adams Express Co.* 21 Wall. 138.

The rule of damage applied by the Circuit Court of Appeals is erroneous in that it is based on an arbitrary formula, the two factors of which are a speculative reproduction cost, and an uncertain depreciation rate; which operates to exclude other material factors in arriving at fair valuation. The proper rule is that adopted by the District Court, and by the Commissioner, whereby, in the absence of a provable market value, all other relevant facts are considered in determining the measure of the loss. There was not any market value for the Proteus at the time of her loss. *Gulf Refining Co.* v. *United States,* 58 Ct. Cls. 559. The burden of proof to establish the loss rested on the Proteus interests (Southern Pacific Company and Director General of Railroads). *The Conqueror,* 166 U. S. 110; Sedgwick on Damages, 9th ed. Vol. 1, p. 181. The Circuit Court of Appeals based its valuation squarely and exclusively on the reproduction and depreciation theory. The factor of "cost of reproduction" which was taken to be $1,750,000, is highly speculative and excessive. The second factor, that of "depreciation," which the

Circuit Court of Appeals assumed to be two and a half per cent. per year, was also unreasonable and unduly advantageous to the respondents, and its acceptance greatly enhanced the result obtained by the formula, and to the disadvantage of the petitioner. A rate of five per cent. of the book value (for each year) as depreciation, was held to be a reasonable allowance for deduction from value, in the case of *San Francisco & Portland SS. Co.* v. *Scott, Collector,* 253 Fed. 854; *United States* v. *Standard Oil Co.* 258 Fed. 696; *The Anhauac,* 295 Fed. 346; *The Harmonides,* 1903 Prob. Div. 1.

The application of the reproduction and depreciation method so exclusively is not supported by the weight of authorities. The cases show a wide latitude in considering all elements which bear on the question of the measure of the loss under the circumstances here: *The Colorado,* Brown Adm. 411, Fed. Cas. No. 3029; affirmed, *The Colorado,* 91 U. S. 692; *Leonard* v. *Whitwill,* 19 Fed. 549; *City of Alexandria,* 40 Fed. 697; *The H. F. Dimock,* 77 Fed. 226; *The Mobile,* 147 Fed. 882; *The Lucille,* 169 Fed. 719; *Alaska S. S. Co.* v. *Inland Nav. Co.* 211 Fed. 840; *The Iron Master,* 1 Swabey Adm. Rep. 441; *The Clyde, Id.* 23 (1856); *Shipping Controller* v. *Lloyds Royal Belge Ltd.,* 1 L. R. 231, 389; K. B. D. Com. Court Nov. 10, 1919; *Harries* v. *Shipping Controller* (May 14, 1918), 14 Asp. Mar. Cas. 320; *The Harmonides, supra; The Winkfield* (1902) P. B. 42; 9 Asp. 259 (July 23, 1903); Roscoe on Damages in Marine Collisions, 2nd ed., p. 166; Marden's Collision at Sea, 7th ed., p. 119. All the circumstances bearing on the value of the Proteus to the respondents (particularly in its aspect as a loss) must be considered as relevant in arriving at an amount which would fulfill the requirements of the doctrine of "*restitutio in integrum.*" *The Iron Master,* Swb. 443; *The Harmonides, supra; The Minnesota Rate Cases,* 230 U. S. 433; *The Utopia,* 16 Fed. 507. Indeed, the "reproduction and depreciation" method as applied by the Circuit

Court of Appeals is contrary to analogous cases decided in other circuits. *The H. F. Dimock, supra; La Normandie,* 58 Fed. 427; *Whitehurst* v. *United States,* 272 Fed. 46; *The J. E. Trudeau,* 54 Fed. 907; *The Samson,* 217 Fed. 344; *The I. C. White,* 295 Fed. 593. The so-called "rate making" cases are somewhat analogous, in so far as a "fair value" is sought as the basis of fixing a reasonable rate for public utilities. *Smyth* v. *Ames,* 169 U. S. 466; *Galveston Electric Co* v. *City of Galveston,* 258 U. S. 388; *The Minnesota Rate Cases, supra; Georgia Ry. & Power Co.* v. *Railway Comm.,* 262 U. S. 625. The same broad rule is also applied in comdemnation proceedings. *Hanson Lumber Co.* v. *United States,* 261 U. S. 581; *United States* v. *New River Collieries Co.,* 262 U. S. 341; *Brooks-Scanlon Co.,* v. *United States,* 265 U. S. 106; *United States* v. *Boston C. C. & N. Y. Canal Co.,* 271 Fed. 877.

Many of the cases reject "reproduction" values, particularly, where, as in the present case, they are founded on transitory and abnormal costs of production. *Mersey Docks and Harbor Board,* 3 K. B. Div. 223, distinguished. Abnormal and transitory values should not control, even where market value is the test. *City of New York* v. *Sage,* 239 U. S. 57; *Reno Co.* v. *Pub. Ser. Comm.,* 298 Fed. 790; *In re Inwood Hill Park,* 189 N. Y. S. 642; *Lawrence* v. *Boston,* 119 Mass. 126; *Brown* v. *Calumet River Ry. Co.* 125 Ill. 600; *Languist* v. *Chicago,* 200 Ill. 69.

The fact that the Proteus was a requisitioned vessel, and that her owner was deprived not only of the power to dispose of her by sale, but of the right to her use, at least until after March 1, 1920, was an important factor in measuring the damage sustained at the time of her loss, and one which the Circuit Court of Appeals plainly disregarded. The courts have recognized that vessels requisitioned because of war conditions suffered thereby a decrease in value to their owners. *The Kia Ora,* 246 Fed. 143; *Harries* v. *Shipping Controller, supra; Shipping Con-*

troller v. *Lloyds Royal Belge, supra. Braceville Coal Co.* v. *People,* 147 Ill. 66; *International News Serv.* v. *Associated Press,* 248 U. S. 215. The original cost of the Proteus, which was less than half of the amount awarded by the Circuit Court of Appeals as measuring her value at the time of the loss, was entirely disregarded as a factor in ascertainment of the measure of the damage. The Proteus was of a special type of construction, which would have operated to reduce her sale value in the open market. That fact was disregarded by the Circuit Court of Appeals. The application of the scale of valuation fixed for vessel property by the Advisory Board of the War Risk Insurance Bureau at the time of her loss, indicates that the Proteus was worth less than $700,000, according to the Advisory Board's scale.

Mr. C. C. Burlingham, with whom *Mr. Van Vechten Veeder* and *Mr. A. Howard Neely* were on the briefs, for respondents.

Mr. Justice Butler delivered the opinion of the Court.

August 19, 1918, the steamship Cushing, owned by the petitioner, Standard Oil Company, and the Proteus, owned by the respondent, Southern Pacific Company, and operated by the Director General of Railroads, collided. The Proteus and her cargo were lost. Petitioner and respondents filed their petitions for limitation of liability. R. S. §§ 4283–4285. Admiralty Rule 54. The proceedings were consolidated. The District Court found that both vessels were at fault and referred the question of damages to a commissioner. 266 Fed. 570. He reported that there should be awarded on account of the loss of the Proteus $750,000, with interest. The report was confirmed and decree entered, November 28, 1922. 285 Fed. 617. Petitioner and Southern Pacific Company appealed; the Director General did not appeal. The petitioner maintained that the Cushing was not at fault and sought reversal on that ground. The Southern Pacific Company contended

that the commissioner's valuation of the Proteus was too low. The Circuit Court of Appeals affirmed the fault of the Cushing and held that the value of the Proteus at the time of the collision was $1,225,000; and the decree of the District Court was modified accordingly. 292 Fed. 560. The petition to this Court for a writ of certiorari alleges that at the time of the collision the Proteus was under the sole control of the Director General of Railroads, and that, if the vessel had not been lost, it would have continued in his control until March 1, 1920; that the claim of the Southern Pacific Company was against the Standard Oil Company and the Director General, who were joint tortfeasors causing the loss of the Proteus, and that, after the expiration of the term of the Circuit Court of Appeals, petitioner learned that a final settlement had been made between the Southern Pacific Company and the Director General, by which the liability of the latter for the loss of the Proteus was satisfied by payment of $750,000 or by adjustment and settlement on that basis. And the petition asserts that thereby any claim of the Southern Pacific Company against petitioner was extinguished, because a settlement with one joint tortfeasor precludes recovery from the other for the same loss. The petition was granted. 263 U. S. 696. Later, the order granting the writ was vacated as to personal injury, cargo and passenger claimants against whom no error was assigned. 263 U. S. 681. By leave of this Court, additional testimony relating to the settlement was taken in accordance with paragraph 2 of rule 12. 265 U. S. 569.

The material facts may be briefly stated. December 28, 1917, the President took over the combined rail and water transportation system of the Southern Pacific Company and its subsidiaries. February 19, 1919, the Director General and the owner made a contract in respect of the operation and upkeep of the properties and for the compensation to be paid for their use during federal control. By it, the Director General was required to pay for

property destroyed and not replaced. December 19, 1922, final settlement under the contract was made. The total amount of all items claimed by the company was $54,252,-694.57. There was paid $9,250,000 as a lump sum; and that was accepted in full satisfaction of all claims, with certain exceptions not here material. The company claimed $1,268,090.26 for the Proteus and $16,663.80 for the lighter Confidence. The Railroad Administration kept a record showing how the lump sum was arrived at. In this record there was allocated on account of the Proteus and the Confidence a lump sum of $885,000, but this was not in any wise communicated to the company. There was no agreement as to the value of the Proteus or as to the amount included in the lump sum on account of her loss or on account of any other item. On the facts disclosed, it is impossible to attribute to her loss any particular amount.

The rule of the common law that one who is injured by a joint tort and accepts satisfaction from one of the wrongdoers cannot recover from the other does not apply. By reason of the immunity of the United States from suit, the Southern Pacific Company did not have the same remedy against the Director General that an owner would have against a private charterer. Waiver of sovereign immunity from suit was not broad enough to permit an action in tort by the company against the Director General for the loss of the Proteus. See § 10, Federal Control Act, c. 25, 40 Stat. 456; *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *Missouri Pacific R. R.* v. *Ault,* 256 U. S. 554. In respect of that, there was no breach of duty owed to the respondent by the Director General as a common carrier. As was said in *The Western Maid,* 257 U. S. 419, 433, "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort." At the time of the collision, the Director General was a special owner having exclusive possession and con-

trol of the vessel; the Southern Pacific Company was the owner of the reversion. Together they had full title, and joined in the petition for limitation of liability. Adjustment of their interests under the contract could be made before as well as after the end of litigation. No question of tort or negligence on the part of the Director General was involved. The settlement had no relation to the wrongful act of petitioner and did not affect its liability. *Ridgeway* v. *Sayre Electric Co.,* 258 Pa. 400, 406. Petitioner is not entitled to dismissal as against the Southern Pacific Company. Nor is the Director General bound by the decree of the District Court as to the amount of damages. On appeal in admiralty, there is a trial *de novo.* The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed. *Reid* v. *American Express Co.,* 241 U. S. 544; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *The John Twohy,* 255 U. S. 77; *Munson S. S. Line* v. *Miramar S. S. Co.,* 167 Fed. 960. And see *Irvine* v. *The Hesper,* 122 U. S. 256, 266.

It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. *The Baltimore,* 8 Wall. 377, 385. Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all proba-

bility would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, 123. And by numerous decisions of this Court it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value. *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 287, and cases cited; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 689; *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 629; *Brooks-Scanlon Corporation* v. *United States, supra,* 125; *Ohio Utilities Company* v. *Public Utilities Commission,* 267 U. S. 359. The same rule is applied in England. *In re Mersey Docks and Admiralty Commisisoners* [1920], 3 K. B. 223; *Toronto City Corporation* v. *Toronto Railway Corporation,* [1925] A. C. 177, 191. It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases,* 230 U. S. 352, 434.

The Proteus was a steel passenger and freight steamship, built in 1900 for use in the Southern Pacific Company's service between New York and New Orleans. Her original cost was $557,600. In 1909, she was reboilered and otherwise improved at a cost of $90,000. The evidence shows that she was unusually well kept and in excellent condition for use. The District Court found that in 1917 and 1918, on account of unprecedented demand and a shortage of shipbuilding facilities, the market value of ships was higher than the cost of construction; and also found that in 1918, when the Proteus was lost, the cost of construction was approaching the peak which came some months later. 285 Fed. 619, 620. Respondents

called three witnesses experienced in shipbuilding and familiar with construction costs and value of ships in 1918. Each made an estimate of the cost of reproduction of the Proteus as of the date of the loss. Their estimates were respectively $1,755,450, $1,750,000 and $1,750,000. One of these witnesses and two others called by respondent testified respectively that in 1918 the value of the Proteus was $1,225,000, $1,297,637 and $1,350,000. The petitioner called a mechanical engineer and naval architect connected with its construction department, who testified that the cost of reproduction of the Proteus in 1918 would have been three times its original cost or approximately $1,670,000. It called two other witnesses, who had been members of a government board of appraisers for the determination of just compensation for vessels requisitioned. They expressed the opinion that the cost of reproduction of the Proteus in 1918 would have been two and a half times its original cost or approximately $1,400,000. But they made no detailed estimates. The figures were arrived at by examination of statistics showing labor and material costs. These three witnesses testified respectively that at the time of the loss the value of the ship was $630,000, $650,000 and $611,000.

In view of changed prices, the original cost of the vessel was not useful as a guide to her value when lost. In *The Clyde,* 1 Swabey 23, Doctor Lushington, speaking of what a vessel would fetch in the market, said (p. 24): "In order to ascertain this, there are various species of evidence that may be resorted to—for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most un-

learned—the constant change which takes place in the market. It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.'" And see *City of Winona* v. *Wisconsin-Minnesota Light & Power Co.*, 276 Fed. 996, 1003.

Restitutio in integrum is the leading maxim applied by admiralty courts to ascertain damages resulting from a collision (*The Baltimore, supra,* 385), and on the same principle, value is the measure of compensation in case of total loss. The evidence requires a finding that, as of the date of her loss, the cost of reproduction new of the Proteus was not less than $1,750,000. Ordinarily, contemporaneous cost of construction would be a good indication of the amount of damages resulting from the loss of a new ship. There ought not to be any difference between reasonable original cost and estimated cost of reproduction as of the date when built. But the Proteus was 18 years old when lost, and all the witnesses who testified on the subject fixed her value at that time higher than her original cost and lower than the estimated cost of construction. There is no established method or rule for determining the difference between her value at the time of the loss and what her value would have been if then new. It was shown that annual rates of depreciation used in the accounts of shipowners varied from two and a half to five per cent., and that such rates are affected by the policy of the owners, business conditions, taxes and other things. It was not shown whether such deductions covered annual depreciation resulting notwithstanding proper maintenance, or whether they included all or part of the current cost of upkeep. It did not appear whether the rates were applied to reproduction cost or to original cost, or to an amount remaining after deduction on account of scrap value or salvage value or other minimum. In August, 1918, the immediate demand for ships was greater than the supply; the

shipyards were working to full capacity; wages and prices were high; the trend of construction costs was upward, and the element of time was of the utmost importance. And witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value. If new, the Proteus would have been worth at least her cost of reproduction. Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new.

Petitioner's mechanical engineer arrived at $630,000 by taking 34 per cent. of $1,670,000, reproduction cost as found by him, and by making some relatively small adjustments on account of expenditures for maintenance and improvement. He arrived at 66 per cent. deducted, by taking 4 per cent. for 14 years and two and a half per cent. for four years, making an average of over 3.6 per cent. The two other witnesses called by petitioner arrived at $650,000 and $611,000 respectively, by taking 45.2 per cent. of $1,400,000, reproduction cost found by them, and by making similar adjustments. They arrived at 54.8 per cent. deducted, by the use of a depreciation table prepared by another member of the board of appraisers. This table applies to steel steamers in salt water service. It is based on a life of 40 years. It makes a different deduction for each year. For the first 20 years it takes off 60 per cent. and for the last, 40 per cent. The average annual rate is two and a half per cent. The evidence showed that the useful life of such a vessel is not any fixed number of years, but varies greatly, depending on upkeep and maintenance. The table was intended to reflect average conditions of the different depreciable elements of ships of that class and to guide to average values over extended periods, including times of depression as well as of prosperity. The value fixed by each of petitioner's witnesses is more than $1,000,000 less than the

reproduction cost. The rate of depreciation taken by petitioner's mechanical engineer is too high in view of the conditions prevailing at the time of the loss. The other witnesses based their calculation on a reproduction cost that was too low. Moreover, certain valuations made by the government board of appraisers of which they were members seriously impair the weight of their testimony. In 1917, the United States requisitioned the Havana and the Saratoga, vessels of the same type as the Proteus and about one and a half times its size, and constructed in 1906. Cramps estimated reproduction cost of each in 1917 to be $3,000,000, about three times original cost. The board fixed value at $2,240,000 each, about 74 per cent. of reproduction cost. But the value of the Proteus as given by these witnesses was less than 38 per cent. of her cost of reproduction new.

We think the commissioner and District Court failed to give due regard to construction costs, conditions, wages and prices affecting value in 1918; and that the evidence sustains the decree of the Circuit Court of Appeals.

Decree affirmed.

MR. JUSTICE SUTHERLAND took no part in the hearing or decision of this case.

IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* GAVIT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 325. Argued April 15, 1925.—Decided April 27, 1925.

1. A will provided that the income from a fund in trust should be applied to the education and support of the testator's granddaughter so far as the trustees deemed proper and that the balance of it should be divided into two equal parts one of which should be paid to the plaintiff in equal, quarter-yearly instalments during his life. On the granddaughter's reaching the age of twenty-one or dying, the fund was to go over, so that, considering her age, the plaintiff's interest could not exceed fifteen years. *Held*, that the sums paid the plaintiff were taxable income within the meaning of the Constitution, and of the Income Tax Act of October 3, 1913, which taxed "the entire net income arising or accruing * * * to every citizen of the United States" and defined net income as "gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent." P. 166.
2. The provision of the above act exempting bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income, properly so called, simply because of a severance between it and the principal fund. P. 167.
3. The rule that tax laws shall be construed favorably for the taxpayers is not a reason for creating or exaggerating doubts of their meaning. P. 168.

295 Fed. 84, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment for the plaintiff in an action to recover taxes and penalties exacted under an income tax law. See 275 Fed. 643.

The *Solicitor General*, with whom *Mr. Chester A. Gwinn*, was on the brief, for petitioner.

The payments were income, taxable at normal and surtax rates under § II of the Income Tax Act of 1913. The

decision of this Court in the case of *Maguire* v. *Trefry,* 253 U. S. 12, directly refutes the contention that earnings of capital, in order to be income to the recipient within the meaning of the Income Tax Act of 1913 and the Sixteenth Amendment, must be a gain derived from a capital or corpus actually owned by the recipient of the income. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509. The error of the Circuit Court of Appeals lies in confusing the income from a legacy with the legacy itself. Under the act the former is taxed as income while the latter is not. What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income. On this interest or use there was no tax because he received it as a bequest. On the other hand, what income Gavit received from the trustees of the estate was taxable. Gavit's interest in the trust fund was "property," the "value" of which is exempt from tax as income because received as a bequest. *Raymer* v. *Trefry,* 239 Mass. 410. The fact that the enjoyment is uncertain never interferes with the vesting of an estate. When the contingency is not in the person, but in the event when enjoyment shall commence, or in the time of the enjoyment, the interest is considered vested. *Neilson* v. *Bishop,* 45 N. J. Eq. 473.

"Income" from capital must be, not capital, but the proceeds of capital. A gift or bequest of capital assets even if payable in installments is not "income." Here not a portion of the capital assets forming the corpus, but certain of the earnings thereof, passed to the *cestui que trust.* The *cestui que trust* has an interest in the corpus, because he is legally entitled to receive whatever income is given him and must have the right to enforce payment if it is wrongfully withheld. The act of 1913 specifically taxes income "growing out of the ownership or use

of or interest in real or personal property." Therefore, it must inevitably follow that, as Gavit had an " interest in " the corpus, the proceeds thereof coming into his hands were taxable income. In denying that the *cestui que trust* had any interest in the principal the lower courts ignored the law of the State of New York as to trust estates. *Metcalfe* v. *Union Trust Company,* 181 N. Y. 39.

The most important aspect of the decision below is not the obvious error in this particular case, but the serious and far-reaching effect upon the whole income-tax system of the Government.

A Constitutional question is involved. The suggestion of the opinion below is that a bequest of income can not be " income " under the Sixteenth Amendment, where the beneficiary owns no part of the corpus, and is not made income by Congress calling it such. Under this theory Congress has no power to tax the income from property acquired by gift or legacy where income is bequeathed apart from the corpus; but under such circumstances both the value of the property itself and the income therefrom are necessarily exempt. The income from a legacy is taxable as income whether the legatee owns any part of the corpus or not. *Baltzell* v. *Casey,* 1 Fed (2) 29; aff'd. by C. C. A., Jan. 14, 1925. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Merchants' Loan & Trust Co.* v. *Smietanka, supra.* There is, and always has been, ample power in Congress to tax income from whatever source derived. Congress used the word " income " in its popular and broadest sense. *Eisner* v. *Macomber,* 252 U. S. 189; *Lynch* v. *Hornby,* 247 U. S. 339.

Mr. Neile F. Towner, for respondent.

The respondent was bequeathed a certain portion of the increase of the estate of the testator for a definite period; that is, until the granddaughter of the testator, who is the daughter of the respondent, attained the age of

twenty-one years. The gift to Mr. Gavit is further limited by the life of the granddaughter, as the will provided that if, prior to attaining the age of twenty-one, she died, respondent was to receive no further sum whatsoever under the will as the entire trust estate went to the issue of the granddaughter, if any, otherwise to the testator's issue. What, then, did Mr. Gavit receive from the estate? A legacy and a bequest are held to be synonymous terms and are properly used to distinguish a gift of personalty made by a testator from a devise which is a gift of realty. *In re Campbell's Estate,* 75 Pac. 851, 853. A bequest is a conditional or unconditional voluntary disposition of personal property by will. *Merriam* v. *United States,* 263 U. S. 179. Under these well recognized definitions, it can not be held that Mr. Gavit did not receive a gift or bequest. It is urged, however, that because, instead of receiving a definite sum or a definite portion of the corpus of the estate, he received a part of the increase, his gift ceased to be a legacy and became income. This contention we believe is unsound when we bear in mind that we are considering this proposition, not from the viewpoint of the estate or the testator's executors and trustees, but from the viewpoint of Mr. Gavit. There is ample authority for our contention that, so far as a beneficiary is concerned, the fact that the gift he received from a testator is measured by the increase of the corpus of the estate, does not change his position, and what he receives continues to be a legacy or bequest and he continues to be a legatee. *Disston* v. *McClain,* 147 Fed. 114; *United States* v. *Fidelity Trust Co.* 222 U. S. 158; *Westhus* v. *Union Trust Co.* 164 Fed. 795; *Matter of Stanfield,* 135 N. Y. 292.

Assume, for instance, in this case that the testator had directed one hundred and fifty thousand dollars to be paid to the respondent in fifteen annual installments which would be approximately the period in this case, there

could be no question but that such a gift would be considered as a bequest. Assume further, that the testator had divided his estate into six equal parts and directed his executors to pay to the respondent a portion of one of the parts in fifteen annual installments. In either case, as far as the beneficiary was concerned, he would be in receipt of a bequest and not income. This leads logically and directly to the present case, where the testator, instead of giving any part of the corpus of his estate to the respondent, directed that a certain percentage of the corpus should be set aside and that the respondent should receive a certain portion of the interest on that trust fund for a period limited. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, distingushed. *Maguire* v. *Trefry,* 253 U. S. 12, distinguished. See *Knowlton* v. *Moore,* 178 U. S. 41.

A conclusive answer to the contention that, although this gift might not be income so far as the respondent himself was concerned, it was income so far as the estate was concerned, and hence taxable, is that the income of an estate was not taxable under the Act of 1913 where there was no person in receipt of such income, simply as income. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602.

Mr. Frank Davis and *Mr. John W. Davis* filed a brief as *amici curiae* by special leave of Court.

Mr. James Craig Peacock and *Mr. John W. Townsend* also filed a brief as *amici curiae* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover taxes and penalties exacted by the Collector under the Income Tax Act of October 3, 1913, c. 16, Section II, A. subdivisions 1 and 2; B. D. and

E. 38 Stat. 114, 166, *et seq.* The Collector demurred to the complaint. The demurrer was overruled and judgment given for the plaintiff by the District Court, 275 Fed. 643, and the Circuit Court of Appeals, 295 Fed. 84. A writ of certiorari was granted by this Court. 264 U. S. 579.

The question is whether the sums received by the plaintiff under the will of Anthony N. Brady in 1913, 1914 and 1915, were income and taxed. The will, admitted to probate August 12, 1913, left the residue of the estate in trust to be divided into six equal parts, the income of one part to be applied so far as deemed proper by the trustees to the education and support of the testator's granddaughter, Marcia Ann Gavit, the balance to be divided into two equal parts and one of them to be paid to the testator's son-in-law, the plaintiff, in equal quarter-yearly payments during his life. But on the granddaughter's reaching the age of twenty-one or dying the fund went over, so that, the granddaughter then being six years old, it is said, the plaintiff's interest could not exceed fifteen years. The Courts below held that the payments received were property acquired by bequest, were not income and were not subject to tax.

The statute in Section II, A, subdivision 1, provides that there shall be levied a tax "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States." If these payments properly may be called income by the common understanding of that word and the statute has failed to hit them it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent. *Eisner* v. *Macomber,* 252 U. S. 189, 203. By B. the net income is to include 'gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent.'

By D. trustees are to make 'return of the net income of the person for whom they act, subject to this tax,' and by E. trustees and others having the control or payment of fixed or determinable gains, &c., of another person who are required to render a return on behalf of another are 'authorized to withhold enough to pay the normal tax.' The language quoted leaves no doubt in our minds that if a fund were given to trustees for A for life with remainder over, the income received by the trustees and paid over to A would be income of A under the statute. It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it is true that the bequest might be said to be of the corpus for life, in the second it might be said to be of the income. But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee.

The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is ap-

propriated to the production of the same result whichever form the gift takes. Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355. Day and night, youth and age are only types. But the distinction between the cases put of a gift from the corpus of the estate payable in instalments and the present seems to us not hard to draw, assuming that the gift supposed would not be income. This is a gift from the income of a very large fund, as income. It seems to us immaterial that the same amounts might receive a different color from their source. We are of opinion that quarterly payments, which it was hoped would last for fifteen years, from the income of an estate intended for the plaintiff's child, must be regarded as income within the meaning of the Constitution and the law. It is said that the tax laws should be construed favorably for the taxpayers. But that is not a reason for creating a doubt or for exaggerating one when it is no greater than we can bring ourselves to feel in this case.

Judgment reversed.

MR. JUSTICE SUTHERLAND, dissenting.

By the plain terms of the Revenue Act of 1913, the value of property acquired by gift, bequest, devise, or descent is not to be included in net income. Only the income derived from such property is subject to the tax. The question, as it seems to me, is really a very simple one. Money, of course, is property. The money here sought to be taxed as income was paid to respondent under the express provisions of a will. It was a gift by will,—a bequest. *United States* v. *Merriam,* 263 U. S. 179, 184. It, therefore, fell within the precise letter of the statute; and, under well settled principles, judicial inquiry may go no further. The taxpayer is entitled to the

rigor of the law. There is no latitude in a taxing statute,—you must adhere to the very words. *United States* v. *Merriam, supra,* pp. 187–188.

The property which respondent acquired being a bequest, there is no occasion to ask whether, before being handed over to him, it had been carved from the original corpus of, or from subsequent additions to, the estate. The corpus of the estate was not the legacy which respondent received, but merely the source which gave rise to it. The money here sought to be taxed was not the fruits of a legacy; it was the legacy itself. *Matter of Stanfield,* 135 N. Y. 292, 294.

With the utmost respect for the judgment of my brethren to the contrary, the opinion just rendered, I think without warrant, searches the field of argument and inference for a meaning which should be found only in the strict letter of the statute.

Mr. Justice Butler concurs in this dissent.

ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 310. Argued March 20, 1925.—Decided April 27, 1925.

1. Claims presented to the Court of Claims but not pressed, in the same proceeding in which others were allowed and paid, *held* barred by Jud. Code, § 178, providing: "The payment of the amount due by any judgment of the Court of Claims . . . shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy." P. 171.
2. In settling a railroad's freight bill for transporting army impedimenta at tariff rates, the auditor for the War Department erroneously made a deduction, by way of counterclaim, upon the ground that part of the transportation was covered, under the railroad's passenger tariff, by the baggage allowance of soldiers who

had moved over the line at the same time as the impedimenta—*Held* that acceptance of the amount allowed, without protest or appeal to the Comptroller of the Treasury, was not acquiescence on the part of the railroad and did not bar it from suing for the balance in the Court of Claims. P. 172.

3. No action of the accounting officials can bar the right of a claimant to have the Court of Claims determine whether he is entitled to recover under a contract with the Government. P. 174.
4. To constitute acquiescence in payment by the Government of a smaller sum than is due, something more must be shown than acceptance of the smaller sum without protest; there must have been some conduct of the creditor akin to abandonment or waiver, or from which an estoppel might arise. P. 175.
5. The provision of the Dockery Act, July 31, 1894, c. 174, §§ 7, 8, 28 Stat. 162, 206, 207, making acceptance of payment under the auditor's settlement, without appeal to the Comptroller, conclusive, does not prevent proceedings in the Court of Claims. Pp. 173, 177.

59 Ct. Cls. 82, affirmed in part, reversed in part.

APPEAL from a judgment of the Court of Claims disallowing three claims for transportation furnished the War Department.

Mr. Lawrence H. Cake, with whom *Mr. Alex. Britton* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom the *Solicitor General* was on the brief, for the United States.

The acceptance of the payment of the unliquidated account without protest or other manifestation of intention to make further claim forecloses the right of the appellant to maintain the suit. "Dockery Act," July 31, 1894, 28 Stat. 206; *Fleckner* v. *United States,* 8 Wheat. 338; *Oregon-Washington R. R.* v. *United States,* 255 U. S. 339; *Louisville & Nashville* v. *United States,* 267 U. S. 395; *Stewart* v. *Barnes,* 153 U. S. 456; *De Arnaud* v. *United States,* 151 U. S. 483; *Chicago, M. & St. P. Ry.* v. *Clark,* 178 U. S. 353; *Baird* v. *United States,* 96 U. S. 430; *Merrit* v. *Cameron,* 137 U. S. 542; *Hennessy* v.

Bacon, 137 U. S. 78. See also *French v. Shoemaker,* 14 Wall. 314, 333, 334; *De Wolf* v. *Hays,* 125 U. S. 614; *Coburn* v. *Cedar Valley Land Co.,* 138 U. S. 196; *United States* v. *Cousinery,* 25 Fed. Cas. 677; *Savage* v. *United States,* 92 U. S. 382; *Savage Arms Corp.* v. *United States,* 266 U. S. 217; *United States* v. *Cramp,* 206 U. S. 118. *St. Louis, Kennett & S. E. R. R.* v. *United States,* 267 U. S. 346; *Cairo, Truman & Sou. R. R.* v. *United States,* 267 U. S. 350.

The inclusion of the items in the former petition on which judgment was stipulated and paid without reservation forecloses the right of the appellant to maintain the suit. *Vaughn* v. *United States,* 34 Ct. Cls. 342; *United States* v. *Frerichs,* 124 U. S. 315.

Mr. Justice Brandeis delivered the opinion of the Court.

This is an appeal by the St. Louis, Brownsville & Mexico Railway from a judgment of the Court of Claims which disallowed three claims for transportation furnished to the War Department. 59. Ct. Cl. 82. That the claims were originally valid is conceded. The defense as to each is that recovery has been barred by discharge. As to two of the claims, by § 178 of the Judicial Code. As to the third, by the rule declared in *Oregon-Washington R. R. & Navigation Co.* v. *United States,* 255 U. S. 339. Whether on the facts found the statute and the rule apply, are the questions for decision.

First. The two claims (numbered 3055 and 4732) were for services rendered in 1917. They had been included with many others in a petition filed in the Court of Claims by the Railway in 1920. On that petition a judgment had been entered for $22,624.78 and duly paid before this suit was begun. The Judicial Code provides in § 178: " The payment of the amount due by any judgment of the Court of Claims . . shall be a full dis-

charge to the United States of all claim and demand touching any of the matters involved in the controversy." The Railway contends that these two claims were not "matters involved in the controversy" on which the earlier judgment was entered. To establish that contention it must rely wholly upon the following finding made in this case: "One of the findings of fact in said [the earlier] case stated that 'the numbers and amounts referred to in the foregoing paragraphs constitute the component parts and sum total of the said $22,624.78 and are the only items in question in the case at bar.' Bills No. 3055 and No. 4732 are not mentioned in the findings in that case. The report of the Treasury Department filed in said case and upon which said stipulation of facts was based stated as to bills No. 3055 and No. 4732 that because no deduction had been made from these bills 'on account of the cause of complaint set forth in the petition nothing is due in recovery.'"

The finding thus relied upon by the Railway does not show that these two claims were not among "the matters involved in the controversy" in the earlier case. On the contrary, it shows that they were there in controversy. And it suggests that the Railway, after the introduction of the report of the Treasury Department, acquiesced in the latter's conclusion that as to these two claims "nothing is due." Compare *United States* v. *Frerichs,* 124 U. S. 315, 320; *Michot* v. *United States,* 31 Ct. Cls. 299; *Vaughn* v. *United States,* 34 Ct. Cls. 342. The case is unlike *Spicer* v. *United States,* 5 Ct. Cls. 34; *Book* v. *United States,* 31 Ct. Cls. 272; and *Adams* v. *United States,* 33 Ct. Cls. 411. As to these two claims the judgment of the lower court is affirmed.

Second. The remaining claim is for the disallowed part of a claim for $2,549.08 which was "settled by the Auditor for the War Department May 10, 1920" by making certain deductions, thus allowing a smaller sum. It has

never been involved in any litigation. The whole claim presented to the Auditor was on a single government bill of lading for transporting, in 1916, so-called Army impedimenta; that is, guns, ammunition, caissons, tents and miscellaneous military equipment belonging to the United States. That the whole of the service covered by the bill was actually rendered was never questioned. Nor was there any dispute either as to quantity or weight, or as to the tariff rate under which such articles ordinarily move. Thus, the claim presented to the Auditor was definite in amount. The deduction made by him was somewhat in the nature of a counterclaim. The Comptroller of the Treasury ruled in 1918 that, for the transportation of military impedimenta, the Government was entitled to the benefit of a provision in a passenger tariff by which, when persons travel in a party, there is allowed for every twenty-five passenger fares one baggage car free for personal effects. The Auditor apparently found that, at the same time these impedimenta moved, at least twenty-five soldiers had moved over the line. He therefore deducted a corresponding amount from this independent bill for freight. In suits brought by other companies the Court of Claims held that the Comptroller's ruling was wrong. See *Missouri Pacific R. R. Co.* v. *United States,* 56 Ct. Cls. 341. Thereupon, this suit was brought in August, 1922, to recover the amount wrongly deducted. The lower court held that the Railway was barred from recovery because it had accepted, without protest or appeal, the reduced amount which the Auditor allowed.

There is no statute or departmental rule which, as in *Nichols* v. *United States,* 7 Wall. 122, makes such protest or appeal a condition precedent to the existence of the cause of action or to plaintiff's right to resort to the Court of Claims. In respect to furnishing transportation, a railroad ordinarily bears to the Government the same relation that it does to a private person using its facilities. It may

exact payment either in advance or upon the completion of the service rendered. It may, as a matter of accomodation or convenience, give a reasonable credit. Payment for transportation, as for other service or supplies, may ordinarily be secured by presenting the claim to the appropriate disbursing officer of the department served. Because of limitations imposed upon the powers of disbursing officers, it is often desirable to present the claim for direct settlement to the Auditor for the department, who is an accounting officer of the Treasury. The Auditor may allow the claim in whole or in part. If his action is not satisfactory, either to the claimant or to the head of the department affected, an appeal may be taken to the Comptroller of the Treasury for its revision. In the absence of an appeal, the settlement of the auditor is "final and conclusive upon the Executive Branch of the Government." In case of such appeal the decision of the Comptroller is conclusive. Any person accepting payment under a settlement by the Auditor is precluded from obtaining such revision of the settlement as to any item upon which payment is accepted. Dockery Act, July 31, 1894, c. 174, §§ 7, 8, 28 Stat. 162, 206, 207.

No action of these officials can bar the right of a claimant to have the Court of Claims determine whether he is entitled to recover under a contract with the Government. *Oregon-Washington R. R. & Navigation Co.* v. *United States,* 54 Ct. Cls. 131, 138, 139. Compare *United States* v. *Harmon,* 147 U. S. 268; *United States* v. *Babcock,* 250 U. S. 328. The right to invoke the legal remedy may be lost by the claimant's failure to invoke it within the statutory period of limitations. But the substantive right to recover an amount confessedly due can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claim-

ant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can, also, be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel might arise. Every case in which this Court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features.[1] In the case at bar they are wholly lacking.

The affirmative defense of acquiescence by acceptance of a smaller sum than was actually due—the bar relied upon in this suit—must not be confused with other affirmative defenses which are often interposed to suits in which the plaintiff claims that the Government has

[1] *United States* v. *Shrewsbury*, 23 Wall. 508; *Railroad Company* v. *United States*, 103 U. S. 703; *Pray* v. *United States*, 106 U. S. 594; *Central Pacific R. R. Co.* v. *United States*, 164 U. S. 93, 99, 100; *United States* v. *Garlinger*, 169 U. S. 316; *Oregon-Washington R. R. & Navigation Co.* v. *United States*, 255 U. S. 339, 344, 345, 347–8; *Western Pacific R. R. Co.* v. *United States*, 255 U. S. 349, 353–5; *New York, New Haven & Hartford R. R. Co.* v. *United States* 258 U. S. 32, 34; *Louisville & Nashville R. R. Co.* v. *United States* 258 U. S. 374, 375; *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395. Compare *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159, 164.

paid him only a part of what was due. Among these are accord and satisfaction or compromise of a disputed claim; [2] voluntary submission of a disputed claim to an investigating board and acceptance of the amount allowed by it; [3] adjustment of damages inherently unliquidated; [4] surrender of the instrument sued on; [5] prior acceptance of the principal of a debt as a bar to a suit for accrued interest; [6] prior judgment on part of an indivisible demand. [7] Cases in which acquiescence by acceptance of a smaller sum is relied upon as an affirmative defense must also be differentiated from those in which acquiescence is proved to show that the claim sued on never arose. Prominent among the cases of this character are those in which a railroad, free to decline, carried the mail after notice from the Postmaster General that payment for future services would be made at a reduced rate.[8] In

[2] *United States* v. *Justice,* 14 Wall. 535. Compare *Mason* v. *United States,* 17 Wall. 67; *Piatt's Administrator* v. *United States,* 22 Wall. 496. In the following cases there was a receipt in full or a release. *United States* v. *Child & Co.,* 12 Wall. 232; *United States* v. *Clyde,* 13 Wall. 35; *Sweeny* v. *United States,* 17 Wall. 75; *Chouteau* v. *United States,* 95 U. S. 61; *Francis* v. *United States,* 96 U. S. 354; *De Arnaud* v. *United States,* 151 U. S. 483; *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States,* 267 U. S. 346. In *Cairo, Truman & Southern R. R. Co.* v. *United States,* 267 U. S. 350, the release was under seal.

[3] *United States* v. *Adams,* 7 Wall. 463, 479; *United States* v. *Mowry,* 154 U. S. 564; *United States* v. *Morgan,* 154 U. S. 565.

[4] *Baird* v. *United States,* 96 U. S. 430; *Murphy* v. *United States,* 104 U. S. 464.

[5] *Savage* v. *United States,* 92 U. S. 382, 388.

[6] *Stewart v. Barnes,* 153 U. S. 456; *Pacific Railroad* v. *United States,* 158 U. S. 118.

[7] *Baird* v. *United States,* 96 U. S. 430, 432.

[8] *Eastern R. R. Co.* v. *United States,* 129 U. S. 391; *Chicago, Milwaukee & St. Paul Ry.* v. *United States,* 198 U. S. 385; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States,* 249 U. S. 385; *New York, New Haven & Hartford R R. Co.* v. *United*

such cases the plaintiff fails, even where it appears that the reduced payment was accepted under protest, because the contract implied in fact on which it seeks to recover cannot be established. Cases involving the affirmative defense of acquiescence by acceptance of a smaller sum than was actually due must likewise be differentiated from those in which one wrongly removed from a statutory office is denied relief unless suit is instituted promptly. The latter rest upon a policy not here applicable.[9] The cases urged upon our attention by counsel for the Government present, in the main, instances of defenses other than acquiescence.

The claim here in question was for an amount fixed by the tariff. A bill for the full sum due was presented to the appropriate officer. The deduction made by the Auditor was without warrant in law. There was no act or omission of the claimant which could conceivably have induced the making of the deduction. Nor did the claimant in any way indicate satisfaction with the reduced amount received by it. The Government did not establish the affirmative defense of acquiescence by showing merely acceptance without protest. To hold that such acceptance barred the right to recover the balance wrongly withheld was to give it an effect in judicial proceedings similar to that which it had within the executive department under the Dockery Act. See *Texas & Pacific Ry. Co.* v. *United States,* 57 Ct. Cls. 284. For such a rule there is no support either in the legislation of Congress or in the decisions of this Court. Compare *Clyde*

States, 251 U. S. 123, 127; *St. Louis S. W. Ry Co.*. v. *United States* 262 U. S. 70. Compare *United States* v. *Bostwick,* 94 U S. 53, 67; *United States* v. *Martin,* 94 U. S. 400; *Willard, Sutherland & Co.* v. *United States,* 262 U. S. 489, 498.

[9] *Nicholas* v. *United States,* 257 U. S. 71, 76; *Norris* v. *United States,* 257 U. S. 77; *Stager* v. *United States,* 262 U. S. 728. Compare *Arant* v. *Lane,* 249 U. S. 367; *Wallace* v. *United States,* 257 U. S. 541, 547.

v. *United States,* 13 Wall 38. The Railway was entitled to judgment for the amount wrongly deducted by the Auditor.

Affirmed in part.
Reversed in part.

YEE HEM *v.* THE UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 303. Argued March 19, 1925.—Decided April 27, 1925.

1. Congress has power to prohibit the importation of opium and, as a measure reasonably calculated to aid in the enforcement of the prohibition, to make its concealment, with knowledge of its unlawful importation, a crime. P. 183.
2. The Act of February 9, 1909, §§ 1 and 2, as amended, January 17, 1914, prohibited the importation of smoking opium after April 1, 1909, made it an offense to conceal such opium knowing it to have been imported contrary to law, and provided that possession by the defendant "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." Section 3 provided that on and after July 1, 1913, all smoking opium within the United States should be presumed to have been imported after April 1, 1909, and that the burden of proof should be on the claimant or accused to rebut the presumption. *Held* that the presumptions thus created are reasonable and do not contravene the due process of law and the compulsory self-incrimination clauses of the Fifth Amendment. P. 183.

Affirmed.

ERROR to a sentence upon conviction of the offense of concealing smoking opium with knowledge that it had been illegally imported.

Mr. Gerard J. Pilliod, with whom *Mr. Joseph C. Breitenstein* was on the brief, for plaintiff in error.

The statute rests upon the authority of Congress to restrict imports, and the jurisdiction of the court was derived accordingly. The statute denounces primarily the

unlawful importation of opium and declares such importation after April, 1909, to be unlawful, except for certain purposes and under certain regulations. Up to this point the authority of Congress is unquestioned. But the legislators sought to go further. As in the Harrison Act they desired to reach the mere possession of smoking opium and fasten to such possession a penal responsibility to the Federal Government. To achieve this purpose it was necessary to infuse into "possession" a criminal element allying it with the original source of congressional authority and federal jurisdiction, and *scienter* was therefore employed to give to the offense a federal tinge. "Knowing the same to have been imported contrary to law" constitutes a necessary ingredient of the offense, and the duty therefore rests upon the Government to prove, first, that the opium had been in fact imported contrary to law, second, that the accused had knowledge of that fact. Such facts would generally be difficult if not impossible of proof, and the statute therefore provides a special rule of evidence to meet the exigency, and effectually relieves the prosecution of the burden and places it upon the defendant. It is not contended that a rigid rule exists derived from the common law or the principles of the Constitution which prohibits Congress from constituting certain facts presumptive or *prima facie* evidence of guilt, as, for instance, the possession of narcotics under the Narcotic Act. This may well be a reasonable exercise of legislative power, though fraught with danger and to be jealously confined. The question is whether Congress has exceeded proper limits in thus creating a special rule of evidence profoundly affecting the constitutional privileges of the accused.

If crude opium or its derivative could under no circumstances be imported into the United States, the problem would be simple indeed; but crude opium may be lawfully imported, may be lawfully converted into smok-

ing opium, and so diverted. Shall mere restriction be construed to charge the accused with scienter equally with absolute prohibition? If so, why were unlawful importation and guilty knowledge expressly made ingredients of the offense? Congress apparently contemplated the possibility that opium might be possessed which had not in fact been unlawfully imported, or which the accused did not know had been so imported. The presumption of accused's innocence therefore related to the fact of unlawful importation and his guilty knowledge thereof and the burden of proof continued with the Government until adequate evidence relating to these elements had been introduced. But no evidence was introduced and none was necessary under this statutory special rule of evidence as applied to the case and addressed to the jury in the court's charge. Possession needed to be proved, and possession only, and the presumption of innocence and its corollary responsibility, the burden of proof, were peremptorily interrupted by force of the statute, and the accused charged with guilty knowledge of unlawful importation stood before the jury condemned by the law because of possession.

Justice would require, at least in its Anglo-Saxon concept, that evidence be introduced on these subjects, and that the accused be confronted with witnesses. The benefit of salutary rules excluding inadmissible, incompetent and irrelevant testimony is denied him. The opportunity to expose falsehood and to discover malice, are forcibly withheld, for, if unlawful importation and guilty knowledge be difficult or impossible of proof by the Government, they are equally or more so by the accused, for aside from the practical difficulties surrounding the proof of origin of such opium he is forced to explain his possession to the satisfaction of the jury, which tends rather to expose him to condemnation of his personal vice, than to the consequences of a violation of a federal import law.

Assuming that the ambiguous clause means that the defendant shall explain possession as being separate and free from unlawful importation and guilty knowledge, its practical effect is to compel him to be a witness against himself. Should he decline, the consequence is obvious. And this proposition cannot be evaded by the contention that the law contemplates explanatory evidence generally, aside from the testimony of the accused. The constitutional provision against self incrimination should receive a broad construction to secure immunity to the citizen from every kind of self accusation. *Wilson* v. *United States,* 221 U. S. 361; *Brown* v. *Walker,* 161 U. S. 591; *M. C. Knight* v. *United States,* 115 Fed. 962; *Slaughter House Cases,* 16 Wall. 36.

Assistant Attorney General Donovan, with whom the *Solicitor General* and *Mr. Harry S. Ridgely,* Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff in error was convicted in the court below of the offense of concealing a quantity of smoking opium after importation, with knowledge that it had been imported in violation of the Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275. Sections 2 and 3 of the act as amended are challenged as unconstitutional, on the ground that they contravene the due process of law and the compulsory self-incrimination clauses of the Fifth Amendment of the federal Constitution.

Section 1 of the act prohibits the importation into the United States of opium in any form after April 1, 1909, except that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for

smoking, may be imported for medicinal purposes only, under regulations prescribed by the Secretary of the Treasury. Section 2 provides, among other things, that if any person shall conceal or facilitate the concealment of such opium, etc., after importation, knowing the same to have been imported contrary to law, the offender shall be subject to fine or imprisonment or both. It further provides that whenever the defendant on trial is shown to have, or to have had, possession of such opium, etc., "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possesion to the satisfaction of the jury." Section 3 provides that on and after July 1, 1913, "all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

The plaintiff in error, at the time of his arrest in August, 1923, was found in possession of and concealing a quantity of smoking opium. The lower court overruled a motion for an instructed verdict of not guilty, and, after stating the foregoing statutory presumptions, charged the jury in substance that the burden of proof was on the accused to rebut such presumptions; and that it devolved upon him to explain that he was rightfully in possession of the smoking opium,—"at least explain it to the satisfaction of the jury." The court further charged that the defendant was presumed to be innocent until the government had satisfied the minds of the jurors of his guilt beyond a reasonable doubt; that the burden to adduce such proof of guilt beyond the existence of a reasonable doubt rested on the government at all times and throughout the trial; and that a conviction could not be had "while a rational doubt remains in the minds of the jury."

The authority of Congress to prohibit the importation of opium in any form and, as a measure reasonably calculated to aid in the enforcement of the prohibition, to make its concealment with knowledge of its unlawful importation a criminal offence, is not open to doubt. *Brolan* v. *United States,* 236 U. S. 216; *Steinfeldt* v. *United States,* 219 Fed. 879. The question presented is whether Congress has power to enact the provisions in respect of the presumptions arising from the unexplained possession of such opium and from its presence in this country after the time fixed by the statute.

In *Mobile, etc., R. R.* v. *Turnipseed,* 219 U. S. 35, 42, 43, this Court, speaking through Mr. Justice Lurton, said:

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. . . .

"Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . .

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

See also, *Luria* v. *United States,* 231 U. S. 9, 25; *State* v. *Moriarty,* 50 Conn. 415, 417; *Commonwealth* v. *Williams,* 6 Gray 1, 3; *State* v. *Sheehan,* 28 R. I. 160.

The legislative provisions here assailed satisfy these requirements in respect of due process. They have been upheld against similar attacks, without exception so far as we are advised, by the lower federal courts. *Charley Toy* v. *United States,* 266 Fed. 326, 239; *Gee Woe* v. *United States.* 250 Fed. 428; *Ng Choy Fong* v. *United States,* 245 Fed. 305; *United States* v. *Yee Fing,* 222 Fed. 154; *United States* v. *Ah Hung,* 243 Fed. 762 764. We think it is not an illogical inference that opium, found in this country more than four years (in the present case. more than fourteen years) after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is "so unreasonable as to be a purely arbitrary mandate." By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress.

Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are

not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. See *Dunlop* v. *United States,* 165 U. S. 486, 502-503; *Wilson* v. *United States,* 162 U. S. 613, 619. In the *Wilson* case the accused, charged with murder, was found, soon after the homicide, in possession of property that had belonged to the dead man. This Court upheld a charge of the trial court to the effect that such possession required the accused to account for it, to show that as far as he was concerned the possession was innocent and honest, and that if not so accounted for it became "the foundation for a presumption of guilt against the defendant."

The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Judgment affirmed.

READING STEEL CASTING COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 233. Argued January 26, 1925.—Decided April 27, 1925.

1. Upon review of a judgment of the District Court in an action on a claim against the United States, (Jud. Code § 24, par. 20,) facts admitted and concessions made by the parties may be considered with the lower court's findings of fact. P. 188.
2. A contract between a private party and the United States for sale of goods by the one to the other is to be construed, and the rights of the parties under it determined. by the same principles as if it were between individuals. *Id.*
3. Casting's, defective because of checks, were delivered to the Government under a contract allowing the vendor to remedy such defects after their extent should be revealed by machining, the burden of which was assumed by the Government. The machining was not done. *Held* that the Government's failure to inspect the castings and give notice of rejection, within a reasonable time, amounted to an acceptance. P. 187.

Reversed.

ERROR to a judgment of the District Court in favor of the United States in an action on contract. The case went to the Circuit Court of Appeals and was transferred. 293 Fed. 386.

Mr. Paul C. Wagner for plaintiff in error.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought under § 24, par. 20 of the Judicial Code, to recover $7581.95, alleged to be due upon

a contract between plaintiff and defendant. The court gave judgment in favor of defendant. Plaintiff took the case to the Circuit Court of Appeals on writ of error, but it should have been brought to this court. *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458; *Campbell* v. *United States,* 266 U. S. 368. The case was transferred to this court under § 238a, Judicial Code; Act of September 14, 1922, c. 305, 42 Stat. 837. 293 Fed. 386.

The facts admitted include the following. September 4, 1918, plaintiff made a contract with the Post Quartermaster, United States Marine Corps, Quantico, Virginia, acting under the direction of the Secretary of the Navy for and in behalf of the United States. By it, plaintiff agreed to furnish two fly-wheels according to certain drawings, each to be cast in halves "in the rough." Delivery was to be made by September 28, 1918, at Reading, Pennsylvania, for shipment to the De La Vergne Machine Company, New York City. The contract contained a provision that upon delivery, and as a condition precedent to their acceptance, the castings should be inspected and approved by defendant, and that any article not so approved would be rejected and should be removed by plaintiff immediately after receipt of notification of such rejection. The court found facts as follows. "The plaintiff failed to perform its contract in that the castings were defective because of the presence of checks. These defects could have been remedied by welding, and the castings thus made to conform to contract. The extent of the cracks and the consequent required welding could not be determined until after the castings had been machined. Plaintiff sent the castings to the company which was to do the machining, and plaintiff was given the privilege of welding the cracks when disclosed by the machining. This welding was, however, not done, nor the castings made as required by the contract. The smaller casting which was the first casting supplied was inspected

and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time. The large casting was not inspected until after a reasonable time. This wheel was shipped December 27, 1918, and reached its destination before February 7, 1919. It had not been inspected on December 6, 1919, and notice of inspection and rejection was not given until October 26, 1920, after suit brought."

In its brief, defendant contends that the plaintiff was bound by the contract to weld checks disclosed by machining; and the plaintiff so construes the contract. The facts admitted and the concessions made by the parties may be considered with the findings of fact made by the district court. This is not inconsistent with the rule stated in *Crocker* v. *United States,* 240 U. S. 74, 78, restricting our inquiry to a consideration of the case on the findings. See *Ackerlind* v. *United States,* 240 U. S. 531, 535. The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Smoot's Case,* 15 Wall. 36, 47; *Manufacturing Company* v. *United States,* 17 Wall. 592, 595; *United States* v. *Smith,* 94 U. S. 214, 217.

As the castings for the smaller wheel were not made to conform to the contract by the welding of the checks for which it was rejected within a reasonable time, plaintiff is not entitled to recover on account of it.

The defendant failed within a reasonable time to inspect the castings for the larger wheel or to give notice of rejection. Plaintiff was not in default. It made delivery as agreed by shipping the castings to the company which was to do the machining. Plaintiff was not bound to have the machining done, and, as between it and defendant, that burden was on the latter. The extent of the checks could not be determined before the castings were machined. Defendant was bound by the contract to ac-

cept or reject the castings within a reasonable time. It is well settled in the law of sales that receipt of goods will become an acceptance of them if the right of rejection is not exercised within a reasonable time. *Foss-Schneider Brewing Co.* v. *Bullock,* 59 Fed. 83, 89. Defendant must be held to have accepted the castings for the larger wheel. Plaintiff is entitled to judgment for the contract price.

Judgment reversed.

SHAFER, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, ET AL. *v.* FARMERS GRAIN COMPANY OF EMBDEN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 34. Argued May 4, 1923. Reargued March 2, 3, 1925.—Decided May 4. 1925.

1. The right to buy wheat with or without dockage, for shipment, and to ship it, in interstate commerce is a common right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution. P. 198.
2. The North Dakota Grain Grading Act, N. Dak. Ls. 1923, 549, assuming control over wheat buying in the State, of which 90% is for interstate shipment, provides, *inter alia:* That grain bought by grade (the established practice) must be graded by licensed inspectors; that (contrary to the general practice) the buyer must separate the dockage and return it to the producer, unless distinctly valued and paid for; that buyers having and operating grain elevators must give bond to the State, if buying on credit, must keep records of all wheat bought, showing grade given and price paid at the elevator and grade fixed and price paid at terminal market (outside the State), and must furnish such data to a state supervisor when requested; that the supervisor shall in a general way investigate and supervise the marketing of the grain with a view to preventing various things deemed unjust or fraudulent, including unreasonable margins of profit and confiscation of dockage; and shall have authority to make and enforce

such orders, rules and regulations as may be necessary to carry out all the provisions of the Act. *Held* a direct interference with and burden upon interstate commerce, and an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. P. 199.

3. The act cannot be supported as an attempt, through inspection regulations, to assist in carrying out the purposes of the United States Grain Standards Act. P. 202.

Affirmed.

APPEAL from an interlocutory decree of the District Court enjoining officials of the State of North Dakota from enforcing provisions of the State Grain Grading Act against the plaintiffs who were numerous owners and operators of county elevators within the State, including some farmers' cooperative companies, and engaged in the business of buying grain from the farmers for shipment to markets in other States.

Mr. Seth W. Richardson, Special Assistant to the Attorney General of North Dakota, with whom *Mr. George F. Shafer,* Attorney General, was on the brief, for appellant.

The North Dakota Grain Grading Act is a police measure, enacted by the State for the protection of the welfare, happiness and prosperity of its citizens. It places upon interstate commerce no real or substantial burden or interference.

The act is intended to be cooperative with the Federal Grain Standards Act, by effectuating the establishment and promulgation of the grades and standards thereof, at the local elevator point—an evil at present not covered by the administration of the federal act, but one which is left to the local or state authorities.

Properly construed, the North Dakota act does not conflict with the federal act, but is harmonious and cooperative.

The provision of the state law requiring a license to grade grain, to be issued by either the federal government

or the state government, operates and takes effect while the grain is wholly within the domain of state authority, and prior to the inception of interstate commerce.

Mr. David F. Simpson, with whom *Messrs. H. A. Libby, John Junell, James E. Dorsey, Egbert S. Oakley, Robert Driscoll* and *William A. Lancaster* were on the briefs, for appellees.

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to restrain the enforcement of the North Dakota Grain Grading Act, an initiated measure approved at a state election November 7, 1922. North Dakota Laws 1923, p. 549. The plaintiffs own and operate country elevators within the State, at which they buy wheat from farmers for shipment to markets in other States; and the defendants are officers of the State, who are charged by the Act with the duty of enforcing it. The plaintiffs challenge the validity of the Act under the Constitution of the United States on the grounds, first, that it interferes with and burdens interstate commerce, and, secondly, that it conflicts with the United States Grain Standards Act, c. 313, 39 Stat. 482. An injunction preventing its enforcement pending the suit was granted by the District Court, three judges sitting; and that interloctory decree is here for review under section 266 of the Judicial Code, as amended March 4, 1913, c. 160, 37 Stat. 1013.

A prior statute concededly "having the same general purpose" was adopted by the state legislature in 1919 and held invalid by this Court in *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, as an interference with interstate commerce. There are differences between that statute and the present one, of which the parties take divergent views. It would serve no purpose to take up

these differences in detail. We shall describe the situation to which the present Act is intended to apply, state its material provisions, and then come to its operation on interstate commerce.

Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent. is used and consumed locally, and about 90 per cent. is sold within the State to buyers who purchase for shipment, and ship, to terminal markets outside the State. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from the farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his grain stored in the country elevator, or shipped to a terminal elevator for storage, and awaits a possible increase in price; but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market if it has not already gone there.

The price paid at the country elevators rises and falls with the price at the terminal markets, but is sufficiently below the latter to enable the country buyer to pay for the intermediate transportation and have a margin of profit. All transactions at the terminal markets, including the price, are based on the grade of the wheat, and by reason of this all buying at the country elevators is by grade.

The grading at the terminal markets is done by inspectors licensed under the United States Grain Stand-

ards Act, who are required to apply to all interstate shipments the grading standards promulgated under that Act by the Secretary of Agriculture. There are no inspectors licensed under that Act at the country elevators; and so the grading is done there unofficially by the buyers or their agents as an incident and part of the buying.

Grading includes an ascertainment of the proportions of clean wheat and of dockage in each lot of grain and an ascertainment of the quality of the wheat. Dockage consists of separable foreign material, such as dirt, pieces of straw, chaff, weed stems, weed seeds and grain other than wheat. Its proportion varies in different lots, but generally is less than five per cent. When not separated it causes the grain to bring a lower price per bushel than clean wheat would bring. When separated it has a value for poultry and stock feed which usually is in excess of the cost of separation. Occasionally the farmer separates it at the farm and sells only the clean wheat, and occasionally the buyer separates it at the country elevator, charges the farmer for that service, and buys and ships only the clean wheat; but generally the grain is sold by the farmer and shipped by the country buyer with the dockage included. The influence of dockage on the value of the grain and the current modes of handling it are shown in publications of the Agricultural Department of the United States, pertinent excerpts from which are set out in the margin.[1]

[1] Extracts from Farmers' Bulletin No. 1118, United States Department of Agriculture, pp. 5, 21:

"The foreign material in wheat may seriously affect its value in that it often increases the cost of milling, and causes injury to the baking qualities of flour. Therefore, that factor is considered in the inspecting and grading of wheat. The amount of dockage present has a bearing upon the commercial value of a lot of wheat. Especially when present in large amounts, it is a factor of considerable importance to the parties interested in the marketing or storage of grain."

As many as 2,200 country elevators are operated within the State in the business here described—generally two or more by competing buyers at each station. Some of the buyers are individuals and others are corporations. A large number are farmers' cooperative companies, which buy grain grown by their stockholders and others in the vicinity of their elevators, ship and sell the same, and distribute as patronage dividends the surplus arising from such transactions—no profit being retained by the companies.

The plaintiffs comprise many buyers, individual and corporate, including 11 farmers' cooperative companies. In the aggregate they own and operate several hundred country elevators, widely distributed over the State, and buy and ship about 30,000,000 bushels of wheat a year. They carry on the business severally, each buying and

"All of the following methods of handling dockage are employed in normal times and all are generally found to be satisfactory:

1. The wheat is cleaned on the farm and only the clean wheat is hauled to market.

2. The wheat delivered by the farmer is run over the proper cleaning machinery at the country elevator or mill, and the dockage is separated and returned to the farmer.

3. The wheat is screened by the local buyer, payment is made to the seller on the basis of the grade of the clean wheat only, and the dockage is retained by the elevator or mill as compensation for services in removing it.

4. The wheat is screened by the local buyer, payment is made to the seller on the basis of the grade of the clean wheat, and the dockage is retained by the elevator or mill, and if the value of the dockage separated exceeds the cost of separation, payment is made for it.

5. The wheat containing the dockage is consigned to the large market by the country mill or elevator, where the dockage is separated and its value is taken into consideration in connection with the price paid for the entire carload of dockage-free wheat. In some localities it is the practice to make a small charge for such services, while in other localities the services are performed without cost.

shipping independently of the others. All buy with the purpose of shipping to and selling in terminal markets outside the State and carry out this purpose in the manner already described.

The North Dakota Act in terms covers all farm products, but as it is chiefly aimed at dealings in wheat and the parties have discussed it on that basis, our statement of its provisions will be shortened by treating them as if relating only to wheat.

The title to the Act describes it as one whereby the State undertakes (a) " to supervise and regulate the marketing " of wheat, (b) to prevent " unjust discrimination, fraud and extortion in the marketing " of such grain, and (c) to establish " a system of grading, weighing and measuring " it. The first section declares the purpose of the State to encourage, promote and safeguard the pro-

6. The wheat containing the dockage is sold to a local buyer, who in turn consigns it to the terminal market with the understanding that the price secured will be based upon the commercial value of both the wheat and the dockage.

The first two methods mentioned, in which only the screened wheat is delivered to the local buyer, tend to minimize the differences of opinion with regard to the grade of wheat delivered and therefore establish greater confidence in the grades given by the local buyer. Furthermore, these methods enable the farmer to utilize the foreign material for feed or to sell it locally."

Extracts from Farmers' Bulletin No. 1287, United States Department of Agriculture, pp. 5, 21:

" The benefits derived from clean wheat are shared by the farmer and the country elevator. If the farmer cleans his wheat before delivering it to the elevator he saves the cost of hauling the dockage to market, and he may be able to use it to advantage for feed, and make a saving in his feed bill. In many cases these savings will repay the farmer for the time and trouble required to clean his wheat. The contention as to the amount of dockage in the wheat which frequently arises between the farmer and the elevator operator will be avoided if clean wheat is delivered. The price paid for clean wheat at the elevator is usually more per bushel than the price paid for unclean wheat, because the elevator operator

duction of wheat and commerce therein by establishing a uniform system of grades, weights and measures. The second and third sections provide for a State Supervisor of Grades, Weights and Measures and give him authority to make and enforce necessary orders, rules and regulations to carry out the provisions of the Act.

The fourth section provides that the Supervisor shall establish a system of grades, weights and measures for wheat "and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices"; declares that whenever grades, weights and measures for wheat are established by the Secretary of Agriculture under the United States Grain Standards Act they shall become the grades, weights and measures of

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must consider either the cost of removing the dockage or the freight charges on it to the terminal market."

"The farm is the logical place to clean wheat, preferably as part of the thrashing operation, because the necessary power is available and later handling is avoided. Since satisfactory cleaning is not always possible under present conditions at thrashing time, other means of cleaning must be used.

The fanning mill is the most practical cleaning machine for farm use, and if properly adjusted and operated will clean wheat satisfactorily for commercial purposes with but little loss of wheat in the screenings."

"The operators of country elevators are beginning to realize more keenly each year that it pays to clean wheat before shipping it to the terminal markets. Many of the country elevators not only clean wheat for themselves but for the farmers as well. The latter is known as 'custom cleaning,' for which country elevators located in the central Northwest ordinarily charge from 2 to 3 cents per bushel, based on the gross weight of the grain before cleaning. A higher charge is made for cleaning the grain for seed purposes. The shrinkage in the weight of the grain is borne by the owner, but the screenings may be returned to him. The returns from custom cleaning add a considerable amount to the income of some country elevators during the year."

the State; and concludes by saying, "In establishing such grades, weights and measures, the value of dockage shall be considered, and the buyer shall not be permitted to retain the same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer." The fifth section provides that no person shall buy any wheat "by grade"—excepting where one producer buys from another producer—unless it has been inspected and graded by a licensed inspector under the provisions of the Act, or those of the United States Grain Standards Act, and is bought by a grade fixed and recognized thereunder.

The sixth section provides for the issue, by the Supervisor, of licenses to grade to persons engaged in buying, weighing and grading wheat—including buyers and agents at country elevators—where they pass a satisfactory examination. Each license is to be held on condition that the licensee shall honestly and correctly determine the grades and dockage and shall likewise weigh the grain. The seventh section authorizes the Supervisor to suspend or revoke any such license where, after investigation, he finds that the licensee is incompetent, knowingly or carelessly has graded grain improperly, has short-weighed it, has taken valuable dockage without compensation, or has violated any provision of the Act or of the United States Grain Standards Act.

The eighth section requires every buyer operating an elevator to obtain from the Supervisor a yearly license, the fee for which is to be adjusted by the Supervisor to the capacity of the elevator at not exceeding $1.00 for each 1,000 bushels. The ninth section requires every elevator operator or individual "buying or shipping for profit," who does not pay cash in advance, to file with the Supervisor a sufficient bond, running to the State, to secure payment for all wheat bought on credit. The tenth section requires every buyer operating an elevator to

keep a record of the wheat bought at the elevator and to show therein the price paid and grades given, and "the price received and the grades received at the terminal markets;" and further requires him to furnish this information to the Supervisor when requested. The twelfth section makes it unlawful for any person to grade wheat who does not have a license therefor under the Act or under the United States Grain Standards Act. And other sections make every violation of the Act a misdemeanor and charge the Attorney General of the State and its other law officers with the duty of prosecuting such violations.

The Act dispenses with grading where the buying is by sample, by type or by certain designations; but this has no bearing here, for the buying for interstate shipment is all by grade. The Act also dispenses with grading by an inspector licensed thereunder, if the grain be graded by an inspector licensed under the United States Grain Standards Act; but this is an idle provision, for there are in North Dakota no inspectors licensed under that Act. Such inspectors are found only at terminal markets, and there is no terminal market in North Dakota.

This statement of the provisions of the Act discloses its full purposes and scope; but some of its features, of special importance here, will be noticed again as we proceed.

Buying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in *Lemke* v. *Farmers' Grain Company, supra,* following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309.

Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and

to ship it, in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution.[2]

The decisions of this Court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here—one that a state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause;[3] and the other that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.[4] These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform.

In our opinion the North Dakota Act falls certainly within the second of the two rules just stated. By it that

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[2] *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 21; *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U .S. 229, 260; *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 215; *Adams Express Co.* v. *New York,* 232 U. S. 14, 31; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 291, 292.

[3] *Sherlock* v. *Alling,* 93 U. S. 99, 102–104; *Kidd* v. *Pearson,* 128 U. S. 1, 22 *et seq.; Geer* v. *Connecticut,* 161 U. S. 519, 532; *Sligh* v. *Kirkwood,* 237 U. S. 52, 59–61.

[4] *Crutcher* v. *Kentucky,* 141 U. S. 47, 56, 58; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 27; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 141; *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596; *Air-Way Corporation* v. *Day,* 266 U. S. 71, 81.

State attempts to exercise a large measure of control over all wheat buying within her limits. About 90 per cent. of the buying is in interstate commerce. Through this buying and the shipping in connection with which it is conducted the wheat which North Dakota produces in excess of local needs—more than 125,000,000 bushels a year—finds a market and is made available for consumption in other States where the local needs greatly exceed the production. Obviously therefore the control of this buying is of concern to the people of other States as well as to those of North Dakota.

Only by disregarding the nature of this business and neglecting important features of the Act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. To conform to recognized commercial practices such buying must be by grade, and it is so conducted. The Act prevents buying by grade, unless the buyer secures from the State a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The Act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for. A failure to comply with this or any other requirement of the Act is made cause for revoking the grading license. It is practically essential that the buyers have and operate elevators as facilities for handling and loading the wheat. The act requires every such buyer to give to the State, if he buys on credit, a bond securing payment for all wheat so purchased; to keep a record of all wheat bought, showing the grade given and price paid at his elevator and the grade fixed and price received at the terminal market; and to furnish such data to the State Supervisor when requested. The Act also intends and declares that the State Supervisor

"shall in a general way investigate and supervise the marketing" of the grain with a view of "preventing" various things deemed unjust or fraudulent, including "unreasonable margins of profit" and "confiscation of valuable dockage;" and, to the end that this and other provisions may be made effective, the Act invests him with authority to make and enforce such orders, rules and regulations as may be necessary to carry out all of its provisions.

We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause.

The defendants cite several cases as making for a different conclusion, but we do not so read them. In some the commerce clause was in no way involved, and those in which it was involved give no support to what is attempted in the Act now before us. In *Munn* v. *Illinois,* 94 U. S. 113, 123, 135, the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The Court held such a regulation admissible because of the public character of the elevator and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *Cargill Co.* v. *Minnesota,* 180 U. S. 452, the Court had before it a state statute, much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the Court said, p. 470: "The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the ship-

ment out of the State of such grain as it purchased." Plainly the case is not in point here. In *Merchants Exchange* v. *Missouri,* 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that as applied to grain received from or shipped to points without the State it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn* v. *Illinois.*

The defendants make the contention that we should assume the existence of evils justifying the people of the State in adopting the Act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the States that are affected.

The defendants further contend that the Act is simply an attempt on the part of the State, through inspection regulations, to assist in carrying out the purposes of the United States Grain Standards Act. We think the Act discloses an attempt to do much more. To require that dockage be separated by the buyer and be returned to the producer unless it be distinctly valued and paid for is not inspection. Nor does the federal Act contain or give support to such a requirement. To exclude one from buying by grade unless he secures a grading license for himself or his agent is apart from what usually is comprehended in inspection. Nothing like this is found in the federal Act.

On the contrary, it declares that persons licensed to grade under it shall not be interested in any grain elevator or in buying or selling grain, or be in the employ of any owner or operator of a grain elevator. Equally unrelated to inspection are the provisions exacting a bond to pay for all wheat bought on credit; requiring that a record be kept of the price paid in buying at the local elevator and the price received in selling at the terminal market; and authorizing the State Supervisor to investigate and supervise the marketing with a view to preventing unreasonable margins of profit. None of these finds any example in the federal Act; and their presence in the state Act makes it a very different measure from what it would be without them. Aside from the adoption of the grades established and promulgated under the federal Act, we find little in the state Act to support and much to refute the assertion that it is merely an attempt to carry out the purposes of the federal Act.

For the reasons here given we hold that the Act is a direct regulation of the buying of grain in interstate commerce, and therefore invalid, and that the District Court rightly granted the injunction.

Decree affirmed.

MR. JUSTICE BRANDEIS dissents.

ALPHA PORTLAND CEMENT COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Nos. 103 and 327. Argued October 23, 1924.—Decided May 4, 1925.

1. A State may not impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions. Mass. Gen. Ls. c. 63. P. 216.

2. Any excise laid on account of interstate commerce is invalid, without regard to measure or amount. P. 217.
3. Under the Commerce Clause and the Fourteenth Amendment, a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business; the amount demanded is unimportant, and payment as a condition precedent to doing business is not a controlling element. *Baltic Mining Co.* v. *Massachusetts* 231 U. S. 68, 87, in part disapproved. P. 218.

248 Mass. 156; 244 *Id.* 530, reversed.

ERROR to judgments of the Supreme Judicial Court of Massachusetts sustaining excise taxes imposed on the plaintiff in error corporation.

Mr. Louis H. Porter, with whom *Messrs. F. Carroll Taylor* and *John G. Palfrey* were on the brief, for plaintiff in error.

Mr. Alexander Lincoln, Assistant Attorney General of Massachusetts, with whom *Mr. Jay R. Benton,* Attorney General, was on the brief, for the defendant in error.

The tax, so far as measured by the value of the corporate excess employed within the Commonwealth, is valid as to foreign corporations engaged solely in interstate commerce. It is well established that property of a non-resident located within a State is subject to taxation by it, although the property is used exclusively in interstate commerce, except when it is actually in the course of an interstate journey, if the tax is laid without discrimination. Apparently the petitioner concedes the application of this rule to tangible personal property, but contends that the rule is otherwise with respect to intangible assets such as a corporate franchise and credits due from residents. So far as the franchise is concerned, the point seems to be concluded by the decisions of this court. *Atlantic & Pac. Tel. Co.* v. *Philadelphia,* 190 U. S. 160; *Horn Silver Mining Co.* v. *New York,* 143

U. S. 305; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696.

The objection to a tax on credits due from residents to non-residents may be based upon the contention either that intangible property is not subject to the foregoing rule or that a tax on such credits is in violation of the Fourteenth Amendment. As to the second point it is submitted that the petitioner is concluded by numerous decisions sustaining state taxation of credits due to non-residents. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National D'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool, etc., Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354; *Shaffer* v. *Carter,* 252 U. S. 37, 52.

The fact that such credits arise from and are used exclusively in interstate commerce, it is submitted, makes no difference. The rule with respect to the taxation of property used in interstate commerce does not distinguish between tangible and intangible property. The validity of the tax does not depend on the connection of the property with some local business but on the remoteness of any burden or effect upon interstate commerce. See *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 222; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 456; *Pullman Co.* v. *Richardson,* 261 U. S. 330.

If a tax on tangible and intangible assets, including the corporate franchise of a foreign corporation, employed in a State, although employed exclusively in interstate commerce, is valid, an excise tax measured by such property should also be valid. A tax measured by property may be valid when a tax on the property itself would be invalid. *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 165; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87. But the

converse is not true. This Court has on several occasions held that such a tax is in effect a tax on property and therefore in no respect repugnant to the Federal Constitution. *Western Union Tel. Co.* v. *Massachusetts, supra.*

The tax, so far as measured by net income derived from business within the Commonwealth, is valid as to foreign corporations engaged solely in interstate commerce. The income of a non-resident is subject to taxation within the State where it was earned or accrued. *Shaffer* v. *Carter,* 252 U. S. 37; *Travis* v. *Yale & Towne Mfg. Co.* 252 U. S. 60. Such a tax does not constitute a direct interference with interstate commerce. *Peck* v. *Lowe,* 247 U. S. 165, 174, 175; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 326–329; *Shaffer* v. *Carter,* supra; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119, 120; *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413, 416, 420. See also *Schwab* v. *Richardson,* 263 U. S. 88; *Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150, dissent; 32 *Harv. L. R.* 634–640, 646–649; 12 Calif. L. R. 39–44. Cf *Knowlton* v. *Moore,* 178 U. S. 41, 59.

The taxes assessed were measured by the value of property used and net income earned within the Commonwealth.

Mr. Basil Robillard filed a brief as *amicus curiae,* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error claims that the Commonwealth illegally exacted of it $800.45 as an excise tax for the year 1921, and $567.57 plus $22.97 interest for 1922. The court below upheld the tax and definitely ruled that it was not repugnant to the Fourteenth Amendment or the Commerce Clause of the federal Constitution. 244 Mass. 530;

248 Mass. 156. With negligible exceptions the assessments followed the Corporation Tax Law (Gen. Acts 1919, c. 355), now codified in Gen. Laws, c. 63. Chapters 361 and 493, Gen. Acts 1921, are subsidiary and demand no particular notice. Record No. 327 discloses how the assessments were calculated; also the essential facts hereinafter stated. The opinion in No. 103 discusses the fundamental questions of law; the later one is supplementary and explanatory.

The statute provides that "every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of . . . five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "two and one-half per cent. of that part of its net income . . . which is derived from business carried on within the Commonwealth;" provided that the total tax shall be not less than an amount equal to one-twentieth of one per cent. of such proportion of the fair cash value of its capital stock as its assets employed within the State shall bear to the total assets. Annual returns, and additional information when demanded, must be filed with the Commissioner. He is empowered to determine, under prescribed rules, the net portion of income from business within the State. But if dissatisfied any corporation may file "a statement in such detail as the Commissioner shall require, showing the amount of its annual net income derived from business carried on within the Commonwealth." Credit for five per cent. of dividends paid to inhabitants of the State is authorized. Pertinent portions of the general statute are in the margin.*

* "Section 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, pro-

We accept the following statements in the opinion below: "The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other States outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States are conducted. The

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vided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth. . . ."

"Section 30. . . . 'Corporate excess employed within the commonwealth' by a foreign corporation, [shall mean] such proportion of the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. . . .

"'Net income,' . . . [shall mean] the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen," less interest on obligations of the United States.

"Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corpora-

office is used as headquarters for travelling salesmen, who solicit orders in Massachusetts and the other New England States. Orders so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this Commonwealth.

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tion derived from business carried on within the commonwealth. . . . The net income as defined in section thirty [less certain credits not here involved] shall be allocated as follows: If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth. If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight."

"Section 38. . . . 2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

"(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

"(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employees.

"(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found

The only property of the petitioner in Massachusetts is its office furniture, valued at $573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding $1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that

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by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

"3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

"4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

"5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

"6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the

law in its application to the petitioner. . . . It is rightly conceded by the Attorney General that the petitioner was engaged in this Commonwealth exclusively in interstate commerce."

Having ascertained the necessary items, the Comptroller made the calculations indicated below. The corporation's total net income returned for federal taxation, after allowances, amounted to $707,577.98; $7,602,090.21 (although not quite accurate) was treated as the total value of intangible assets.

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commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation. . . .

"9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth."

"Section 75. In addition to the methods provided by sections seventy-two and seventy-three [distraint or action in contract], taxes under this chapter, except section sixty-two [not here involved], may be collected by an information brought in the Supreme Judicial Court by the attorney general at the relation of the state treasurer. The Court may issue an injunction upon such information, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Amount of tax measured by net income.

Average value of tangible property in Mass., $573. Divide this by average value all tangible property, $16,992,355.22; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	$8.02
Wages, salaries, etc., assignable to Mass., $11,493.38. Divide this by amount of all wages, salaries, etc., $1,650,614.73; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	1,642.29
Gross receipts assignable to Mass., $343,204.60. Divide this by gross receipts from all business, $10,717,546.43; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	7,552.22
Net income		$9,202.53
2½% of $9,202.53	$230.06	
Less 5% of dividends paid Mass. inhabitants	42.15	
Total according to income		$187.91

Amount of tax measured by corporate excess.

Income assigned to Massachusetts, as above shown, $9,202.53. Divide this by $707,577.98 (entire apportionable net income); multiply resulting fraction by $7,602,090.21 (used for total intangible assets). This yields $98,827.17, which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $573, were added and $99,400 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $16,352,162; all assets $21,406,098. Divide $99,400 by

$21,406,098; multiply resulting fraction by $16,352,162; the result is $75,932.08—the "corporate excess." Five dollars per thousand upon this is $379.66.

Total Assessment for 1922 ($187.91 plus $379.66), $567.57.

In the course of its opinion the court below said—

"This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. *Eaton, Crane & Pike Co.* v. *Commonwealth,* 237 Mass. 523.

"The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture by such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, whether tangible or intangible, is exempt from direct or local taxation. The amount of the excise tax is measured as to a foreign corporation, § 39, by the sum of 'An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth,' and 'An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within this Commonwealth,' with a further provision that a minimum tax [shall be paid] of not less than one twentieth of one per cent of such proportion of the fair cash value of its shares of capital stock as its assets employed in business in this Commonwealth bear to its total assets employed in business. . . .

"The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable to the business done within this Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G. L. c. 59, § 5, cl. 16. . . .

"The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Commonwealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors, (1) the value of the corporate excess employed within the Commonwealth, and (2) the net income derived from business within the Commonwealth.

"1. The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation. If it were, it would be invalid. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. It is measured by the value of the property of the foreign corporation, including its franchise, employed in the Commonwealth, after certain deductions are made. It seems to us that this factor of the tax stands under the protection of several decisions of the Supreme Court of the United States. . . .

"It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70 must have involved credits, bills receivable and obligations to it of considerable amounts. No contention to the con-

trary has been urged by the petitioner. Such credits, bills receivable and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable and obligations constitute a part of 'the value of the assets' of the petitioner 'employed in . . . [its] business within the Commonwealth' used as the basis of ascertaining 'the corporate excess' of the petitioner 'employed within the Commonwealth' upon which this factor of the excise is calculated. . . .

"2. The tax, as measured by the net income from business transacted in Massachusetts as a factor, is dependent upon net profits derived solely from interstate commerce. But there is no discrimination in the statute against interstate commerce. This net income is used as a measure applicable to all corporations alike. While not an income tax according to strict definition, in substance it affects net income alone, is measured by net income alone, is reasonable in amount and incidence, and is payable out of net income. . . .

"The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the State but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate

commerce indirectly and is not an immediate burden upon it. It affords to the State only a fair and reasonable revenue for the maintenance of the government, the benefits from the protection of which the petitioner enjoys. Our conclusion is that the law thus construed, as applying to a foreign corporation using a part of its property exclusively for interstate commerce within the Commonwealth, violates no guaranty established by the Constitution of the United States. The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner."

Counsel for the Commonwealth assert: "The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce." "The taxes complained of were excises and not property taxes." "Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts." See *Judson Freight Forwarding Co.* v. *Commonwealth,* 242 Mass. 47.

This view of the nature of the exaction was adopted by the court below, and we think it is the correct one. The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a State impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to

transactions therein, and the proportion of net income attributed to such transactions?

Cheney Brothers Co. v. *Massachusetts,* 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, § 56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This court said: "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause." Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount. *Looney* v. *Crane,* 245 U. S. 178, 190; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 142; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259; *Texas Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150.

International Paper Co. v. *Massachusetts* considered an excise upon a corporation doing both local and interstate business, measured by its capital stock. St. 1909, c. 490; St. 1914, c. 724. Pertinent cases were cited and discussed and the tax declared "unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the State." Payment as a condition precedent to the doing of any business was not a controlling circumstance. The opinion recognizes the State's right to demand excises of foreign corporations in respect of intrastate business unless the exaction is really a tax on interstate business or property beyond the State. Under this principle certain of the complaining corporations in *Cheney Brothers Co.* v. *Massachusetts, supra,* were properly taxed. Plaintiff in

error did no local business, and there was no proper foundation for the excise.

It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.

Union Tank Line Co. v. *Wright,* 249 U. S. 275, 282, *et seq.,* pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a State. We there declined to follow the rule applied in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the State is taxed. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State. Of course, the opinion does not support the suggestion that the present statute is free from

the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business. It cites approvingly *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 364; and there this court said—

"So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in *Postal Tel. Cable Co.* v. *Adams,* 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: 'It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.'"

The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in *Cheney Brothers Co.* v. *Massachusetts,* and cannot be enforced against a foreign corporation which does nothing but interstate business within the State. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden.

The decrees of the court below must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS dissents.

UNITED STATES *v.* JOHNSTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 111. Argued April 30, 1925.—Decided, May 11, 1925.

1. Under the provision of the "Revenue Act of 1918," taxing admission fees, (Feb. 24, 1919, c. 18, § 800, 802, 40. Stat. 1057, 1120,) a person who has collected such fees at a public exhibition and is required to pay the tax to the United States is a debtor and not a bailee; so that failure to pay the tax is not indictable as an embezzlement of money of the United States, within § 47 Criminal Code. P. 226.
2. A person who collects admission fees to boxing matches is liable to punishment under § 1308b of the above Revenue Act for failure to pay the taxes to the United States, if he really acts on his own behalf in giving the exhibitions, collecting the fees and undertaking to pay taxes, even though, to comply with a state law, the exhibitions are given nominally by a corporate licensee of which he is technically but the agent. P 227.

290 Fed. 120, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a sentence of the District Court in a criminal prosecution for failure to pay over admission fees taxes, and for embezzlement.

Mr. William J. Donovan, Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

This Court has jurisdiction to grant certiorari at the suit of the Government in a criminal case. It is not

necessary to argue this proposition at length, as it is presumed that the Court considered the matter when it passed upon the petition for certiorari (263 U. S. 692), and when it granted a similar petition at the suit of the Government (*United States* v. *Gulf Refining Co.,* 262 U. S. 738). It is sufficient to submit that the former holding in *United States* v. *Dickinson,* 213 U. S. 92, is not now an authority to the contrary, in view of the significant changes which have been made in the statute since that case was decided. Act of March 3, 1911, c. 231, § 240, 36 Stat. 1087, 1157, amending the Act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828. An examination of the committee reports, and of the statements made by committee members upon the floor of the Senate, clearly shows that the framers of that section of the Judicial Code intended that the United States should be permitted to bring up criminal cases from the Circuit Court of Appeals by certiorari. The section was, in fact, amended during its passage through the Senate, in order to accomplish that result. Cong. Rec. 61st Congress, 3rd Sess., vol. 46, part 3, p. 2134; vol. 46, part 4, pp. 3762, 4000, 4001.

The Club was formed and the license procured at Johnston's request, at his expense, and for his benefit. The sole reason for its existence is to be found in the provision of the state laws which permitted only incorporated clubs to hold boxing licenses. The whole device was merely a subterfuge to permit Johnston to do indirectly through the medium of a corporation what the state law prevented him from doing directly as an individual. One may be liable criminally for acts done under the cloak of corporate existence, even though the corporation is a separate entity. *United States* v. *Lehigh Valley R. R. Co.,* 220 U. S. 257, 274; *In re Reiger,* 157 Fed. 609; *Wood* v. *United States,* 204 Fed. 55, 58. In this case, however, it is submitted that the acts charged

in the indictment were from the beginning to end the direct acts of the defendant Johnston alone. The contract between the Club and Johnston was in reality nothing more nor less than a lease to the defendant of the Manhattan Casino for a specified cash rent, and was so understood by all parties. Johnston, as lessee, controlled all the arrangements for the contests, sold the tickets, and collected the tax. Johnston had agreed with the Club that he would pay both state and federal taxes. His assistant, O'Brien, actually did pay the state tax in full, submitting over his signature the reports required by the state Treasurer. But neither he nor anyone else took any steps toward paying over the federal tax to the Collector of Internal Revenue. The Revenue Act of 1918 requires that the tax shall be paid by the spectators and collected by the person who receives the payments from the spectators. The Act looks to the person who is in actual control of admissions. Treas. Dep. Int. Rev. Reg. 43, part 1, Art. 64, p. 98, approved January 26, 1921. Even if it be held that the Club was also liable for the tax, the defendant Johnston was none the less properly convicted. Even assuming that the Club failed to account for the taxes, it was not necessary to charge that Johnston had aided or abetted in the failure. Under § 1308 (d), and § 332 of the Penal Code, he could be charged as a principal.

A collector of tax moneys is not a debtor to the United States; he is a bailee. *United States* v. *Thomas,* 15 Wall. 337, 352. The amount of this tax is kept separate from the price of admissions; and the regulations of the Treasury Department require that the price of admission, the amount of the tax, and the total of admission plus tax be printed as separate items on every ticket sold. It is submitted that the clear purpose of both the law and the regulations is to impose upon the person collecting admissions the capacity *quoad haec* of a govern-

ment agent. He is the instrumentality through which the United States takes the tax directly from the spectators. The case is not analogous to that of income or other taxes of that nature. The collector of entertainment taxes stands upon a different footing. The tax is not upon him; it is upon the spectator. His duty is to collect the tax from the spectator. He collects it, and it comes lawfully into his possession, as the agent of the United States; and if he converts it to his own use, he commits the crime of embezzlement. *Grin* v. *Shine*, 187 U. S. 181; *United States* v. *U. S. Brokerage & Trading Co.*, 262 Fed. 459; *Schell* v. *United States*, 261 Fed. 593.

Mr. Thomas C. Bradley, for respondent.

The purpose of the Criminal Appeals Act is to grant to the Government the right to review the decisions of the lower courts only in cases therein specifically enumerated. Since that act is inclusive and no provision is made for a writ of certiorari by this Court directed to the Circuit Court of Appeals, where the Circuit Court of Appeals had reversed a judgment of conviction, this Court has no jurisdiction to entertain the petition filed by the Government. Section 240 of the present Judicial Code in no way supersedes the Criminal Appeals Act, and in no way does it enlarge the right of the Government to appeal in the case at bar by certiorari or other means. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Dickinson*, 213 U. S. 92.

The indictment is fatally defective in that it wholly fails to charge any offense against the laws of the United States. It is not conceivable that a person or corporation owing a duty under the Revenue Law to collect and pay taxes to the Government can by contract shift that obligation to another so that the other will be obligated to the Government and liable civilly and criminally for failure to carry out such contract. Such a contract may

properly be made by the parties, but if made it is their responsibility as to its faithful performance. If A were proprietor of a theater, duly licensed and doing business, there is no reason why he should not, for reasons of his own, contract with B to operate the theater, under his license, and pay him a fixed sum weekly or monthly and in addition provide that B pay license-fees, fixed charges and expenses of entertainment and all state and federal taxes. That was exactly what was done in this case. But can it be said that by this contract A is relieved of liability to the Government either as to the collection or payment of the taxes and that the Government must look to B for satisfaction? To answer in the affirmative would be to open the door to fraud and permit a responsible party with property to substitute a totally irresponsible party in his stead and thus defraud the Government of large sums of money. Even if it were shown that he actually and in fact personally collected the tax under the contract, he could not be held under the indictment in this case, for no such theory is presented and no allusion to such a contract or arrangment is made. He is charged as though he held the exhibitions as principal and there is no reference made to the Central Manhattan Boxing Club, Inc., or to any contract with that Club. The failure to plead the contract or charge the facts upon which the Government relied to support such a theory, we submit, renders the indictment a nullity.

Sections 800 and 802 of the Revenue Act of 1918 provide (a) that all persons that pay and secure admission to any place where admissions are charged shall pay, in addition to admissions, a tax of 1 cent for each 10 cents or fraction thereof paid for admission, or (b) that, being admitted free to any place where admissions are charged, "the person so admitted" shall pay the amount of the tax and that in both instances the tax shall be collected by the person receiving any payments for ad-

mission or who admits any person free, and (c) that returns and payments of the amounts so collected shall be made as provided in § 502. It will be seen that it is the duty of the person securing admissions to pay the tax and the duty of the proprietor to first collect the tax and then pay it over to the Government. He is penalized by the Act, § 1308(b), if he fails to do either. He cannot pay it in the first instance. He must collect it from the persons securing admissions, whether paid or free, and it is not a tax on admissions paid, but is a tax on "admissions" based on the price of the tickets, whether paid or free, by which "admissions" are secured.

The only return required by the Act is the return of the amount of taxes collected, as provided in the sections quoted above. Yet the pleader charges and the Court permitted conviction for failure to make a return of the amount of admission fees collected. As the law required that the tax be collected on all "admissions," paid or free, and as the reports of the New York State authorities show that a large percentage of the "admissions" were free, it can readily be seen that to report merely the amounts "of money collected . . . in admissions" would fall far short of serving any useful purpose. The requirement of the Act was, as stated, to make "returns of the amounts so collected (taxes) at the same time and in the manner as provided in § 502."

The offense of embezzlement here charged is not defined or created by federal law. Section 47 of the Criminal Code merely provides that "whoever shall embezzle . . . money of the United States, shall be fined," etc. The statute simply adopts and fixes a punishment for the offense of embezzlement at common law. *United States* v. *Allen*, 150 Fed. 152. In the indictment, there is no allegation of any relation or capacity whatever, nor any allegation that defendant was authorized to collect the taxes for the United States.

The Treasury Department, by Regulation 43–1, Art. 35, has held that the money collected as admissions tax is not the property of the Government until paid to the Government, and evidently Congress had that in mind when it provided for payment by those who procured admissions, and collection and accounting by the proprietor, with drastic criminal penalties for failure of either to comply with the Act (§ 1308–b).

The money which the defendant is charged with having embezzled, was not money of the United States, but was simply money due the United States. Int. Rev. Bulletin, Vol. I, No. 25, June 19, 1922, p. 18.

Mr. Justice Holmes delivered the opinion of the Court.

The respondent, Johnston, was convicted on an indictment charging in separate counts a failure to pay over the tax upon admission fees received at certain boxing matches and a failure to make return to the collector of internal revenue of the money so received, contrary to the Act of February 24, 1919, c. 18, §§ 800, 802, 1308(b); 40 Stat. 1057, 1120, 1143. He also was convicted under § 47 of the Criminal Code of embezzling the amounts collected as taxes on the same occasions. Act of March 4, 1909, c. 321, § 47; 35 Stat. 1097. The judgment was reversed and the District Court was directed to dismiss the indictment by the Circuit Court of Appeals. 290 Fed. 120. A writ of certiorari was granted by this Court as the decision was said to be of grave importance to the administration of the revenue laws. 263 U. S. 692.

So far as the charge of embezzlement goes we think that the Court below and the intimation of the Treasury Department that it followed were clearly right. However it may have been under other statutes (*United States* v. *Thomas,* 15 Wall. 337) it seems to us that under this law the person required to pay over the tax is a

debtor and not a bailee. The money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show. We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank. Reports are required only once a month, §§ 802, 502, which does not look as if the Government were dealing with these people otherwise than with others answerable for a tax. Further argument seems unnecessary upon this point.

On the other counts we are of opinion that the Court below was wrong. We do not grant a certiorari to review evidence and discuss specific facts. But the Court seems to have regarded the formal relations of Johnston to the Central Manhattan Boxing Club, Inc., made necessary by the laws of New York, as conclusive upon his relations to the United States. The laws of New York permitted a license only to a corporation and so Johnston may have assumed the technical position of agent and manager for the Club. But if as a matter of fact all this was machinery to enable Johnston to give exhibitions, collect the entrance fees and make himself liable for the tax, it properly might be alleged that he collected the fees and if he wilfully failed to pay that he refused and failed to pay the tax. As the jury found Johnston guilty, although with an earnest recommendation of mercy, we are of opinion that the sentence and judgment of the District Court, which was much less than it might have been under § 1308(b), must be affirmed.

Judgment of the Circuit Court of Appeals reversed.
Judgment of the District Court affirmed.

THE STATE OF COLORADO *v.* TOLL, SUPERINTENDENT OF THE ROCKY MOUNTAIN NATIONAL PARK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 234. Argued April 24, 1925.—Decided May 11, 1925.

1. A proper remedy for a State which claims that acts of a federal official are without authority and derogate from its quasi-sovereign authority, is to by bill in equity, in the federal court, to restrain him as an individual, without joining his superior officers or the United States. P. 230.
2. A decree of the District Court dismissing a bill brought by a State complaining of an infringement of its right in the highways and of other reserved powers, *held* to involve construction of the Constitution and to be appealable directly to this Court. *Id.*
3. The Act of January 26, 1915, creating the Rocky Mountain National Park did not authorize federal regulation of automobile traffic inconsistent with the right of the State of Colorado over traffic on her roads traversing the park area. *Id.*
4. It will not be assumed, without proof and in face of the State's bill to the contrary, that this right of the State has been ceded to the United States. P. 231.

Reversed.

APPEAL from a decree of the District Court dismissing a bill by which the State of Colorado sought to enjoin the superintendent of a national park from carrying out certain park regulations, particularly with regard to automobile traffic, alleged to be unauthorized by Congress and in derogation of the rights and powers of the State.

Mr. William L. Boatright, Attorney General of the State of Colorado, and *Mr. Paul W. Lee,* with whom *Mr. Geo. H. Shaw* was on the brief, for appellant.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *the Solicitor General* and *As-*

sistant Attorney General I. K. Wells were on the brief, for the appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill brought in the District Court by the State of Colorado to enjoin the superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which are alleged to be beyond the authority conferred by Acts of Congress and to interfere with the sovereign rights of the State. These regulations forbid any person to reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the National Parks Service, provide for the removal of disorderly persons and forbid their return without permission from the Director, and impose a fine or imprisonment or both for violating these regulations, the defendant, it seems, being the sole judge. The special subject of complaint is a further regulation subject to similar penalties that "The park is open to automobiles operated for pleasure, but not to those carrying passengers who are paying, either directly or indirectly, for the use of machines. (Excepting, however, automobiles used by transportation lines operating under Government franchises.)" It is alleged that the defendant and his superior officers assert full authority over all highways in the park to the exclusion of the State and refuse permission to anyone operating automobiles for hire except one corporation which has received a permit. It is alleged that he asserts the right to exact a license fee from privately owned vehicles, although it does not appear that this has been done in this park. There are many thousands of acres in the park owned by private persons, and there are houses and hotels that were built before the park was laid out. It is feared that the same jurisdic-

tion will be exercised over the forest reservations in the State and it is alleged that all the main highways connecting the eastern and western parts of the State traverse either the reservation or the park, which last contains about 400 square miles. The roads were built by counties and the State under the grant of right in Rev. Sts. § 2477 before the park was laid out. It is alleged that the State never has ceded its power. The bill was dismissed for want of equity by the District Court.

The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. *Missouri* v. *Holland,* 252 U. S. 416, 431. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619, 620. As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question. Also the direct appeal to this Court is proper as the State complains of an infringement of its right in the highways and of its other reserved powers and the case as made involves the construction of the Constitution of the United States.

The park was created by the Act of January 26, 1915, c. 19; 38 Stat. 798. By § 2 the Act is not to "affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever," and by § 3 "no lands located within the park boundaries now held in private, municipal, or State ownership shall be affected by or subject to the provisions of the Act." By § 4 the park is put under the executive control of the Secretary of the Interior and it is made his duty to make such reasonable regulations, not inconsistent with the laws of the United States, as he deems proper for the management of the same, such "regulations being pri-

marily aimed at the freest use of the said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof. . . . The regulations governing the park shall include provisions for the use of automobiles therein." There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of the State over the roads are left unaffected in terms. Apart from those terms the State denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525. The statute establishing the park would not be construed to attempt such a result. *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States,* 92 U. S. 733. As the defendant is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed. The cases cited for the defendant do not warrant any such extension of the power of the United States over land within a State. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. *McKelvey* v. *United States,* 260 U. S. 353, 359. See *Omaechevarria* v. *Idaho,* 246 U. S. 343.

It is said, although it does not appear in the record, that the decision below was based upon *Robbins* v. *United States,* 284 Fed. 39, in which these regulations were held to be justified by a cession from the State. But the alleged cession is not in this record and the State denies it in the bill. In its argument it maintains that the Acts relied upon by the superintendent do not have the scope attributed to them and asserts that if they had purported to go so far they would have been without authority. The State is entitled to try the question and

to require the alleged grant to be proved. As the case can be dealt with more satisfactorily when the exact facts are before the Court we go into no more elaborate discussion now.

Decree reversed.

SOUTHERN UTILITIES COMPANY *v.* CITY OF PALATKA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 339. Argued April 27, 1925.—Decided May 11, 1925.

1. An agreement of a public utility with a city to observe specified rates remains binding even after the rates become unremunerative, if the contract does not lack mutuality. P. 233.
2. The fact that the state legislature has power to regulate the rates does not deprive the contract between the utility and the city of mutuality. *Id.*

86 Fla. 583, affirmed.

CERTIORARI to a decree of the Supreme Court of the State of Florida, affirming a decree enjoining the petitioner from increasing its rates for electric lighting.

Mr. William L. Ransom, with whom *Messrs. W. B. Crawford* and *J. T. G. Crawford* were on the briefs, for petitioner.

Mr. P. H. Odom, with whom *Mr. J. J. Canon* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The City of Palatka brought this bill to restrain the petitioner, the Southern Utilities Company, from charging more than ten cents per kilowatt, meter measurement, for commercial electric lighting in the city. It alleged a contract in the grant of the petitioner's fran-

chise by which the petitioner was bound not to charge more than that sum. The defendant pleaded that in present circumstances the rate prescribed in the ordinance granting the franchise was unreasonably low and that to enforce it would deprive defendant of its property without due process of law contrary to the Constitution of the United States. The plea was overruled and defendant having declined to plead further a decree was entered for the plaintiff by the Circuit Court for Putnam County which subsequently was affirmed by the Supreme Court of the State. 86 Fla. 583.

The Supreme Court held that the City had power to grant the franchise and to make the contract and that it had no power of its own motion to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that in the absence of contract it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the Company in consideration of the grant of the franchise might not bind the Company in some cases, even if it left the City free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. *Georgia Railway & Power Co.* v. *Decatur,* 262 U. S. 432, 438. *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215, 218. Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain. There is nothing in this decision inconsistent with *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547 and *Ortega Co.* v. *Triay,* 260 U. S. 103.

Decree affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* WOOLDRIDGE, RECEIVER OF THE NATIONAL BANK OF CLEBURNE.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 352. Argued April 29, 1925.—Decided May 11, 1925.

1. Where a guaranty company executed a bond guaranteeing the fidelity of the president of a national bank, and another to a depositor of the bank insuring payment of deposits, and the bank thereafter became insolvent through the frauds of the president and the guarantor paid the depositor and took an assignment of the depositor's claim against the bank with approval of the bank's receiver, *held* that this claim could not be set-off by the guarantor as assignee or subrogee in an action by the receiver upon the bond first mentioned. P. 237.
2. The doctrine of relation is a legal fiction invented to promote justice and never allowed to defeat the collateral rights of third persons. *Id.*

295 Fed. 847, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court in favor of the receiver of a national bank in an action against the surety of one of its officers.

Mr. Walter F. Seay and *Mr. Jos. A. McCullough,* for the plaintiff in error.

Upon failure of a bank a depositer may off-set any claim the bank may have against the depositor to the extent of the deposit. The Receiver takes the assets of an insolvent bank as a mere trustee and creditor, subject to all claims and defenses that might have been interposed as against the insolvent corporation. *Scott* v. *Armstrong,* 146 U. S. 499.

A surety on paying the debt of its principal is entitled to be subrogated to the rights of the creditors in all

or any of the securities, means or remedies which the creditor has for enforcing payment against the principal.

The right of a surety to subrogation begins with the contract of suretyship and relates back to that time, and is not simply inchoate until it pays the debt. *Prairie State National Bank* v. *United States,* 164 U. S. 227; *Henningson* v. *U. S. F. & G. Co.* 208 U. S. 403; *Hardaway* v. *National Surety Co.* 211 U. S. 550; *Fidelity & Deposit Co. of Maryland* v. *Duke,* 203 Fed. 661; *Cox* v. *New England Ins. Co.* 247 Fed. 955; *Wasco County* v. *New England Eq. Life Ins. Co. et al.* 172 Pac. 126.

The closing of the bank, the inability of the bank to pay its depositors, the necessity of plaintiff in error's paying the railway company and its liability to the bank because of the defalcation, in reality all grew out of the same transaction, or act, to wit: the embezzlement.

Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it; and the ordinary rule is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other. *Scott* v. *Armstrong, supra; North Chicago Rolling Mill* v. *St. Louis Ore & Steel Co.,* 152 U. S. 594. *Fidelity & Deposit Co.* v. *Duke,* 203 Fed. 661; *National Bank of the Commonwealth* v. *Mechanics' National Bank,* 94 U. S. 437.

A set-off otherwise valid cannot be considered a preference, as it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The right of subrogation relates back to the time of the contract of suretyship, and not merely from the time that the debt is paid by the surety or actual liability upon the surety is invoked. This being correct, then this plaintiff in error's right to set-off preceded the failure of the bank and of necessity could not be a preference. *Scott* v. *Armstrong, supra.* The

rules of law and equity as to the rights of a surety to subrogation and set-off are not altered merely because the surety was a compensated one.

From the inception of the suretyship relation there is an implied legal obligation on the part of the principal to indemnify and reimburse his surety. This implied promise of indemnity is as effectual as if embodied in a written indemnity agreement executed by the principal at the date of its application for the bond; *Williams* v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 557; and constitutes the surety a creditor of the principal from the time of the execution of the bond. To regard the claim of the surety against the principal as arising merely through assignment after insolvency of the principal and payment to the obligee is to ignore the debtor-creditor relationship existing *ab initio* between a surety and its principal. *Rice* v. *Southgate,* 16 Gray, 143; *Barney* v. *Grover,* 28 Vermont, 393; *Beaver* v. *Beaver,* 23 Pa. St. 167; *Walker* v. *Dicks,* 80 N. C. 263; *M. Kalin* v. *Bro. V. Bledsoe,* 98 Pac. 921; *Craighead* v. *Swartz,* 67 Atl. 1003; *Allen* v. *Van Campen,* 1 Freem. Ch. 273; *Labbe* v. *Bernard,* 82 N. E. 688; *Dudley Lumber Co.* v. *Nolan Bros.* 156 S. W. 465.

Mr. Ellis Douthit, with whom *Mr. J. H. Barwise, Jr.,* was on the brief, for defendant in error.

Mr. Loren Grinstead and *Mr. Frank T. Wyman* filed a brief as *amici curiae* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

The National Bank of Cleburne, Texas, became insolvent through the frauds of its president and closed its doors on October 17, 1921. On November 1 following the defendant in error was appointed receiver, and on April

14, 1922, began this suit upon a bond executed by the plaintiff in error on August 28, 1921, binding it to indemnify the Bank for losses of this character to the extent of $25,000. The Guaranty Company pleaded in setoff that on August 24, 1921, it became surety for the Bank upon another bond to the Gulf, Colorado and Santa Fe Railway Company, conditioned upon payment by the Bank to the Railway Company of the Company's deposits in the Bank, and that on January 16, 1922, it paid to the Railway Company $23,312.51 and as matter of law became subrogated to the rights of the Company against the Bank, and in addition took an assignment of such rights, which was approved by the plaintiff on February 1. An agreement of the parties was filed, that the facts alleged were true and that the only question for the Court was "whether or not under the facts alleged, the defendant is entitled as against the plaintiff to set off the demand it holds as assignee or subrogee of the Gulf, Colorado & Santa Fe Railway Company." Thus the answer and the agreement confine the issue before us to the rights of the defendant Guaranty Company by way of subrogation or assignment. The District Court and the Circuit Court of Appeals gave judgment for the plaintiff for $25,000 interest and costs and denied the defendant's right. 295 Fed. 847.

The two bonds were wholly independent transactions and were not brought into mutual account by an agreement of the parties. The Guaranty Company after the insolvency of the Bank could not have bought a claim against the Bank and used it in setoff. *Scott* v. *Armstrong,* 146 U. S. 499, 511. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 290. *Yardley* v. *Philler,* 167 U. S. 344, 360. The Receiver contends that that is the position of the defendant here, because it was only a guarantor and was only liable upon the default of the President of the Bank that produced the insolvency. The Court

below treated the claim of the Railway Company against the Bank as acquired by the defendant after the insolvency. The defendant, however, contends that upon its payment to the Railway Company its subrogation related back to the date of its contract; and we will assume for purposes of argument that this is true. But suppose it is, the right of the Railway Company was simply that of a depositor, a right to share with other unsecured creditors in the assets of the Bank, of which the bond now in suit was a part. There would be no equity in allowing the Railway Company a special claim against this bond. We will assume that if the Railway Company had insured the honesty of the Bank's officers the Bank might have offset the obligation of the company against its claim as a depositor. But it is impossible to treat the succession of the defendant to the Railway Company's claim as effecting such an absolute identification with the Railway Company that one and the same person insured the Bank and made the deposits. The doctrine of relation "is a legal fiction invented to promote the ends of justice. . . . It is never allowed to defeat the collateral rights of third persons, lawfully acquired." *Johnston* v. *Jones,* 1 Black, 209, 221.

Judgment affirmed.

LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* FRICK ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 681. Argued April 16, 1925.—Decided May 11, 1925.

1. Acts of Congress are to be construed, if possible, so as to avoid grave doubts of their constitutionality. P. 251.
2. The provisions of the Revenue Act of February 24, 1919, purporting to include policies insuring the life of a decedent in the

gross value of his estate as a basis for fixing the transfer tax thereon, though the policies be payable to beneficiaries other than the estate, and allowing the executor to recover from such beneficiaries their proportions of such tax and making them personally responsible therefor if not paid when due, are to be construed as inapplicable to transactions antedating the passage of the act. P. 251.

3. A declaration in an act that a provision in it shall be retroactive helps the conclusion that the same provision in an earlier act, lacking such declaration, was not retroactive. P. 252.

298 Fed. 803, affirmed.

ERROR to a judgment recovered in the District Court by the defendants in error in an action to recover the amount of taxes collected by duress.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom the *Solicitor General, Messrs. Nelson T. Hartson* Solicitor of Internal Revenue, and *Merrill E. Otis,* Special Assistant to the Attorney General, were on the briefs, for plaintiff in error.

Section 402 (f) of the Revenue Act of 1918 provides a reasonable measure of an excise tax imposed upon a transmission of a decedent's property by death. The tax is not a direct tax but an excise measured by the value of the net estate. *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Greiner* v. *Lewellyn,* 258 U. S. 384; *Edwards* v. *Slocum,* 264 U. S. 61; *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *United States* v. *Woodward,* 256 U. S. 632. Congress has provided a measure for that tax based not solely upon the transfer of the decedent's property, but upon transactions, whether transfers from a decedent or not, which accomplished the same results as testamentary dispositions would accomplish. *Pennsylvania Company* v. *Lederer,* 292 Fed. 629; *McElligott* v. *Kissam,* 275 Fed. 545; *Farmers' Loan & Trust Co.* v. *Winthrop,* 238 N. Y. 488. A measure which bears a reasonable relation to the subject matter of the tax is constitutional although the

property affording the measure could not itself be taxed. *Maxwell* v. *Bugbee,* 250 U. S. 525; *Flint* v. *Stone Tracy Co.* 220 U. S. 107; *Greiner* v. *Lewellyn, supra; Plummer* v. *Coler,* 178 U. S. 115; *United States* v. *Perkins,* 163 U. S. 625; *Orr* v. *Gilman,* 183 U. S. 278; *Bullen* v. *Wisconsin,* 240 U. S. 625. The measure of the tax bears a reasonable and proper relation to the occasion of the tax. *Penn Mutual Life Ins. Co.* v. *Lederer,* 252 U. S. 523.

It can hardly be questioned that a deposit by A in a Savings Bank to be paid with accumulations to B on A's death would constitute a gift intended to take effect in possession or enjoyment at or after A's death, and therefore be properly included in A's gross estate under § 402 (c) of the Act. *Shukert* v. *Allen,* 300 Fed. 754. Differences between a savings deposit and the taking out of a life insurance policy on one's own life for the benefit of another, are superficial, when used to differentiate such a contract from a gift intended to take effect in possession or enjoyment at or after death. It is, of course, true that the beneficiary has a vested interest in the policy. But the ownership of the policy as such is worthless. Its only value is the assurance that at the death of the insured a certain sum will be paid. There is no true "possession or enjoyment" of a policy. The possession or enjoyment attaches when, and only when, the money is paid. It is held that gifts are taxable, regardless of the vesting of title or of the right to future enjoyment, if the actual enjoyment of the property which comprised the present right to the earnings, income, and avails thereof is postponed until the donor's death. *People* v. *Kelley,* 218 Ill. 509; *Re Cornell,* 170 N. Y. 423; *State* v. *Probate Court,* 102 Minn. 268; *American Bd. Comm'rs* v. *Bugbee,* 98 N. J. L. 84, 118 Atl. 700; *People* v. *Shaffer,* 291 Ill. 142; *People* v. *Danks,* 289 Ill. 542; *In re Felton's Estate,* 176 Cal. 663; *Harber* v. *Whelchel,* 156 Ga. 601.

Assuming for the purposes of argument that the transfer of title to the insurance policies is the subject of the

tax, the act is not unconstitutional. *New York Trust Co.* v. *Eisner, supra; Knowlton* v. *Moore, supra; Cahen* v. *Brewster,* 203 U. S. 543; *Stockdale* v. *The Insurance Companies,* 20 Wall. 323; *Billings* v. *United States,* 232 U. S. 261; *Magoun* v. *Ill. Trust & Sav. Bank,* 170 U. S. 283; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 145, 158, 169; *Keeney* v. *New York,* 222 U. S. 525, 536. The provisions effecting the collection of the tax do not affect its nature or render the act unconstitutional. There is nothing to indicate that any change in the nature of the tax was contemplated; none of the sections concern the imposition of the tax; they are merely details deemed proper for the effectual and practical operation of the law. *Flint* v. *Stone Tracy Co., supra; In re Inman's Estate,* 101 Ore. 182, 199 Pac. 615. The matter of who pays the tax is not primarily important. It is a matter which does not concern the Government. *New York Trust Co.* v. *Eisner, supra; Edwards* v. *Slocum,* 264 U. S. 61.

State cases holding retroactive excise laws unconstitutional are not in point. In the first place, such cases are decided under constitutional restrictions applicable to States but not to Congress. A State may not so legislate, whether in the form of taxation or otherwise, as to impair a vested right. To do so is to violate the constitutional limitations which prohibit the State from impairing the obligations of a contract. It is doubtful that this limitation prevents the imposition of a retroactive excise by a State. *Nickel* v. *Cole,* 256 U. S. 222. Certainly there is no such limitation upon the power of Congress. Its power to tax is exhaustive, and if the imposition be a tax, then, although it impair the obligations of contracts or interfere with vested rights, it is, nevertheless, valid. *License Tax Cases,* 5 Wall. 462; *United States* v. *Singer,* 15 Wall. 111; *Knowlton* v. *Moore, supra; Patton* v. *Brady,* 184 U. S. 608; *Mc Cray* v. *United States,* 195 U. S.

27; *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States, supra; Brushaber* v. *Union Pac. R. R. Co.* 240 U. S. 1; *United States* v. *Doremus,* 249 U. S. 86.

The statute by its expressed words does not tax the transfer of policies. Furthermore, neither the policies nor their value are included in the gross estate. Their transfer, issuance, or assignment are entirely immaterial. What is included is the "amount receivable"—the money. Regardless of who owned the policies at the date of Mr. Frick's death, the moneys received were in substance the decedent's money, for it was the decedent's money that purchased the right to receive them, and that right was contingent upon the decedent's death. The amounts thus received were included under the statute, whether received by the beneficiaries or by the estate, the only difference being that when received by beneficiaries a part is exempt. The correct theory is that the decedent makes a gift, not of the policy but of his money (invested in insurance, it is true), and the gift is not complete until the money is received. For the purpose of measuring or levying a tax upon the transfer of the net estate, the moneys received by Mrs. and Miss Frick were a part of the Frick estate. They were accumulated or purchased by Henry C. Frick in his lifetime. The right to their possession and enjoyment was generated by his death precisely the same as the right to possession and enjoyment of a trust estate created by a testator to take effect upon his death is so generated. One can not receive money or property unless another part with it. A receipt is a part of a transfer. These moneys were in fact transferred after and because of Mr. Frick's death from the insurance companies to his wife and daughter. The statute does not say when the transfer shall occur, or from and to whom the moneys or property shall pass. It certainly does not contemplate that it shall pass from the decedent at the moment of and because of his death.

True, the transfer mentioned is that of the estate of the decedent, but the decedent's estate is that which is made up of the elements expressly designated in the statute. *Knowlton* v. *Moore, supra.* The tax is levied on neither the policies nor their value, nor the moneys received under the insurance contracts. It is levied "upon the transfer of the net estate," and the generating cause—the cause which justifies the tax and to which it is attached—is the death of the decedent.

The provision of the act of 1918 (40 Stat., chap. 18, sec. 402(f), p. 1098) applies to the proceeds of policies issued before the passage of the act. *Shwab* v. *Doyle,* 258 U. S. 529; *Union Trust Co.* v. *Wardell,* 258 U. S. 537. It certainly can not be insisted with reason that the proceeds of policies issued before the enactment of the statute and made payable to the executors were not intended to be included in the gross estate. That being true, the date of the issuance of the policy is immaterial; the determinative event is when the money is received. The requirements that there shall be included in the gross estate the amounts received by the executors as insurance and those received as insurance "by all other beneficiaries" in excess of $40,000, are in the same sentence, and there is not a word in the provision which contains a suggestion that a different rule was intended to be observed as to the two classes of funds derived from insurance. In fact, if the provision does not apply to insurance policies issued before the passage of the act, it could have had but little practical effect for a number of years after its passage. Such a construction would practically postpone for years its going into effect. Policies are issued only to those who are physically fit and have a long expectancy of life, and but few policies mature within the early years after their issuance.

There are two lines of cases relating to the modification of the language of legislative acts by subsequent

legislation. The one line proceeds upon the theory that Congress intended to include a *casus omissus* from the previous act, and the other upon the theory that Congress intended to remove any doubt that might otherwise exist as to the inclusion of the case in the previous act. Apparently the distinction between the two lines of decisions is this: If the inserted word change the meaning of the language of the previous statute, or add something thereto when construed according to the obvious and usual meaning of its language, it will then be assumed that the inserted words were intended as an amendment; but if the words inserted accord with the plain and obvious meaning of the language of the previous statute, they are taken to define and make more certain its meaning. *Bailey* v. *Clark,* 21 Wall. 284; *Johnson* v. *So. Pac. Co.* 196 U. S. 1; *Wetmore* v. *Markoe,* 196 U. S. 68; *United States* v. *Coulby,* 251 Fed. 982; *Matter of Reynolds' Estate,* 169 Cal. 600; *Abstract & Title Guaranty Co.* v. *State,* 173 Cal. 691.

Mr. George B. Gordon, with whom *Messrs. John G. Buchanan, Miles H. England,* and *S. G. Nolin,* were on the briefs, for defendants in error.

The policies were property belonging, not to Mr. Frick's estate, but to the beneficiaries. *Tyler, Administratrix,* v. *Treasurer and Receiver General,* 226 Mass. 306; *Elliot's Appeal,* 50 Pa. 75; *Anderson's Estate,* 85 Pa. 202; *Matter of the Transfer Tax upon the Estate of Andrew Carnegie,* 203 App. Div. (N. Y.) 91; *Neary* v. *Metropolitan Life Ins. Co.* 103 Atl. 661, (Conn. 1918); *Holden* v. *Insurance Co.* 77 So. Car. 299; *Matter of Parson's Estate,* 102 N. Y. Supp. 168; *In re Voorhee's Estate,* 193 N. Y. Supp. 168; *Lloyd* v. *Royal Union Mutual Life Ins. Co.* 245 Fed. 162. See especially *Washington Central Bank* v. *Hume,* 128 U. S., 195.

The reservation of a power by the donor which was never exercised does not affect the vesting of the estate

in the donee. *Jones* v. *Clifton,* 101 U. S. 225; *Matter of the Transfer Tax upon the estate of Andrew Carnegie, supra; Matter of Miller,* 236 N. Y. 290; *Dolan's Estate,* 279 Pa. 582. An attempt was made in the court below to show that the existence of these options and powers, which were never exercised, prevented the " estate " from vesting in the beneficiary. We are at a loss to see what application this contention has to the case; for it is the estate of the beneficiary that is being taxed here. That estate, whether you call it vested or contingent, came into being when the contract which created the obligation to pay the policy to the beneficiary was made, and continued unmodified by the exercise of options or powers right down to the death of the insured, when the policy became payable at once to the owner of the estate. It is perfectly clear that Mr. Frick's so-called rights were no " conditions of the vesting of the estate " (if we must use this inaccurate expression) but were simply conditional limitations. In authorities as old as Littleton we find the illustration that an estate to A if he returns from Rome is a conditional estate. It does not vest any right in him until and unless he returns from Rome; but an estate to A until B returns from Rome is a vested estate in A. It is simply a conditional limitation upon, not a conditional vesting of the estate. *Bennett* v. *Robinson,* 10 Watts, 348; *Irvine* v. *Sibbetts,* 26 Pa. 477; *Cooper* v. *Pogue,* 92 Pa. 254; *McArthur* v. *Scott,* 133 U. S. 340; *Girard Trust Co.* v. *McCaughn,* 3 Fed. (2d), 618. Mrs. Frick's right (estate) became her property (vested) when the policy was issued or the assignment thereof was made, and could only be divested by a subsequent event (the failure to pay a premium, or the exercise of a power), which never happened. In this connection it is well to bear in mind that the beneficiaries had the right to pay the premiums and thus to prevent the policies from lapsing.

Neither these insurance policies nor the assignments thereof comply with the requirements of the Pennsyl-

vania statute on wills; therefore they are not wills. An insurance policy is the antithesis of a will. It is primarily and fundamentally a provision for his dependents, made by a man in his lifetime. It is, as we have shown, their property both by form of contract and by statute, and the proceeds of the policy are not subject to the financial vicissitudes of the insured. It is not a part of his estate; it is not liable for his debts; it does not pass under his will; nothing new vests in the beneficiaries by reason of the insured's death.

The assessment of this tax under the provisions of § 402 (f) of the Revenue Act of 1918 was illegal because that section of the act is not retroactive. In addition to what for all other purposes is regarded as constituting a decedent's estate, this act includes in the gross estate, as it defines it, certain items of property which, though not unconnected with the past activities of the decedent's lifetime, are not at the time of his death part of his estate for the payment of debts, or for distribution, or for any other than the artificial purpose of determining the tax in accordance with the language of the act. Those items are: (1) gifts and trusts made by the decedent in contemplation of death, or to take effect at death; (2) property conveyed to the decedent and some other person and held by them at the time of the decedent's death as joint tenants or tenants by the entireties, with the right of survivorship; (3) policies of life insurance taken out by the decedent on his own life and made payable to persons other than the decedent's executors. The three provisions of the Act which accomplish this extraordinary classification of property are very similar in their terms and are identical in the fact that, as originally enacted, they did not contain any language that required them to have a retrospective application. They contained no hint that they were to be applied to any trusts, gifts, entireties, or life insurance poli-

cies other than those made after the passage of the Act. This is the natural meaning of the language used. And that such was the meaning that Congress actually had in mind when it enacted the statute is shown by the fact that since the provisions were originally enacted Congress has from time to time added to one or another of the clauses language making it retroactive, until finally in the Act of 1924 it introduced language making them all retroactive. But this is not all. The first two of the three original provisions have already been passed upon by this Court and have been construed not to be retroactive. *Shwab* v. *Doyle,* 258 U. S. 259; *Union Trust Co.* v. *Wardell, Id.* 537; *Levy* v. *Wardell, Id.* 542; *Knox* v. *McElligott, Id.* 546.

By making subdivision (g), the language of which is exactly the same as that of subdivision (f) of § 402 of the Acts of 1918 and 1921, applicable to all transfers, etc., made before the enactment of the Act of 1924, Congress conceded that the language of the earlier acts did not apply to the proceeds of policies taken out before this Act went into effect. *Shwab* v. *Doyle, supra; Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602; *United States* v. *Field,* 255 U. S. 257. The conclusion that the provisions of § 402 (f) are not applicable to the proceeds of insurance policies taken out and assigned long before this Act was passed is further supported by numerous decisions in this and other courts holding, as was held in *Shwab* v. *Doyle, supra,* that tax laws are to be strictly construed in favor of the taxpayer. *United States* v. *Merriam,* 263 U. S. 179; *Gould* v. *Gould,* 245 U. S. 151; *Eidman* v. *Martinez,* 184 U. S. 578. See *Reynolds* v. *McArthur,* 2 Pet. 417, 434. An established practice of this Court is to avoid giving to a statute a construction which involves constitutional difficulties. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375.

Even though it be deemed that the Act was intended by Congress to be retroactive, the tax was illegally levied

(a) because such a tax is a direct tax and (b) because it is not due process of law. A retroactive tax is not an excise tax but a direct tax requiring apportionment, since a tax cannot be an excise unless "the element of absolute and unavoidable demand is lacking." *Thomas* v. *United States,* 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co., supra; Singer* v. *United States,* 15 Wall. 111, 120; *Patton* v. *Brady,* 184 U. S. 608, 623. The tax must therefore be either a direct tax upon the person, imposed by reason of his past acts, or a direct tax upon the property transferred. It is a direct property tax within the definitions adopted in: *Pollock Case,* 157 U. S. 429; *Dawson* v. *Kentucky Distilleries Company,* 255 U. S. 288. *Eisner* v. *Macomber, supra; Nicol* v. *Ames,* 173 U. S. 509; *In re Pell,* 171 N. Y. 48.

A tax in any form, imposed upon the creation or transfer of property rights at a time long past, is in substance not a tax but an imposition so arbitrary and unreasonable as to amount to a confiscation of property within the prohibition of the Fifth Amendment. *Brushaber* v. *Union Pacific R. R. Co.* 240 U. S. 1; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44.

The Constitution requires duties, imposts and excises to be uniform throughout the United States, Art I, § 8. *United States* v. *Singer,* 15 Wall. 111.

It was not due process of law to compel the executors to pay an estate transfer tax on property which was not part of the decedent's estate, but which belonged to others. Such a tax is unconstitutional because—(1) It is unequal; it is a deprivation of property without due process of law. (2) The remedy over sought to be given to the executors against the beneficiaries is inadequate, (a) Because a mere cause of action to recover is not the equivalent to immunity from taxation; and (b) Because the act attempts to give the right to recover only a part of the amount which the estate has to pay. That the

tax is an excise tax founded upon the termination of Mr. Frick's title has been expressly held by this court in cases involving the application of that act. *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *Edwards* v. *Slocum,* 264 U. S. 61. See *Knowlton* v. *Moore,* 178 U. S. 41.

Our proposition that you cannot include in the value of the taxable thing the value of some other thing is a fundamental point in the following cases: *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Delaware, L. & W. R. R. Co.* v. *Pennsylvania,* 198 U. S. 341; *Union Refrigerator Co.* v. *Kentucky,* 199 U. S. 194; *Sou. Pac. Co.* v. *Kentucky,* 222 U. S. 63; *Wallace* v. *Hines,* 253 U. S. 66; *Air-Way Corp.* v. *Day,* 266 U. S. 71; *Wardell* v. *Blum,* 276 Fed. 226; *Chanler* v. *Kelsey,* 205 U. S. 466. A tax cannot be made the means of imposing upon one man the burden which should be borne by another. *United States* v. *B. & O. R. R. Co.,* 17 Wall. 322; *Knowlton* v. *Moore, supra; Loan Association* v. *Topeka,* 20 Wall. 655.

Messrs. Ira J. Williams Jr., A. Carson Simpson, Ira J. Williams and *Francis Shunk Brown; Isaac B. Lipson; Frederick Geller* and *Russell L. Bradford; William B. Sears* and *Alexander Lincoln; Tyson S. Dines, Peter H. Holme, Harold D. Roberts* and *Charles E. Works;* and *William Marshall Bullitt,* filed briefs as *amici curiae,* by special leave of court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the executors of Henry C. Frick to recover the amount of taxes collected by duress under the supposed authority of the Revenue Act of February 24, 1919, c. 18; 40 Stat. 1057, on the ground that the Act is unconstitutional so far as it purports to tax the matters here concerned. The District Court gave judg-

ment for the plaintiffs for the whole sum demanded. 298 Fed. 803. The case was tried without a jury and the Court adopted as its findings among others the following facts which were agreed: Henry C. Frick died on December 2, 1919, and his will was admitted to probate on December 6. There were outstanding policies upon his life, four payable to his wife and seven to his daughter. The total amount received under them was $474,629.52, and as his estate apart from this was more than ten million dollars, an additional tax of $108,657.88, or twenty-five per cent. of the sum received less the statutory deduction of $40,000, was required to be paid. All the policies were taken out before the Revenue Act was passed. The largest one, for $114,000 dollars, was a paid-up policy issued in 1901, payable to Mrs. Frick without power in Mr. Frick to change the beneficiary. Another, similar so far as material, was for $50,000. Others were assigned or the beneficiary named (Frick's estate) was changed to Frick's wife or daughter before the date of the statute. All premiums were paid by Mr. Frick, and some seem to have been paid after the statute went into force.

The tax imposed by the Act is, a tax 'upon the transfer of the net estate' of the decedent. § 400; 40 Stat. 1096. 'For the purpose of the tax the value of the net estate shall be determined' by deducting certain allowances from the gross estate. § 403. By § 402 "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." These last words are the ground of the Collector's claim.

By § 408; 40 Stat. 1100, "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate." By § 409 a personal liability is imposed upon the beneficiaries if the tax is not paid when due. The defendants in error say that if these policies are covered by the statute these sections show that the beneficiaries are taxed upon their own property, under the guise of a tax upon the transfer of his estate by Mr. Frick, and that this is taking their property without due process of law, citing *Matter of Pell,* 171 N. Y. 48, and other cases. In view of their liability the objection cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax. The interest of the beneficiaries is established by statutes of the States controlling the insurance and is not disputed. It also is strongly urged that the tax would be a direct tax. In view of our conclusion it is not necessary to state the position of the defendants in error more in detail.

We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. *Panama R. R. Co. v. Johnson,* 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only

to transactions taking place after it was passed, but the general principle "that the laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways. *Schwab* v. *Doyle,* 258 U. S. 529, 534. This case and the following ones, *Union Trust Co.* v. *Wardell,* 258 U. S. 537, *Levy.* v. *Wardell,* 258 U. S. 542, and *Knox* v. *McElligott,* 258 U. S. 546, go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 2, § 302(h); 43 Stat. 250, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602.

Decree affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 13, Original. Argued April 20, 1925. Decided May 11, 1925.

1. Description of a boundary in field notes and patent as "up the river", *construed,* in the light of connected surveys and a plat, as calling for the river as a boundary. P. 255.
2. A natural boundary like a river controls courses and distances. *Id.*
3. A river bank boundary, whether private or public, changes with erosion and accretion. P. 256.
4. Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of an estoppel; and if they relate to a real property title the condition of which is known to both parties, or both have the same means of ascertaining it, there can be no estoppel. *Id.*

On exceptions to the special master's report on conflicting claims to royalty interests in proceeds held by the receiver in this cause derived from oil wells in a parcel of land on Red River in Texas. Exceptions overruled.

Mr. C. F. Greenwood for Durfee Mineral Company, in support of exceptions.

Mr. A. H. Carrigan for Roberts and Britain, *contra.*

Mr. Justice Van Devanter delivered the opinion of the Court.

As an incident of the receivership in this cause it becomes necessary to determine conflicting claims to the royalty interest in the impounded proceeds of the oil taken from wells Nos. 152, 153 and 154. 258 U. S. 574, 581. These wells are immediately south of the south bank of Red River, and therefore in the State of Texas. 261 U. S. 340. The claimants are T. P. Roberts and A. H. Britain on the one hand and the Durfee Mineral Company on the other. Both claims are founded on Texas surveys—that of Roberts and Britain on the Lewis Powell survey made in 1861 and patented in 1868, and that of the Durfee Mineral Company on the A. A. Durfee survey made in 1886 and patented in 1889.

The principal question is whether the Powell survey extended northward to the south bank of Red River, leaving nothing between it and the bank, or stopped short of the bank, leaving a narrow wedge-shaped strip between it and the bank. The Durfee survey was made 25 years later on the assumption that the Powell survey left such a strip there. The three wells are in the wedge-shaped strip or land accreted to it. A secondary question is whether, if the Powell survey included this strip, the present owners of that survey are estopped from claiming the strip, and therefore the royalty interest, as against the Durfee Mineral Company.

January 19, last, the conflicting claims were referred to a special master with directions to take the evidence and report the same with findings of fact, conclusions of law and recommendations for a decree. 267 U. S. 7, par. 8. The master made his report with findings, conclusions and recommendations favorable to the claim of Roberts and Britain; the Durfee Mineral Company excepted; and both claimants have been heard in briefs and oral argument on the report and exceptions.

The master found that the Powell survey fronted on the river and had the south bank as its northerly boundary. In the exceptions it is insisted that this finding rests on an erroneous interpretation of the survey. For reasons which will be explained, we think it rests on a right interpretation.

The Powell was one of five surveys made by the same surveyor on the same day—May 8, 1861. These surveys were contiguous and were in the form required of surveys fronting on a stream like Red River.[1] They were also so tied together that the interpretation of one involves an examination of the others.

The surveyor began with the easterly one and proceeded westerly until he had finished all five. His field notes described all as " on the south bank of Red River," and the drawings or plats accompanying the field notes represented all as fronting on the river and having its irregular line as a northerly boundary. The field notes of all, excepting the Powell, also described the northerly line as beginning at the northwest corner of the adjoining survey on the east and running " thence up the river with its meanders " in a stated direction a given distance to a stake or mound " in the bottom " or " on the bluff " at the other end. The Powell was the fourth survey in the line, and so was between others the field notes of which said

[1] Vernon's Sayles' Civ. Stat. §§ 5338, 5339.

" thence up the river with its meanders." The field notes of the Powell transmitted to the state land office, and on which the patent issued, were like the others, save that they said " thence up the river " and omitted " with its meanders." But the field notes entered in the appropriate local records said " thence up the river with its meanders." Doubtless the discrepancy resulted from a clerical error in preparing the duplicate sent to the state land office.

We put aside the question of the effect to be given to the entry in the local records; for the phrase " thence up the river " in the field notes sent to the state land office and in the patent evidently mean up the natural course of the river. *Schnackenberg* v. *State,* 229 S. W. 934, 937; *Stover* v. *Gilbert,* 247 S. W. 841, 843; *Brown* v. *Huger,* 21 How. 305, 320. Of course, that phrase must be read with the declaration that the survey was on the south bank of the river and in the light of the drawing or plat representing the river as the northern boundary.

We think it apparent that the survey was intended to call, and did call, for the river as a boundary and that controlling influence must be given to that call rather than to the course and distance given for that boundary. The courts of Texas, in common with other courts, recognize and apply this rule of interpretation. *Anderson* v. *Stamps,* 19 Tex. 460, 465–466; *Stafford* v. *King,* 30 Tex. 257, 271–272; *Schnackenberg* v. *State, supra; Stover* v. *Gilbert, supra,* and cases there cited; *Cordell Petroleum Co.* v. *Michna,* 276 Fed. 483. The evidence, as pointed out by the master, does not admit of the conclusion that the surveyor mistook a bayou or other body of water for the river, or that the river was not in immediate proximity to the upper corners of the survey when it was made (see *United States* v. *Lane,* 260 U. S. 662); so authorities rejecting an obviously mistaken call for a river or lake are not in point. See *Jeems Bayou*

Fishing and Hunting Club v. *United States,* 260 U. S. 561.

The master next found that the land lying between the south bank as now existing and that bank as existing at the time of the Powell survey is accretion to the bank, and therefore part of the Powell tract. Exception is taken to this finding on grounds that are not made very clear. A short statement of what the evidence tends to show in this connection will make it plain that the exception must be overruled. During the 25-year period intervening between the Powell survey and the Durfee survey there was a large addition to the south bank, but in later years most of that addition was cut away. At present the bank extends a little farther northward than it did when the Powell survey was made. These changes all resulted from the natural and gradual processes of accretion and erosion, which are rather pronounced in Red River. Its currents and channels shift from one side of its wide bed to the other, gradually cut away one bank and build up the other, and later on reverse that action. Where, as here, a boundary bank is changed by these processes the boundary, whether private or public, follows the change. *Oklahoma* v. *Texas,* 260 U. S. 606, 636; *Oklahoma* v. *Texas,* 265 U. S. 493, 499.

The necessary result of the two findings we have mentioned is that there was no public land between the Powell tract and the river to which the Durfee survey and patent could give any right.

The next exception is to the master's conclusion that there was no sufficient evidence on which to invoke an estoppel against the assertion by Roberts and Britain of title to the strip in controversy or to the royalty interest arising therefrom.

The grounds on which an estoppel is invoked are that Specht, from whom Roberts acquired the Powell tract, had theretofore made and distributed a plat of that tract,

along with others, whereon it was represented as not extending to the river bank; that Roberts after getting the title made and distributed a plat with a like representation of the northern boundary; that Roberts pointed out to the Durfee Company and its predecessors as the northern boundary a line running south of the land in dispute; and that, acting upon those plats and Roberts' statement, the Durfee Company and its predecessors purchased the land in dispute from a claimant under the Durfee survey and paid a valuable consideration for it. The evidence bearing on the asserted estoppel is in several respects conflicting. It is fully and fairly reviewed by the master in his report and need not be restated here. The master concluded, and we agree with him, that as a whole the evidence shows that the Durfee Company and its predecessors purchased with full knowledge of the record title, including the surveyor's field notes before described; that the plats made by Specht and Roberts were too vague to have been relied upon as a representation of the nature or location of the northern boundary; that the conveyance from Specht to Roberts, which was part of the record title, described the Powell tract as extending to the meanders of the river; that the Durfee Company and its predecessors in purchasing did not in fact rely upon the Specht and Roberts plats or any statement of Roberts, but upon a report made by their attorneys based on the record title, including the field notes; and that the alleged statement by Roberts to them, if made, was made after they had purchased, gone into possession and paid the purchase price. In this situation the asserted estoppel must fail. Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of such an estoppel. And if they relate to the title of real property "where the condition of the title is known to both parties, or both have the same means of

ascertaining the truth, there can be no estoppel." *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 336–337; *Crary* v. *Dye*, 208 U. S. 515, 521; *Westbrook* v. *Guderian*, 3 Tex. Civ. App. 406; *Hunter* v. *Malone*, 49 Tex. Civ. App. 116, 121; *Bender* v. *Brooks*, 130 S. W. 653, 657; *Barclay* v. *Dismuke*, 202 S. W. 364, 365; Pomeroy's Eq., 4th ed., sec. 807. There was no laches on Roberts' part in asserting his claim after the company purchased. He soon went to the land with a surveyor to run out his lines and make his claim known, but was prevented from doing so by an armed guard. With reasonable promptness he brought a suit in a court of competent jurisdiction to enforce his rights. Proceedings in that suit were soon suspended by reason of this receivership, and he promptly asserted his claim here.

An order will be entered overruling the exceptions, confirming the master's report and directing payment of the royalty interest to Roberts and Britain. The costs will be adjusted in the order.

Claim of Roberts and Britain sustained.
Claim of Durfee Mineral Company denied.

COCKRILL ET AL. *v.* PEOPLE OF CALIFORNIA.

ERROR TO CALIFORNIA DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT.

No. 182. Argued March 6, 1925.—Decided May 11, 1925.

By the California Alien Land Law, under which acquisition, use or control of agricultural land is forbidden to aliens not eligible to citizenship under the laws of the United States and interests which such persons can not take are to escheat to the State when conveyed with intent to avoid that result, it is provided that a *prima facie* presumption that conveyance is made with that intent shall arise upon proof of the taking of the property in the name of a person not inhibited if the consideration is paid, or

agreed or understood to be paid, by an alien of the disqualified classes—In a prosecution for conspiracy to violate the statute, where the conveyance was taken by an American citizen and the consideration paid by an ineligible Japanese, but with intent, as it was claimed, that the interest should be held for his children, who were American citizens by birth, *held;* That the statutory presumption of intent is consistent with the due process and equal protection clauses of the Fourteenth Amendment and with the provision of the treaty with Japan guaranteeing to the subjects of the parties to it protection of persons and property and enjoyment in that respect of the rights and privileges granted native citizens. Pp. 261, 262.

62 Cal. App. 22, affirmed.

Error to a judgment of the California District Court of Appeal affirming a sentence for conspiracy to violate the Alien Land Law of that State. The Supreme Court of California had refused a petition for review.

Mr. Algernon Crofton, with whom *Mr. Charles A. Wetmore, Jr.,* was on the brief, for plaintiff in error.

Mr. F. L. Guerena for defendant in error. *Messrs. U. S. Webb,* Attorney General of California, *Frank English, John H. Riordan* and *J. Charles Jones,* Deputy Attorneys General, were on the brief.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiffs in error were convicted in the superior court of Sonoma County, California, of conspiracy to effect a transfer of real property in violation of the Alien Land Law of that State. Judgment was affirmed by the district court of appeal. 62 Cal. App. 22. A petition to have the case heard and determined in the Supreme Court of California was denied. The case is here on writ of error. § 237, Judicial Code.

Under the Alien Land Law, Japanese subjects who are not eligible to citizenship under the laws of the United

States are not permitted to acquire, use or control agricultural lands in California. Statutes of California, 1921, p. lxxxiii. Treaty of February 21, 1911, 37 Stat. 1504. *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; *Frick* v. *Webb,* 263 U. S. 326; *Terrace* v. *Thompson,* 263 U. S. 197. Section 9 provides: "Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof [one not eligible to citizenship under the laws of the United States] is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein. A prima facie presumption that the conveyance is made with such intent shall arise upon proof of . . . the taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof; . . ." Section 10 provides that, if two or more persons conspire to effect a transfer of real property or of any interest therein in violation of the provisions of the statute, they shall be punishable by fine or imprisonment or both.

Plaintiff in error Cockrill is an American, and Ikada is a Japanese subject not eligible to citizenship. They entered into an agreement to purchase certain agricultural lands and to take title in the name of Cockrill. Ikada furnished the money which was paid on account of the purchase price, and, upon the making of the contract, took possession of the property. Cockrill had no interest in the land; and the prosecution maintained that he made the contract with the seller and intended to take the deed and hold the land in trust for Ikada. But

plaintiffs in error represented that the land was being acquired for and was to be owned by the children of Ikada, who are natives of the United States and entitled to take and hold such lands. See *Estate of Tetsubumi Yano,* 188 Cal. 645, 649. The court included in its charge to the jury the above quoted provisions of section 9. Plaintiffs in error assert that the rule of evidence so declared violates the equal protection clause of the Fourteenth Amendment and also the treaty between the United States and Japan.

It is not, and could not reasonably be, suggested that the statute is repugnant to the due process clause. It does not operate to preclude any defense. The inference that payment of the purchase price by one from whom the privilege of acquisition is withheld and the taking of the land in the name of one of another class are for the purpose of getting the control of the land for the ineligible alien is not fanciful, arbitrary or unreasonable. There is a rational connection between the facts and the intent authorized to be inferred from them. The statute involves no attempt to relieve the prosecution of the burden of proving guilt beyond reasonable doubt. It merely creates a presumption which may be overcome by evidence sufficient to raise a reasonable doubt. See *Yee Hem* v. *United States, ante,* p. 178; *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43; *People* v. *Rodriguez,* 182 Cal. 197.

The statute is not repugnant to the equal protection clause. The rule of evidence applies equally and without discrimination to all persons—to citizens and eligible aliens as well to the ineligible. In the application of the law at the trial, no distinction was made between the citizen and the Japanese. Plaintiffs in error maintain that invalidity results from the fact that, where payment of the purchase price is made by an ineligible alien, the law creates a presumption of a purpose to pre-

vent, evade or avoid escheat, while no such presumption arises where such payment is made by a citizen or eligible alien. But there are reasonable grounds for the distinction. Conveyances to ineligible Japanese are void as to the State and the lands conveyed escheat. Payment by such aliens for agricultural lands taken in the names of persons not of that class reasonably may be given a significance as evidence of intent to avoid escheat not attributable to like acts of persons who have the privilege of owning such lands. The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the State between ineligible aliens and other persons within its jurisdiction. The State has a wide discretion and may classify persons on bases that are reasonable and germane having regard to the purpose of the legislation. *Truax* v. *Corrigan,* 257 U. S. 312, 337. This is well illustrated by the Alien Land Laws. *Terrace* v. *Thompson, supra,* 218; *Porterfield* v. *Webb, supra,* 233; *Webb* v. *O'Brien, supra,* 324; *Frick* v. *Webb, supra,* 333. The fact that in California all privileges in respect of the acquisition, use and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence.

It is the third paragraph of Article I of the treaty that plaintiffs in error contend is violated. The treaty provision is, "The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects." It is plain that the treaty does not furnish any protection to Japanese subjects in this country against the application of a rule of evidence created

by state enactment that is not given them by the due process and equal protection clauses of the Fourteenth Amendment. As the law does not contravene these constitutional provisions, it must be held not to violate the treaty.

Judgment affirmed.

SOUTHERN PACIFIC COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 285. Argued November 19, 20, 1924.—Decided May 11, 1925.

1. Where a railroad, for transporting applicants for enlistment in the Army, discharged, retired and furloughed soldiers, and civilian employees of the War Department, rendered its bills at land-grant rates, knowing that according to a ruling of the Comptroller of the Treasury such persons were to be regarded as "troops of the United States" for whose transportation only land-grant rates could be paid by disbursing officers, and accepted payment of its bills on that basis without protest, *held* that, though the Comptroller's ruling was erroneous, the railroad was bound by acquiescence and could not recover the difference between the amount received and the larger amount which it would have been lawfully entitled to charge under its tariff. P. 268.
2. But *aliter* where the bills, though rendered at land-grant rates, bore a short form of protest; "Amounts claimed in this bill accepted under protest"; or a form more extended and explanatory; since by these the government officers were sufficiently notified that payment at the lower rates would not be accepted in final settlement. P. 268.
3. Where, however, the railroad rendered most of its bills with indorsed protests, but a considerable number during the same period without them, as to these latter it was bound by its acceptance of the land-grant rates. P. 270.

59 Ct. Cls. 36, reversed.

APPEAL from a judgment of the Court of Claims rejecting the appellant's claim for the difference between

amounts paid by the Government for transportation at land-grant rates and the lawful tariff charges.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the briefs, for appellant.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

Mr. Justice Sanford delivered the opinion of the Court.

The Southern Pacific Company, having carried certain persons as passengers at the request of the Government and received payment for such transportation at land-grant rates, brought this action to recover the difference between the rates thus paid and the full tariff rates. The Court of Claims, on its findings of fact, being of opinion that the claimant by its course of proceeding and acceptance of the land-grant rates was precluded from the recovery of the balance of the full tariff rates, entered judgment dismissing the petition. 59 Ct. Cls. 36.

The facts found, shortly stated, are as follows: The claimant in 1911 became a party to the so-called "land-grant equalization agreements" with the Quartermaster General, by which it agreed (subject to certain exceptions not here material) to transport troops of the United States at the net rates effective over land-grant lines, that is, at fifty per cent. of the rates charged private parties.[1] Thereafter, between March 1, 1912, and June 18, 1916,[2] the claimant transported, upon Government requests, a number of applicants for enlistment in the Army, discharged, retired and furloughed soldiers, and civilian employees in the War Department.

[1] See *United States* v. *Union Pacific Railroad,* 249 U. S. 354, note 1.

[2] The date on which the so-called "interterritorial military arrangement" became effective as to the claimant and the other railroads.

It had been previously ruled by the Comptroller of the Treasury that such persons were to be regarded as troops of the United States and that their transportation could be paid for only at land-grant rates; and disbursing officers, as the claimant knew, were authorized to make payments on that basis only. Because of this ruling the claimant presented its bills for all such transportation on the form of voucher prescribed for transportation at land-grant rates,[3] in which it stated in appropriate columns the "gross amount" of the regular fares, the "amount to be deducted on account of land-grant," and, in the final column, the "amount claimed" (the gross amount less the land-grant deduction); and certified the accounts to be correct. All these vouchers were presented to the Disbursing Quartermaster at San Francisco, and were paid by him in the amounts claimed; and all these payments were accepted by the claimant.

Prior to January 1, 1914, the claimant, except in one instance, accepted payment of these bills without protest or other objection.

After January 1, 1914, however, there was written, typewritten or stamped by the claimant upon a part of the land-grant vouchers, before they were paid, a so-called short form of protest, reading as follows: "Amounts claimed in this bill accepted under protest." This form of protest was understood by the clerk who handled these bills in the office of the Disbursing Quartermaster as being "addressed to the matter of land-grant rates," for the purpose of reserving the claimant's right to present a further claim for full commercial fares to the accounting officers or the courts. The claimant used this form of protest on 201 vouchers between January 1 and October 1, 1914;[4] but 303 of the vouchers presented and paid during this period bore no protest.

[3] See 14 Comp. Dec. 967.

[4] Also on one previous voucher.

On October 1, 1914, the claimant began "systematically" to endorse in typewriting on the land-grant vouchers, before presentment, a so-called long form of protest, reading as follows: "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S. such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed." This form of protest was used on 516 vouchers between October 1, 1914, and June 18, 1916,[5] but 212 of the vouchers presented and paid within this period bore no form of protest whatever.

The claimant brought the present action in March, 1918, shortly before the decision in *United States* v. *Union Pacific Railroad*, 249 U. S. 354. In that case the railroad company, a party to the land-grant equalization agreement, having transported persons of all the classes that are here in question except civilian employees, had presented to the Auditor for the War Department claims for such transportation at the full tariff rates, and the Auditor and Comptroller having successively refused to allow these claims at more than the land-grant rates, had then brought suit in the Court of Claims to recover the full passenger fares. It was held by this court that such persons were not troops of the United States within the meaning of the land-grant acts and the equalization agreements, and that the railroad company was entitled to recover the full amount claimed. In the present case the Court of Claims held that in the light of this decision none of the classes of persons here in question could be regarded as troops of the United States, and recognized that the claimant would have been en-

[5] Also on four previous vouchers.

titled originally to compensation at the full passenger rates. This is not questioned by the Government; the sole contention being that, as was further held by the Court of Claims, the action of the claimant in voluntarily presenting its bills at the land-grant rates and accepting payment thereof, precludes it from recovery of the balance of the full rates to which it would otherwise have been entitled.

The question when the substantive right to recover an amount justly due from the Government is lost through some act or omission upon the part of the claimant, was considered at length in *St. Louis, Brownsville & Mexico Railway* v. *United States, ante,* p. 169, in which the decisions bearing on this question were collated. It was there said that this right "can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claimant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can, also, be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must mave been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel may arise." The defense of acquiescence by the acceptance of a smaller sum than was actu-

ally due, it was further pointed out, is not to be confused with the defense "of accord and satisfaction or compromise of a disputed claim," evidenced by a receipt in full or a release.

Manifestly there was here "no accord and satisfaction or compromise of a disputed claim." The claimant, while presenting its bills for transportation at the land-grant rates and accepting payment thereof, did not execute either a receipt in full for its transportation charges or a release thereof. The crucial question then is whether the conduct of the claimant with reference to the acceptance of the land-grant rates establishes an acquiescence in the payment thereof, in the nature of an abandonment or waiver, that operated as a discharge of its claim for the full passenger rates. This is to be determined by the application of the rules stated in *St. Louis, Brownsville & Mexico Railway* v. *United States, supra.*

1. It is clear that as to all the bills which were presented at land-grant rates prior to January 1, 1914, and paid and accepted without protest or other objection, the conduct of the claimant was such as to lead the Government to believe that the land-grant rates were accepted in full satisfaction of the original claims and established an acquiescence on the part of the claimant that operated as a discharge of the claims for the full passenger rates. *Oregon-Washington Railroad* v. *United States,* 255 U. S. 339, 347; *Western Pacific Railroad* v. *United States,* 255 U. S. 349, 355; *Louisville & Nashville Railroad* v. *United States,* 258 U. S. 374, 375; *Louisville & Nashville Railroad* v. *United States,* 267 U. S. 395; *St. Louis, Brownsville & Mexico Railway* v. *United States, supra.* This is not seriously questioned by the claimant.

2. The case is manifestly different as to those bills presented on the land-grant vouchers which bore either the short or long form of "protest." While a "protest" has no

definite legal significance in connection with the receipt of money—being ordinarily used in connection with the involuntary payment of money under legal compulsion or duress—it may nevertheless be effective as an indication of non-acquiescence in the receipt of the amount paid as a final settlement of the claim. In the present case it is clear that the use of these protests upon the vouchers was reasonably adapted to lead the Government officials to believe that the amounts of the vouchers were not all that was claimed and such amounts were not accepted in full satisfaction of the transportation claims. This was not only brought to the attention of the disbursing officer in the first instance, but later, in due course, to the attention of the accounting officers by whom the payment of the vouchers was approved. The clerk in the office of the Disbursing Quartermaster who handled these bills understood that the short form of protest was addressed to the matter of land-grant rates, for the purpose of reserving the claimant's right to present a further claim for full commercial fares; and there is no suggestion that either the Disbursing Quartermaster or the accounting officers understood that the payment of the vouchers on which the protests were endorsed was received in full settlement of the transportation claims.

We find no essential difference in this respect between the short and long forms of protest. The short form gave notice that the amounts claimed in the bills were "accepted under protest;" and the long form gave notice that by reason of the claim of the Government accounting officers the fares were shown at land-grant rates, under protest, without waiver of the claimant's right to full tariff fares, and that the payment of less than the full fares would be accepted "as part payment only for the services performed." And the fact that a preliminary reference was made merely to the claim of the accounting officers as to discharged soldiers, did not destroy the effect

of the protest in its entirety as a notice that the land-grant rates were claimed and accepted in part payment only.

We conclude that the endorsement of these protests on the vouchers sufficiently notified the government officers that the payment of the land-grant rates was not accepted in final settlement of transportation claims, and that, as to such vouchers, the Government has not established an acquiescence in the payment of the land-grant rates which discharges the claims for the remainder of the full tariff fares. And we are of opinion that the claimant was not compelled, at its peril, to present its claims originally for the full tariff rates, as was done in the *Union Pacific case*—which would have involved delay in the payment of any part of its claims—but that, having first presented its claim for the land-grant rates accompanied by notices showing that it did not accept such rates in final settlement, it was thereafter entitled to bring suit for the recovery of the remainder of the full tariff fares.

3. A different question arises, however, as to those bills which were presented on land-grant vouchers after January 1, 1914, upon which no protests were endorsed. It is perhaps true that the claimant, although presenting its bills on land-grant vouchers, might have sufficiently preserved its right to full compensation by a general notice, in advance, to the War Department that in so doing and in accepting payment on such vouchers at land-grant rates it did not intend to waive its claims to the full tariff rates and reserved the right to present subsequently its claims for the difference between the amounts paid and the full rates, and that in such case it would not have been essential to the claimant's right to full compensation that each specific bill should be accompanied by a notice showing its non-acquiescence therein as a final settlement. This, however, it did not do. It gave no such general

notice, but adopted for the preservation of its rights the method of endorsing its protests upon the separate vouchers. Having adopted this method of procedure it was compelled to follow it in order to preserve its rights. Between January 1 and October 1, 1914, about three-fifths of the vouchers, and between October 1, 1914 and June 18, 1916, about two-sevenths, bore no protest. The number is too great to be presumptively explained on the theory of inadvertence and oversight. There is nothing in the findings of fact to indicate that this was the case, and no explanation whatever appears for the absence of the protests. Under these circumstances we think that as to all the bills presented on land-grant vouchers after January 1, 1914, which bore no protest whatever, the case is in the same situation as the bills which were presented prior to that date, without any protest; and that for the same reason it must be held that the presentation of these vouchers at the land-grant rates and the acceptance of payment thereof, established an acquiescence on the part of the claimant which discharged its claim for further compensation at the full tariff rates.

The judgment of the Court of Claims is accordingly reversed, and the cause remanded to that court for further proceedings in conformity to this opinion.

Judgment reversed.

WESTERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 287. Argued November 19, 20, 1924.—Decided May 11, 1925.

1. Where transportation bills at land-grant rates bore endorsements sufficiently notifying government officers that payment at those

rates to the railroad was not accepted in final settlement, the railroad was not barred by acquiescence from further claiming the difference between the amounts received and the lawful tariff fares. See *So. Pacific Co.* v. *United States, ante,* p. 263. P. 274.

2. Claims accruing more than six years before beginning the action in the Court of Claims are barred by Jud. Code § 156. P. 275.
3. The provision of Rev. Stats. § 3477 that all transfers and assignments of any claim against the United States shall be absolutely null and void unless made after the allowance of such claims and the ascertainment of the amount due, does not apply to a transfer of claims through a judicial sale under an order of court. *St. Paul Railroad* v. *United States,* 112 U. S. 733, distinguished. P. 275.

59 Ct. Cls. 67, reversed.

APPEAL from a judgment of the Court of Claims rejecting claims of a railroad for transporting passengers for the Government.

Mr. George Francis Williams, with whom *Mr. Henry C. Clark* was on the brief, for appellant.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case, which was heard with *Southern Pacific Co.* v. *United States, ante,* p. 263, just decided, is a similar action brought by the Western Pacific Railroad to recover the difference between the land-grant rates and the full tariff rates for the transportation of passengers carried at the request of the Government. The Court of Claims, on its findings of fact, entered judgment dismissing the petition. 59 Ct. Cls. 67.

The petition covers claims for transportation services alleged to have been furnished between September 24,

1914, and June 18, 1916,[1] (a) by the Western Pacific Railway, a predecessor in title of the claimant; (b) by receivers of the property of said Railway appointed in a suit brought against it by a Trustee in a Federal District Court in California; and (c) by the claimant, which became the purchaser of the property of said Railway under a sale made in the said suit.

The material facts, as found, are as follows: During the period in question the Western Pacific Railway—which had entered into the so-called land-grant equalization agreements[2] for the transportation of troops of the United States at land-grant rates—the receivers in the said suit, and the claimant, successively carried as passengers, on Government requests, various discharged and retired soldiers, discharged military prisoners, and other persons. Bills for the transportation of such persons were presented by the Railway, the receivers, and the claimant, respectively, on land-grant vouchers, claiming land-grant rates, as in the *Southern Pacific Case, supra.* In all cases, however, there was typewritten on the vouchers before they were presented, an endorsement in the following form: "As United States Government accounting officers claim that they have no authority to allow or pay for the transportation of [here is typewritten the class of travel objected to] more than the fares for troops of the United States, such fares are shown herein but under protest, and the Western Pacific Railway Co. for itself and connecting carriers does not waive [?] of its rights to full publish—tariff fares and payment of any less amount will be accepted as part payment only for the services performed." All these vouchers were presented to the Government disbursing officers, and were paid by

[1] On the hearing other claims covering transportation furnished by the claimant after June 18, 1916, the effective date of the so-called "interterritorial military arrangement," were withdrawn.

[2] *Southern Pacific Co.* v. *United States, supra.*

them in the amounts of the land-grant rates, as claimed; and all these payments were accepted by the Railway, the receivers and the claimant, respectively.

Pursuant to a sale made under a decree in the Trustee's suit in the District Court the claimant acquired by a special master's deed all the property, assets and choses in action belonging to the Western Pacific Railway or to its receivers. In 1920, after payment had been received of all the land-grant vouchers, the claimant presented to the proper accounting officers of the Government supplemental claims covering the balance of the full passenger fares on all the transportation in question. These were disallowed; and the claimant on February 2, 1921, brought the present action.

1. It is not questioned that in the light of the decision in *United States* v. *Union Pacific Railroad,* 249 U. S. 354, none of the classes of persons here in question can be regarded as troops of the United States, and that the claimant and its predecessors would have been entitled originally to compensation at the full passenger rates. The Government contends, however, that—as was held by the Court of Claims—the action of the claimant and its predecessors in voluntarily presenting their bills at land-grant rates and accepting payment thereof, precludes the recovery of the balance of the full rates to which they would otherwise have been entitled. In this aspect the present case is in all respects similar to the *Southern Pacific Case, supra,* and is controlled by the decision therein; and on the authority of that decision we hold that the endorsements on the vouchers sufficiently notified the Government officers that the payment of land-grant rates was not accepted in final settlement of the transportation claims, and that the Government has not established an acquiescence in the payment of such rates which discharges the claims for the remainder of the full tariff fares.

2. All the claims which accrued more than six years prior to the beginning of the present action are, however, barred by the express provision contained in § 156 of the Judicial Code. This was recognized by the Court of Claims, and is not here questioned.

3. The Government further contends that as to the claims for transportation furnished by the Western Pacific Railway and its receivers, which were acquired by the claimant under the special master's deed, a recovery is precluded by § 3477 of the Revised Statutes. This section provides, *inter alia,* that all transfers and assignments of any claim against the United States, shall be " absolutely null and void," unless made after the allowance of such claims and the ascertainment of the amount due. The object of this section is to protect the Government and prevent frauds upon the Treasury. It applies only to cases of voluntary assignment of demands against the Government, and does not embrace cases where there has been a transfer of title by operation of law. *United States* v. *Gillis,* 95 U. S. 407, 416; *Erwin* v. *United States,* 97 U. S. 392, 397; *Goodman* v. *Niblack,* 102 U. S. 556, 560; *Price* v. *Forrest,* 173 U. S. 410, 421. And see *Seaboard Air Line* v. *United States,* 256 U. S. 655, 657. In *Price* v. *Forrest, supra,* p. 422, it was specifically held that this section did not apply to the assignment of a claim to a receiver under the order of a court, this being " the act of the law." So here the sale to the claimant of so much of the claims as had accrued to the receivers for transportation furnished by them, was clearly a transfer by operation of law and did not come within the prohibition of the statute.

As to the claims for the transportation that had been previously furnished by the Western Pacific Railway, the Government relies upon *St. Paul Railroad* v. *United States,* 112 U. S. 733, 736, in which there was a general statement—not necessarily involved in the decision of the

case—that a voluntary transfer of a claim against the United States, by way of mortgage, finally completed and made absolute by a judicial sale, falls within the prohibition of § 3477. We need not now determine the effect to be given to this general statement, nor whether it could have any application where the mortgage does not specifically transfer existing claims against the United States. In any event it has no application to the present case. The findings of fact do not show that these claims were included in any mortgage executed by the Railway or were acquired by the claimant through its foreclosure, but merely that they were acquired through a judicial sale pursuant to a decree of the court. So far as appears from the findings this was merely a sale of assets of the Railway not covered by a mortgage, bringing the case in this aspect within the doctrine of *Price* v. *Forrest, supra,* as a transfer of the claims by operation of law.

We conclude that on the facts found § 3477 does not preclude the recovery of any of the claims in suit.

The judgment of the Court of Claims is accordingly reversed, and the cause remanded to that court for further proceedings in conformity to this opinion.

Reversed.

NORTH LARAMIE LAND COMPANY *v.* HOFFMAN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

No. 323. Argued April 14, 1925.—Decided May 11, 1925.

1. Upon review of a judgment of a state court involving the constitutionality of a state statute, the interpretation of the statute adopted by the state court is binding on this court. P. 282.
2. The Wyoming Road Law (Comp. Stat. 1910, as amended, § 2524,) limits the time within which a land owner may file objections

to the establishment of a road and claim for damages to thirty days after the Board of County Commissioners determines to establish it. *Held,* reasonable, and consistent with the due process clause of the Fourteenth Amendment. P. 282.

3. The necessity and expediency of taking private property for a public road are legislative questions, to a decision of which a hearing of the land owner is not essential under the Fourteenth Amendment. P. 284.
4. The Wyoming Road Law, *supra,* provides that notice of proposed establishment of a road by the Board of County Commissioners shall be published for three successive weeks in three successive issues of some official paper published in the county; that there shall be an appraisal, when claims for damages are filed; and that any applicant for damages may, within thirty days after the final decision of the board establishing the road and fixing the damages, appeal to the District Court of the County, which has jurisdiction to determine the amount of damages in the same manner as in a court action. Under Comp. Stats. Wyo. §§ 1413, 1424, the meetings of the board are public and all their proceedings must be promptly published in a newspaper of the county—*Held* that this procedure affords due process to the land owner on the matter of damages, since the hearing in the District Court makes unnecessary a hearing before the board or the appraisers, and, through the publication of the board's action, the land owner is duly notified of the date from which his time for appeal begins to run. P. 285.

30 Wyo. 238, affirmed.

The plaintiff in error, which was plaintiff below, brought action in the District Court of Platt County, Wyoming, against the Board of County Commissioners of that county, asserting the illegality of the establishment of a certain road running through and appropriating for that purpose part of plaintiff's land. The petition prayed that the defendants "be perpetually restrained from taking any further proceedings or doing acts with respect to locating said proposed road." The defendants appeared and answered and after hearing upon the issues of law and fact, judgment of the District Court was entered denying relief to the plaintiff. Plaintiff thereupon removed the cause by petition in error to the Su-

preme Court of the State of Wyoming, which affirmed the decree of the lower court. 30 Wyoming 238.

The case comes here upon assignments of error calling in question both the constitutionality of the public road law of the State of Wyoming and the proceedings had under it resulting in opening the road across the plaintiff's land, on the ground that such statutes and procedure amounted to a denial of due process of law and a taking of property without due process of law in contravention of the Fourteenth Amendment of the Federal Constitution. The particular grounds of attack are that the notice of the proceedings was not sufficient to meet the requirements of the constitutional provision; that there was, under the provisions of the statute, a denial of an opportunity to Plaintiff in Error to be heard and that the entire proceedings were void for want of the sufficient statutory petition for initiating them.

The applicable statutory provisions, so far as material to the present inquiry, may be summarily stated as follows:

The Statute of the State of Wyoming, known as the "Road Act," Wyoming Compiled Statutes of 1910 as amended by Laws of 1913, Chapter 73, prescribes the following procedure for the location and establishment of public roads:

(a) A petition for the establishment of a road signed by ten or more electors of the County residing within fifteen miles of the proposed road, may be filed in the office of the County Clerk (Section 2516).

(b) Upon the filing of the petition, the Board of County Commissioners, or its chairman, is required to appoint a disinterested elector, who may be a member of the Board, as a viewer to determine whether the proposed road is required (Section 2518).

(c) The viewer is required to report whether the proposed road is practicable and ought to be established, stat-

ing probable cost and such other matters as shall enable the Board to act understandingly (Section 2518).

(d) If the Board shall determine to establish the road, it is required to appoint a day, not less than thirty days after such determination, on or before which date all objections and claims for damages are required to be filed with the County Clerk (Section 2524).

(e) By Laws of Wyoming 1913, Chapter 73, (Section 2525) it is provided " that notice of the proposed establishing of the road shall be published for three successive weeks in three successive issues of some official paper published in the county, if any such there be, and if no newspaper be published therein, such notice shall be posted in at least three public places along the line of said proposed or altered road " and the Statute provides that " publication and posting of such notice shall be a legal and sufficient notice to all persons owning lands or claiming any interest in lands over which the proposed road is to be located or altered." The Statute does not require that the notice shall state the time within which objections and claims may be filed and there is no direct statutory requirement that the Board shall hear objections to the establishment of a road or claims for damages, although it is given power " to continue all such claims for a further hearing " until the matter can be disposed of (Section 2527).

(f) When claims for damages are filed, the Board, " at its next regular or special meeting, or as soon thereafter as may be practicable or convenient " is required to appoint three suitable and disinterested electors of the county as appraisers to view the road, on a day to be fixed by the Board, and to report in writing within thirty days fixing the amount of damage sustained by the claimants (Section 2528).

(g) The appraisers are required to view the ground and fix the amount of damages sustained by each claimant

after allowing for benefits which may accrue by reason of the location of the road. They may notify claimants of the time and place of their meeting; and may hear evidence (Section 2530).

(h) At the next meeting of the Board of County Commissioners after the report of the appraisers has been filed, the Board may hear testimony and consider petitions and may fix damages, increasing or diminishing them, and establish the road (Section 2531).

(i) There are no statutory provisions requiring notice of the meeting of appraisers to be given to claimants or giving to them a right to be heard, either by the Board of Appraisers or the Board of County Commissioners to whom the appraisers are required to report. But from the final decision of the Board establishing the road and fixing the amount of damages, any applicant for damages may appeal to the District Court of the County, which has jurisdiction to determine the amount of the damages in the same manner as in a court action. Notice of appeal is required to be filed with the Clerk of the Court within thirty days after the decision of the Board (Section 2336).

A written instrument purporting to be a petition for location of the road in question was filed with the Board of County Commissioners and the Chairman of the Board thereupon appointed himself a viewer pursuant to Sec. 2524 of the Road Law. Acting in that capacity, he reported to the Board recommending the establishment of the road. Public notice dated May 8, 1917, of the proposed establishing of the road was given by publication, in accordance with the Statute for four successive weeks, in a local newspaper, the first publication being dated May 9th and the last being dated May 30th, 1917. In the form provided by the Statute and in accordance with a permissive provision of the Statute (Sec. 2525 as amended), the notice as published contained the informa-

tion that all objections to the proposed road and all claims for damages " must be " filed not later than June 7, 1917. By stipulation entered into by plaintiff with the Board, the time to file claims for damages was extended until July 7, 1917. On June 30, 1917, which was after the date fixed by the published notice for filing objections and claims, and more than thirty days after the decision of the Board to locate the road and more than thirty days after publication of the notice, plaintiffs filed objections to the establishment of the road as unauthorized under the laws and Constitution of the State of Wyoming and of the United States and made claim of damages, without specifying any amount, for the opening of the road.

In the meantime and on June 8, 1917, the Board appointed appraisers to determine the damages occasioned by the establishment of the proposed road, directing them to view the said proposed road for the purpose of determining damages. On the 16th day of June, 1917, they reported that the benefits to be derived from the road exceeded the damages to land owners. The proceedings had by the appraisers were *ex parte* and without notice to the plaintiff. Thereafter, on August 10, 1917, the Board of County Commissioners of Platt County took final action establishing the road in accordance with the petition and took no action fixing or determining the damages of any claimant. Plaintiff took no appeal from the determination of the County Commissioners authorizing the location of the road as provided by Section 2536, and on November 30, 1917, brought its action for an injunction.

Mr. George G. King, with whom *Messrs. Max Pam, Harry Boyd Hurd* and *Roderick N. Matson* were on the brief, for plaintiff in error.

No brief filed for defendants in error.

MR. JUSTICE STONE, after stating the case as above, delivered the opinion of the Court.

In the Supreme Court of Wyoming, on error to the District Court of Platt County, plaintiff urged various technical objections to the procedure had under the road law of Wyoming for the establishment of the proposed road, particularly that the petition for the establishment of the road was insufficient within the provisions of the Statute and also duly presented to the Court for its consideration the constitutional objections which are urged here.

The Supreme Court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound. *American Land Co.* v. *Zeiss,* 219 U. S. 47; *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U. S. 445. That court also held that under the terms of the Statute, Section 2524, the time for filing objections to the establishment of the road and claims for damages could not be extended by the Board of County Commissioners and that the plaintiff having failed to file its objection and claim within the statutory period, was thereby foreclosed from further proceedings under it. By this interpretation of the meaning and effect of the Statute of Wyoming we are likewise bound, but we are nevertheless free to inquire whether the Statute as interpreted and applied by the State Court denies rights guaranteed by the Constitution and to consider the contention of plaintiff in error that the Statute itself is unconstitutional because of the insufficiency of the required notice of the proceedings had under it, and because by it plaintiff was denied a hearing within the meaning of the due process clause of the Fourteenth Amendment.

Under the requirements of that Amendment, property may not be taken for public use without reasonable notice of the proceedings authorized for its taking and

without reasonable opportunity to be heard as to substantial matters of right affected by the taking. But a state statute does not contravene the provisions of that Amendment unless, in some substantial way, it infringes the fundamental rights of citizens and, in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.

All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard* v. *Hunter*, 204 U. S. 241, at p. 262.

The limitation of time provided by the Wyoming Statute for filing notice of objection and claim for

damages to thirty days after the determination of the Board of County Commissioners to establish a public road does not, on its face, appear to be unreasonable and no foundation is laid either in the record or briefs of counsel for the contention that it is, in its practical operation, unreasonable for that purpose, or that by it there was a denial of due process of law. A like or less period of notice by publication has been repeatedly held by this Court to satisfy the constitutional requirements for the initiation of proceedings to enforce assessment or tax liens. *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526; *Castillo* v. *McConnico,* 168 U. S. 674, 680; *Ballard* v. *Hunter, supra.*

So also with respect to judicial proceedings affecting title to land, *Arndt* v. *Griggs,* 134 U. S. 316; *Hamilton* v. *Brown,* 161 U. S. 256, and with respect to the condemnation or appropriation of land for public use, *Huling* v. *Kaw Valley Railway & Improvement Co., supra; Bragg* v. *Weaver,* 251 U. S. 57.

There remains for consideration the plaintiff's objection that the statutory method of giving notice of the proposed location of the road under Section 2525 of the Statute was insufficient and that plaintiff was afforded no opportunity for a hearing before either the appraisers or the Board of County Commissioners with respect either to the location of the road or the damage suffered by plaintiff by the opening of the road. The taking of property provided for by the Statute is a taking of land under the direction of public officers for a public use. As was held in *Bragg* v. *Weaver, supra,* the necessity and expediency of the taking of property for public use "are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Joslin Co.* v. *Providence,* 262 U. S. 668, 678; *Georgia* v. *Chattanooga,* 264 U. S. 472, 483. With respect to the compensation

for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings. See *Bragg* v. *Weaver, supra.*

There being a newspaper published within Platt County, notice of the initiation of the proceedings for the establishment of the road by publication for three successive weeks in three successive issues of some official paper published in the County, is made mandatory by Section 2525 of the Public Road Law of Wyoming, as amended by Chapter 73 of the Laws of Wyoming of 1913, and the requirements of this Statute were fully complied with. These requirements in all material respects are identical with those passed upon by this Court in *Huling* v. *Kaw Valley Railway & Improvement Co., supra,* in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law.

And see also *Bragg* v. *Weaver, supra,* holding that in proceedings for the condemnation of property for public use, notice by publication is constitutionally sufficient. See also *Castillo* v. *McConnico; Ballard* v. *Hunter; Arndt* v. *Griggs* and *Hamilton* v. *Brown, supra,* upholding a like procedure for the foreclosure of assessment or tax liens.

But the plaintiff in error objects to the procedure established by the Statute because, under it, plaintiff was afforded no opportunity for a hearing either before the Appraisers or the Board of County Commissioners, and in consequence, assuming the sufficiency of the notice, there was a denial of due process of law in determining the amount of damage or compensation to be awarded for the taking of plaintiff's property. When there is a constitutional right to a hearing, as was held in *Bragg* v. *Weaver, supra,* one constitutional method of fixing

damages "among several admissible modes is that of causing the amount to be assessed by viewers subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial." This is the rule adopted in numerous other cases. See *Huling* v. *Kaw Valley Railway & Improvement Co., supra; Lent* v. *Tillson,* 140 U. S. 316, and *Winona & St. Peter Land Co.* v. *Minnesota, supra.* It is the mode of procedure adopted by the Wyoming Statute. Section 2536 provides for an appeal to the District Court of the County within thirty days after the decision of the Board of County Commissioners establishing the road.

Plaintiff in error does not deny the soundness of the rule, but questions its applicability to the present case on the ground that the procedure established by the Statute affords no means of ascertaining at what time the final decision of the Board of County Commissioners establishing the road is made, and consequently when the time to appeal to the District Court, as provided by Section 2536, begins to run. It is urged that notwithstanding the fact that the Board of County Commissioners may lawfully meet and reach a final decision, and notwithstanding the fact that the Board in the present case kept minutes and recorded its action in making final decision to establish the road in question, nevertheless the law provides for no public record from which the decision of the Board may be ascertained and claimants are denied any legal means of ascertaining whether in fact such action has been taken.

In making this contention, plaintiff in error overlooks the plain effect of Sections 1413 and 1424 of the Compiled Statutes of Wyoming of 1920 which were in force at the time of the proceedings in question. By Section 1413 it is provided that all meetings of the Board of County Commissioners are public meetings, and Section 1424 requires that all proceedings of the Board of County

Commissioners shall be published in a newspaper of the County and the County Clerk is required to furnish such paper with a copy of the proceedings of each meeting for that purpose, within forty-eight hours after adjournment. No contention was made in the courts below or here that the requirements of these sections of the law were not complied with, and there is no basis for such contention in the assignments of error.

Having in mind the character of the procedure in condemnation proceedings and the numerous decisions of this Court, to which reference has been made, establishing what is a due procedure in this class of cases, we have no hesitancy in holding that the method provided by Section 1424 of giving notice of the final decision of the Board of County Commissioners establishing the road is reasonably adapted to the other procedure laid down in the Statute, that it affords reasonable opportunity to claimants to ascertain the fact and that it satisfies all constitutional requirements. A land owner who had notice of the initiation of the proceedings for the opening of the road published in accordance with the Statute, which notice as we have seen under the decisions of this Court is constitutionally sufficient, would have experienced no practical difficulty in ascertaining when the Board of County Commissioners took final action, and by filing notice of appeal to the District Court within thirty days thereafter, he could have secured the full hearing to which he is constitutionally entitled. Having failed to adopt such procedure, the plaintiff cannot complain of a denial of due process of law.

The judgment of the Supreme Court of Wyoming is

Affirmed.

NORTH CAROLINA RAILROAD COMPANY *v.* STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 322. Argued April 14, 1925.—Decided May 25, 1925.

1. A judgment of a state supreme court affirming the refusal of a lower court to continue a temporary restraining order and to grant a permanent injunction on the petition and answer, and leaving nothing for the lower court to do but dismiss the petition, *held* a final judgment and reviewable by certiorari under Jud. Code § 237, as amended September 6, 1916. P. 291.
2. An appellate court, upon an appeal from a temporary or interlocutory order or decree, has power, under general equity practice, to examine the merits, if sufficiently shown by the pleadings and record, and, upon deciding them for the defendant, to dismiss the bill. *Id.*
3. A judgment not appealed from, however erroneous, is *res judicata*. P. 292.
4. Section 206 (g) of the Transportation Act of 1920, providing: "No execution or process . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control," does not prevent judgments in the cases specified but protects the carrier's property from execution under them. *Id.*
5. A decision by a state supreme court that a judgment recovered against a carrier for personal injuries suffered while its railroad was under federal control conclusively established the right to recover a second judgment in an action on the first, is not a decision that the first judgment established plaintiff's right to levy execution on the carrier's property notwithstanding § 206 (g) of the Transportation Act. P. 293.
6. The reasoning and opinion of a court are not *res judicata* unless the subject matter be definitely disposed by the decree. P. 294.

187 N. C. 184, reversed.

CERTIORARI to a decree of the Supreme Court of North Carolina affirming a decree which refused relief by injunction against the levy upon the Railroad's property of an execution to satisfy a judgment based on another judgment, which last had been recovered in an action against the railroad for personal injuries. See also 184 N. C. 442.

Mr. S. R. Prince, with whom *Messrs. H. O'B. Cooper, W. M. Hendren* and *L. E. Jeffries* were on the briefs, for petitioner.

Mr. Chapin Brown, with whom *Messrs. Robert C. Strudwick* and *William P. Bynum* were on the briefs, for respondents.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The questions in this case are two. One is of our jurisdiction to issue the writ of certiorari to review a judgment of the Supreme Court of North Carolina, and turns on its finality. The second is whether a judgment of that court against the North Carolina Railroad Company for injuries caused by the operation of the road by the United States will bar a suit by the Company to enjoin the execution of such judgment against its property under § 206 (g) of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 462). The relevant part of the section reads as follows:

"No execution or process . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

Maggie Barber was killed in North Carolina by a collision between a locomotive of the Southern Railway

Company and an automobile in which she was riding. It was on the line of the North Carolina Railroad Company, then under a long lease to the Southern Railway Company. King, the administrator of the deceased, sued the North Carolina Company, in the Superior Court of Guilford County, charging negligence by defendant's lessee. The defendant by answer denied that the death was caused by the negligence of its lessee or its employees, because the railroad was then being operated by the Director General of Railroads. The jury returned a verdict for $2,500 and judgment was entered. An appeal was attempted but was not perfected, due, it is said, to the illness of counsel. Without seeking execution, the administrator instituted a second suit, based on the first judgment, averring that it was unpaid. The Company by answer set up § 206 (g), above quoted, as a defense, and averred that the second suit was brought to evade the section. The plaintiff demurred, on the ground that the first judgment had become *res judicata*. The court rendered judgment with interest and further costs. The Company appealed, and the judgment was affirmed. 184 N. C. 442. The Company opposed execution in the lower court, and excepted to the order directing it to Story, the Sheriff of Alamance County, to be levied upon certain real estate of the Company in that county.

The Company then brought the present action based on § 206 (g) in the Superior Court of Guilford County against Story and the administrator, seeking to enjoin permanently the execution. The defendants answering admitted the execution but pleaded the second judgment as *res judicata*. The Company secured a temporary restraining order and a rule on the defendants to show cause why the temporary order should not be continued and made permanent. On hearing, the motion to continue the order and make it permanent was denied. The court, pending plaintiff's appeal, stayed the execution

upon the giving of bond, while the plaintiff was taxed with the costs of the case. On appeal, the action of the lower court was affirmed by the Supreme Court. 187 N. C. 184. This Court then granted a certiorari and brought the case here. 264 U. S. 579.

Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, provides that final judgments of the highest court of a State are subject to review by certiorari. Is this judgment a final judgment? We think it is. In its terms it affirms the refusal of the lower court to continue the temporary order and to grant a permanent injunction. The Supreme Court based its decision on the facts admitted in the petition and answer. Its judgment was that the previous judgment as between the parties was *res judicata*, estopped the Company from resisting execution and thereby deprived it of any right to either a temporary or permanent injunction. Injunction was the only relief which the Company sought or could seek under its petition and prayer. The affirmance of the judgment of the lower court upon the certified opinion of the Supreme Court, left nothing for the Guilford County Court to do but to dismiss the petition. Something is said about other issues raised by the administrator in his answer; but the ruling of the Supreme Court ignored them and disposed of the case in his favor. Such a decree is a final decree. *Chesapeake & Potomac Telephone Company* v. *Manning,* 186 U. S. 238; *Mower* v. *Fletcher,* 114 U. S. 127; *Commissioners* v. *Lucas, Treasurer,* 93 U. S. 108; *Flemming* v. *Roberts,* 84 N. C. 532, 539. See also *Forgay* v. *Conrad,* 6 How. 201; *Bronson* v. *Railroad Company,* 2 Black, 524; *Beebe* v. *Russell,* 19 How. 283; *Crosby* v. *Buchanan,* 23 Wall. 420; *Thomson* v. *Dean,* 7 Wall. 342. Compare *Headman* v. *Commissioners,* 177 N. C. 261.

It is said that the judge of the lower court to whom the application for the continuance of the temporary injunc-

tion and the granting of a permanent injunction in this case had been referred by the regular judge of Guilford County, was a judge of a court of another county, and had by the practice of the State no power to grant a permanent injunction, and so that the appeal from his order denying the application to continue the temporary injunction did not bring to the Supreme Court for its decision the question of the issue of a permanent injunction. The report of the case in the Supreme Court shows it as one presenting the question of an application to continue the temporary injunction and to make it permanent, and, whatever the power of a judge of a court in another county in North Carolina to allow a permanent injunction in his court, we must assume from the action of the Supreme Court, and the recital of what was before it, that it intended the Guilford County Court on the coming down of its mandate to terminate the case by following its opinion. By the ordinary practice in equity as administered in England and this country an appellate court has the power on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 523, 524, and cases cited; *Denver* v. *New York Trust Co.,* 229 U. S. 123; *Meccano Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141. We think we have jurisdiction.

Coming now to the merits, it may be conceded that the first judgment against the Company in favor of the administrator, however erroneous it was in view of the cases of *Missouri Pacific Railroad* v. *Ault,* 256 U. S. 554, and *North Carolina Railroad Company* v. *Lee, Administrator,* 260 U. S. 16, not having been appealed from was *res judicata.* Nor could § 206 (g) prevent the second judgment. It was not directed against judgments. It was intended to pro-

tect the property of the Company not by preventing a judgment but by preventing an execution to satisfy a judgment for injury by Government operation of its road, whether that judgment was rendered against the carrier which leased the road, against the carrier which owned the road, or against the Government itself. The language of the statute assumes the existence of judgments against carriers for fault of the Government management before the section comes into play. There had been so much diversity of practice as to the person against whom the judgment should be rendered in seeking to establish and collect claims for injuries caused in government operation that Congress adopted this unusually broad method of rendering the property of the carriers immune. By virtue of a law of Congress plainly within its power, a distinction was thus made between the judgment and the execution. The state Supreme Court decided that the right to a judgment as between the plaintiff and the Railroad Company in the second case was established by the first judgment, not that a right to execution thereon was established. 184 N. C. 442.

After considering the contention made by the Company against the right to a judgment because of § 206 (g), the court said (page 448):

"It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of the defendant road, and his proceeding, therefore, does not come within the literal terms of the provision on which he here relies, but inasmuch as the answer contains averment that plaintiff is wrongfully seeking in this present suit to avoid the force and effect of the statutory provision just quoted, we consider it pertinent to say that in our opinion the judgment sued on does not come within the inhibition as stated."

The Court then proceeded to consider § 10 of the Federal Control Act, 40 Stat. 456, and paragraphs A, B, C,

D, E, and G of § 206 of the Transportation Act of 1920, and to hold that the former was a prohibition against physical interference by third persons, creditors or others, while the road was in the possession of the Government, and that the latter was a protection of the carriers in possession from physical interference by actions or judgments provided and allowed for by the Government. "But," said the Court, "this legislation in our view was never intended to protect the carriers from judgments in independent suits by claimants when they have failed to plead or properly insist on the immunity from liability which had been provided for their protection." In effect, the Court gave two reasons for its conclusion, the first of which was that it was not dealing with an execution and the second that § 206 (g) did not apply to either a judgment or an execution in a case like the one before it. But the point adjudged was not the effect of § 206 (g) on an execution, whatever the inference from the Court's reasoning. The estoppel of the Court's conclusion reached only the judgment

It is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance or only to be inferred by arguing from the decree. *Hopkins* v. *Lee,* 6 Wheat. 109, 114; *Norton* v. *Larney,* 266 U. S. 511, 517. The reasoning and opinion of the court are not *res judicata* unless the subject matter in issue be definitely disposed of by the decree. *Keane* v. *Fisher,* 10 La. Ann. 261; *Bridges* v. *McAlister,* 106 Ky. 791; *Probate Court* v. *Williams,* 30 R. I. 144; *Scottish-American Mortgage Company* v. *Bunckley,* 88 Miss. 641; *Braun* v. *Wisconsin Rendering Company,* 92 Wis. 245; *Citizens Bank of Emporia* v. *Brigham,* 61 Kan. 727.

The judgment of the Supreme Court of North Carolina is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

CORONADO COAL COMPANY ET AL. *v.* UNITED MINE WORKERS OF AMERICA ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 671. Argued January 7, 1925.—Decided May 25, 1925.

1. Where the constitution of an "international" trade union provided that its constituent district organizations might order local strikes within their respective districts on their own responsibility, but that such strikes, to be financed by the international union, must be sanctioned by its executive board, *held* that liability for damages to property inflicted in a local strike called without such sanction by a district organization could not be imposed on the larger organization, and that evidence of participation by its president was insufficient to show participation by the organization itself or to bind it on principles of agency. P. 299.
2. The mere reduction in the supply of an article to be shipped in interstate commerce by the tortious prevention of its production is ordinarily an indirect and remote obstruction to that commerce; but when the intent of those unlawfully preventing the production is to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act. P. 310.
3. In an action brought under the Anti-Trust Act by the owners of coal mines against a district union and local unions of coal miners and individuals, to recover damages resulting from the destruction of the mines during a strike, *held* that there was substantial evidence tending to prove that the purpose of such destruction on the part of the defendants was to stop the production of non-union coal and prevent its shipment to markets in other States where it would by competition tend to reduce the price of the commodity and thus affect injuriously the maintenance of wages for union labor in competing mines, and that direction of a verdict for the defendants was therefore erroneous. P. 305.
4. In such a case, evidence tending to prove that the production of the plaintiffs' mines with non-union labor would be sufficient to become a serious factor in the interstate coal market, is relevant, in connection with other evidence of the intent of the defendants to prevent its shipment to neighboring States at non-union cost. P. 305.

300 Fed. 972, in part affirmed; in part reversed.

Error to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court entered on a verdict directed for the defendants, in an action for treble damages under the Anti-Trust Act. For the opinion of this Court on a former review, see 259 U. S. 344.

Mr. Henry S. Drinker, Jr., with whom *Messrs. James B. McDonough* and *Edwin A. Lucas* were on the briefs, for plaintiffs in error.

Mr. William A. Glasgow, Jr., with whom *Messrs. G. L. Grant* and *Henry Warrum* were on the brief, for defendants in error.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a suit for damages for the effect of an alleged conspiracy of the defendants unlawfully to restrain and prevent plaintiffs' interstate trade in coal in violation of the first and second sections of the Federal Anti-Trust Act. The charge is that the defendants, in 1914, for the purpose of consummating the conspiracy, destroyed valuable mining properties of the plaintiffs. Treble damages and an attorney's fee are asked under the seventh section of the Act. The suit was brought in the District Court for the Western District of Arkansas. The plaintiffs are the Bache-Denman Coal Company and eight other corporations, in each of which the first named owns a controlling amount of stock. One of them is the Coronado Company, which gives the case its name. The corporations were correlated in organization and in the physical location of their mines. They had been operated for some years as a unit in the Prairie Creek Valley in Sebastian County, Arkansas. Immediately after the destruction of the property the District Court in a proper proceeding appointed receivers for the mines, and they or their successors are also parties to this suit. The original com-

plaint was filed in September, 1914. It was demurred to, and the demurrer sustained. On error in the Court of Appeals the ruling was reversed. *Dowd* v. *United Mine Workers of America,* 235 Fed. 1. The case then came on for trial on the third amended complaint and the answers of the defendants. The trial resulted in a verdict of $200,000 for the plaintiffs, which was trebled by the court, and a counsel fee of $25,000 and interest to the date of the judgment were added. The Court of Appeals reversed the judgment as to interest, but in other respects affirmed it. 258 Fed. 829. On error from this Court under § 241 of the Judicial Code, the judgments of both courts were reversed, and the cause remanded to the District Court for further proceedings. The opinion is reported in 259th United States, 344. The new trial, in October, 1923, resulted in a directed verdict and judgment for the defendants, which was affirmed by the Circuit Court of Appeals. The case is here on error for a second time.

In our previous opinion we held that the International Union, known as the United Mine Workers of America, the union known as United Mine Workers, District No. 21, and the subordinate local unions which were made defendants, were, though unincorporated associations, subject to suit under the Anti-Trust Act, but that there was not sufficient evidence to go to the jury to show participation by the International Union in the conspiracy and the wrongs done. We found evidence tending to show that District No. 21 and other defendants were engaged in the conspiracy and the destruction of the property, but not enough to show an intentional restraint of interstate trade and a violation of the Anti-Trust Act. The plaintiffs contend that they have now supplied the links lacking at the first trial against each of the principal defendants.

The Bache-Denman mines lie near the west line of Arkansas, next to Oklahoma. In all the Arkansas mines,

except a small one, union miners were engaged. The towns of the neighborhood—Hartford, Huntington, Midland, Frogtown and others—were peopled by them. District No. 21 was a regional organization of the United Mine Workers which included Arkansas, Texas and Oklahoma. Mr. Bache as manager of the plaintiffs' mines had been operating them for a number of years with union labor and under a District No. 21 contract and scale of wages, which did not expire until July 1, 1914. In March of that year he determined to run his mines thereafter on a non-union or open basis, and notified Pete Stewart, the president of the District No. 21, that he intended to do so. He shut down his mines and prepared to open them on an open shop basis on April 6th. He anticipated trouble. He employed three guards from the Burns Detective Agency and a number of others to aid him. He bought a number of Winchester rifles and ammunition, and surrounded his principal mining plant at Prairie Creek, No. 4, with cables strung on posts. He had notices prepared and sent to his employees who occupied the company's houses that they should vacate unless they remained in his employ. He sent out for non-union men and had gathered some thirty or more for the day fixed for the opening. The people in all that part of the country were urged by the members of the local unions to come to a meeting at the school house, a short distance from the Prairie Creek mine, for a public protest. The meeting appointed a committee to visit the superintendent and insist that the mine remain a union mine. The guards, directed not to use their guns save to defend their own lives, were at the mercy of the union miners, who assaulted them, took their guns away and injured a number of them. The employees deserted the mine, which filled with water upon the stopping of the pumps. One of the crowd went up to the top of the coal tipple and planted a flag on which was the legend, "This is a union man's country."

Mr. Bache obtained from the federal District Court an injunction against the union miners and others taking part in this lawless violence, including among them the President of No. 21, Pete Stewart, and Holt, its Secretary-Treasurer. Bache then prepared to resume mining. The work progressed under the protection of United States deputy marshals. Meanwhile non-union miners and other employees were brought in from out of the State. The United States marshals were after some weeks withdrawn from the property and only private guards were retained. Meanwhile the water had been pumped out and the mining and shipping of coal were about to begin. A large force of union miners of the local unions and of District No. 21, and their sympathizers, armed themselves with rifles and other guns furnished and paid for by the District No. 21 organization, and before day on July 17th began an attack upon the men whom Bache had brought together, and proceeded to destroy the property and equipment. It was a battle, in which two of the employees of the mine, after capture, were deliberately murdered, and not only gunfire and bullets but also dynamite and the torch were used to destroy all the property on the premises of the Prairie Creek Mine and of three of the other mines of the plaintiffs.

First. Is there any evidence in the present record tending to show that the International Union of the United Mine Workers participated?

Under Article 16 of the constitution of the International Union, it is provided, Section 1:

"No district shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board."

Section 2:

"Districts may order local strikes within their respective districts on their own responsibility, but where local

strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board."

It does not appear that the International Convention or Executive Board ever authorized this strike or took any part in the preparation for it or in its maintenance, or that they ratified it by paying any of the expenses. It came within the definition of a local strike in the constitutions of both the national and district organizations. The district organization made the preparations and paid the bills. It was sought on both trials to bring the International in by proving that the President of the national body, John P. White, was in Kansas City and heard of the trouble which had taken place on April 6 at Prairie Creek, and that he reported it to the International Board; and further that in May he made a long speech at a special convention of District No. 21, held at Fort Smith, Arkansas, for the trial of one of its officers for corruption, in which he referred with earnest approval to the great international union strikes in Colorado and West Virginia, but made no specific allusion to the Prairie Creek difficulty. It was also argued that communications from outsiders and editorials published in the United Mine Workers' journal giving an account of the occurrence at Prairie Creek, and representing that the troubles were due to the aggression of the armed guards, and that the action of the union men was justified in defense of their homes, expressed such sympathy with the union men as to constitute a ratification by the International Union because the United Mine Workers' journal was an authorized publication of the Union.

There were introduced at both trials long accounts of speeches and votes at national conventions of the International Union and meetings between union operators and representatives of the International Union from 1898 to 1914, revealing a constant effort on the part of the

operators to force wages down to meet the competition of non-union mines, accompanied by assurances by the union representatives that they would do everything to unionize the competing non-union mines and enable the union mine operators to maintain the scale insisted on.

We thought at the first hearing and we think now that none of this evidence tends to establish the participation of the International in the Prairie Creek strike and disturbances.

The new evidence adduced for the purpose is chiefly the testimony of one James K. McNamara. He was the secretary of Local Union No. 1526 at Hartford and checkweighman at Mine No. 4 of the Central Coal & Coke Company, a union mine which was a competitor of the Bache-Denman mines and of larger capacity and business. McNamara seems to have been the field leader of the union forces at the battle of July 17, 1914. He was tried with others and convicted for violation of the injunction as a conspiracy to defeat the process of the federal court, and was confined in the Leavenworth penitentiary. His testimony at the second trial was that in May, 1914, between the riot of April and the July battle, he went to Fort Smith to see Pete Stewart, the President of District No. 21, who was ill; that Stewart told him that he had been to Kansas City and had a talk with White, the International President, and that they had arranged a plan there to prevent Bache from producing coal. He said that White wished to see McNamara. Thereafter White came to Fort Smith to participate in the trial of the secretary of No. 21, already mentioned, between the 18th and 23rd of May. McNamara said he went to Fort Smith and met one Jim Slankard, who was a town marshal in Hartford, Sebastian County, and a very active promoter of union violence in this case, that Slankard told him that White wished to see him at the hotel, that he and Slankard went to White's room, that

White said, "How is things at Prairie Creek?" that the witness said, "Things are a little watery in Prairie Creek No. 4, yet," referring to the pumping of the water out of the mine which was going on, to which White replied: "Yes, I have been informed on that"; and then said, "Stewart told me that they can not get enough men to operate the mine." And continued, "If they do that, we must prevent the coal from getting into the market."

Q. Did he say why? A. Yes sir.

Q. Tell it. A. He said, "because if Bache coal, scab dug coal got into the market it would only be a matter of time until every union operator in that country would have to close down his mine, or scab it, because the union operators could not meet Bache competition."

Q. Did he say anything more after that? A. Yes sir.

Q. What did he say? A. He said, "When you go back to Hartford," he said, "I want you to tell the men what I have told you, but don't tell them I have told you."

Q. Did he say why not? A. Yes sir, he said he did not want the National Organization mixed up in this case; he said, "So far you have handled it, this part, and we have West Virginia and Colorado on our hands, and we can not bear any more fights."

Q. After that, did you go up and down the valley, as he said? A. I went back to Hartford and just quietly told the men what he said.

Q. How many of them did you tell, in a general way? A. I don't remember, I told practically everybody, I suppose.

Q. What did you tell them? A. I told them what White told me.

Q. Tell them the reasons, as he had given them to you? A. Yes sir.

Q. And in pursuance of that, was that doctrine told all over the valley? A. Yes sir. I told the men we wouldn't do anything until Bache begun producing coal. . . .

Q. Now did you know what Pete Stewart did on Monday following that convention about going around the field? A. He came to Hartford and made a speech. He said he would furnish guns and ammunition to all these men and their families in that valley, and if it was necessary he would sacrifice his own life to prevent Bache getting coal out there.

McNamara further testified that he saw between three and four hundred guns in boxes at Hartford and that part of them were distributed to the union miners and part returned to the secretary of District No. 21 at McAlester, Oklahoma. It was an avowed grievance of McNamara that he had not been paid sufficient money for the sacrifices he had made to the union cause. He said he had received $250 after the battle of July 17 from Stewart of District No. 21 to enable him to escape and avoid arrest, and something more later, but nothing from White or the International. He volunteered in his cross-examination the statement that White said to him at the interview: "Now you boys will not lose a day and your expenses will be paid for every day you are in this trouble." He was led by other questions to add that the trouble referred to by White was his suffering in the penitentiary. When it was called to his attention that his conversation with White in May, 1914, was before he had gone to the penitentiary, he found it necessary to qualify his statement and in answer to the question: "Did you have any arrangements to get money from him then?" said: "It was generally understood that the National Organization was going to pay us for the time we lost . . , and I thought the only man to go to would be White to get it, because he was the National President." And so, he said, two years after he had finished his term at the penitentiary, he met White at Hartford and asked him "When will I get my money that I was promised for this work?"

to which White replied: "I will take it up with the Board as soon as I can." But he said he never got any money. We do not regard this as evidence that he was promised or received money from the International either to induce or reward his unlawful acts.

Giving the fullest credence to all that McNamara says, it is clear that White did not intend by what he did to make the Prairie Creek difficulty a national affair. The International Board had not approved as the constitution required that they should do in order to make it so. It is quite true that White himself personally can be held as a defendant, if McNamara's evidence is to be believed, for urging and abetting the destruction of the plaintiffs' property; but according to McNamara's testimony, repeated by him several times, White was particular to insist that he did not wish to be regarded as acting for the International in the matter or to involve it in the Prairie Creek difficulties. In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.

As we said in our previous opinion, 259 U. S. 395:

"A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some

third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively."

Again:

"But it is said that the District was doing the work of the International and carrying out its policies and this circumstance makes the former an agent. We can not agree to this in the face of the specific stipulation between them that in such case unless the International expressly assumed responsibility, the District must meet it alone."

The action of the trial court in its direction of a verdict for the defendant, the International Union, must be affirmed.

Second. The tendency of the evidence to show that District No. 21 through its authorized leaders and agents and certain of its subordinate local unions organized and carried through the two attacks of April 6th and July 17th is so clear that it does not need further discussion. The only issue is whether the outrages, destruction and crimes committed were intentionally directed toward a restraint of interstate commerce. On the first trial we held that the evidence did not show this. The circumstances seemed amply to supply a different and a merely local motive for the conspiracy. The hostility of the head of District No. 21 and that of his men seemed sufficiently aroused by the coming of non-union men into that local community, by Mr. Bache's alleged breach of his contract with District No. 21 in employing non-union men three months before it expired, by his charged evasion of it through a manipulation of his numerous corporations, by his advertised anticipation of trespass and violence in his warning notices, in his enclosing his mining premises with a cable, and in stationing guards with guns to defend them. These preparations in the heart of a territory that had been completely unionized for years were likely to stir a bitterness of spirit in the neighborhood. Bache

had himself foreseen such a spirit when he took part in the formulation of a letter to his stockholders for his superintendent to sign, in which it was said: "To do this means a bitter fight, but in my opinion it can be accomplished by proper organization." He testified that he was entering into a matter he knew was perilous and dangerous to his companies. In view of these circumstances, we said in the previous opinion:

"Nothing of this is recited to justify in the slightest the lawlessness and outrages committed, but only to point out that as it was a local strike within the meaning of the International and District constitutions, so it was in fact a local strike, local in its origin and motive, local in its waging, and local in its felonious and murderous ending."

Were we concerned only with the riot of April 6th, we should reach the same conclusion now; but at the second trial plaintiffs were able to present a large amount of new evidence as to the attitude and purpose of the leaders and members of District No. 21, shown especially in the interval between the riot of April 6th and the destruction of the mine property on July 17th following. This is attributed by counsel for the plaintiffs to the fact that the new witnesses had moved away from Sebastian County, Arkansas, and were freed from local restraint and to grievances of former union sympathizers and participants who thought themselves not sufficiently appreciated.

Part of the new evidence was an extract from the convention proceedings of District No. 21 at Fort Smith, Arkansas, in February, 1914, in which the delegates discussed the difficulties presented in their maintenance of the union scale in Arkansas, Oklahoma and Texas because of the keen competition from the non-union fields of Southern Colorado and the non-union fields of the South in Alabama and Tennessee. Stewart, the president,

called attention to a new field in Oklahoma which he said would be a great competitor of union coal fields, and that District No. 21 would be forced to call a strike to bring into line certain operators in that section, and in the event that they did so the District would fight such a conflict to the bitter end regardless of cost. They also discussed a proposal to reduce the scale at the union mines at McCurtain, Oklahoma, which Stewart advocated, in order that the McCurtain operators might be put on a proper competitive basis in interstate markets with other operators. Several of the delegates at this convention took part in the riot of April 6th and the battle of July 17th following.

A new witness was one Hanraty, who was for seven years president of District No. 21, then a state mine inspector for three years, and then national organizer from 1912 to 1914, and president of District No. 21 again in 1915, but subsequently separated from the union. He testified that he had been closely associated as president of the District with Stewart as a member of the District executive board. He had been frequently in close conference with most of the leading men who had taken part in the violence at Prairie Creek. He said that he made speeches all through District No. 21 and did not remember a speech in which he did not mention the danger from non-union coal in taking the markets of union coal and forcing a non-union scale, and that it was a constant subject of discussion among the officers and members.

A leading witness among many others on this subject was a Dr. H. P. Routh, who practiced medicine at Hartford in 1914, and who lives now at Tulsa, Oklahoma. He said he was living at the Davis Hotel in Hartford in May, 1914, when the Executive Board of District No. 21 came down there for a meeting, and he heard a great deal of the conversation between the board members as to the

effect of this threatened non-union Bache-Denman operation. The conclusion they reached was that its success would affect so injuriously the trade of the Central Coal & Coke Company in shipping and selling coal in the neighboring States, that this company, the largest coal producer in that section, would have to become non-union. He talked specifically to several members of the Board and of the Union who, the evidence shows, were shown to be actively engaged in the battle of July 17th.

In addition to this, the testimony of McNamara, already discussed, while ineffective to establish the complicity of the International Union with this conspiracy, contains much, if credited, from which the jury could reasonably infer that the purpose of the union miners in District No. 21 and the local unions engaged in the plan was to destroy the power of the owners and lessees of the Bache-Denman mines to send their output into interstate commerce to compete with that of union mines in Oklahoma, in Kansas, in Louisiana markets and elsewhere. It appeared that 80 per cent. of all the product of the mines in Sebastian County went into other States.

New and more elaborate evidence was also introduced in the second trial as to the capacity of the Bache-Denman mines under the open shop. In our previous opinion we declined to hold that the mere elimination from interstate trade of 5,000 tons a week, which we took to be the practical limit of capacity of the plaintiffs, was significant in the total tonnage of the country or state or that its stoppage furnished a basis of itself for inferring a palpable and intentional restraint of interstate trade with which the defendants could be charged even though coal could be produced at a reduced cost under non-union conditions. The amount we assumed was based on the averments of the third amended bill in which the normal gross income from the four mines of the plaintiffs used by them, and which were destroyed, was alleged to be in good times be-

fore the trouble something more than $465,000 a year. At the price at which coal usually sold at the mine, this would make the output 5,000 tons a week. In a petition for a rehearing, plaintiffs urged upon us that this was an error and that the potential capacity of all the mines owned and leased by the Bache-Denman Company in that region, nine in number, was 5,000 tons a day rather than 5,000 tons a week. In the view we took of the evidence then before us, we had only the isolated circumstance of the reduction in shipment of the normal product of the four mines destroyed, without other evidence to show an actual intent and plan on the part of the defendants thereby to restrain interstate commerce. Whatever error therefore might have been made in stating the capacity of all the mines of the plaintiffs could not affect our conclusion, and the rehearing was denied. In the second trial, however, the total possible capacity not only of the destroyed mines but of the other unworked mines of plaintiffs became more important, in view of the direct testimony as to the moving purpose of District No. 21 to restrain and prevent plaintiffs' competition. The possible total to which their production might be brought was testified to by a number of new expert witnesess who were familiar with the mines and the business of mining and selling coal in the markets of the neighboring States. The conclusion of some of these witnesses was that with the union restrictions removed and a regular demand for the coal, the capacity of all the mines, owned and leased by the plaintiffs, those destroyed and those uninjured, could have been increased to substantially more than 5,000 tons a day. Such conclusion was possibly subject to criticism as exaggerated and speculative, and dependent on conditions probably not realizable, but it was all relevant evidence for the jury to consider and weigh as a circumstance with the rest of the new testimony in proof of intent of the leaders of District No. 21 to prevent shipments to neighboring States

of such an amount of non-union coal at non-union cost. There was also new evidence tending to show the knowledge by Hanraty, Stewart and other leaders of District No. 21 of the character of plaintiffs' mines and their capacity.

The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 408, 409; *United Leather Workers* v. *Herkert*, 265 U. S. 457, 471; *Industrial Association* v. *United States, ante*, p. 64. We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other States than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, and that the direction by the District Judge to return a verdict for the defendants other than the International Union was erroneous.

We affirm the judgment of the District Court and the Circuit Court of Appeals in favor of the International Union of United Mine Workers of America, and reverse that in favor of District No. 21 and the other local unions and the individual defendants and remand the cause as to them for a new trial.

Affirmed in part and reversed in part.

FERNANDEZ *v.* PHILLIPS, U. S. MARSHAL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

No. 680. Argued May 4, 1925.—Decided May 25, 1925.

1. In extradition proceedings, form is not to be insisted upon beyond the requirements of safety and justice, and the competent evidence establishing reasonable grounds for extradition is not necessarily evidence competent to convict. P. 312.
2. *Habeas corpus* can not be used to rehear the findings of a magistrate in extradition, but only to inquire whether he had jurisdiction, whether the offence is within the treaty, and whether there was any evidence warranting the finding of reasonable ground to believe the accused guilty. P. 312.
3. Complaint in extradition filed by an Assistant United States Attorney, upon information, *held* sufficient, where it appeared at the hearing that it was ordered by the Attorney General upon request of the Secretary of State based on a request and a record of judicial proceedings from the foreign country. P. 312.
4. Embezzlement or peculation of public funds by a public officer is a crime in Mexico within the extradition treaty. P. 313.
5. Warrant in extradition (if required) *held* good in *habeas corpus* over the objection of misnomer of the accused, where the name in the warrant was one of two applied to him in the proceedings and he was identified by the testimony.

Affirmed.

APPEAL from a judgment of the District Court remanding the appellant in a *habeas corpus* case.

Mr. John E. Benton, with whom *Messrs. Robert W. Upton* and *Edward C. Niles* were on the brief, for appellant, submitted.

Mr. Harold B. Elgar, with whom *Mr. Jerome S. Hess* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The appellant is charged with embezzlement of public funds while a public officer of the United States of Mex-

ico. He was held for surrender to that Government after a hearing before a District Judge who found that there was probable cause to believe that he was guilty and that he was a fugitive from justice. Writs of *habeas corpus* and certiorari were issued by another District Judge who came to the same conclusion and remanded the appellant. The case is brought here directly upon the somewhat strained assumption that the construction of our treaty with Mexico is involved. Being here, out of a natural anxiety to save the appellant if possible from being sent from New Hampshire to Mexico for trial, it has been presented as if this were the final stage and every technical detail were to be proved beyond a reasonable doubt. This is not the law. Form is not to be insisted upon beyond the requirements of safety and justice. *Glucksman* v. *Henkel,* 221 U. S. 508, 512. Competent evidence to establish reasonable grounds is not necessarily evidence competent to convict. See e. g., *Bingham* v. *Bradley,* 241 U. S. 511, 517. *Collins* v. *Loisel,* 259 U. S. 309, 317. 1 Wigmore, Evidence, 2d ed., § 4(6), p. 21.

The foregoing are general principles relating to extradition, but there are further limits to *habeas corpus.* That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty. *Benson* v. *McMahon,* 127 U. S. 457. *Re Luis Oteiza y Cortes,* 136 U. S. 330. *Bryant* v. *United States,* 167 U. S. 104, 105. *Elias* v. *Ramirez,* 215 U. S. 398, 406. We pass to the consideration of the specific objections urged.

It is objected in the first place that the complaint and warrant are defective. The complaint was filed by an As-

sistant District Attorney of the United States for the District of New Hampshire. It alleged that the complainant was informed 'through diplomatic channel' that the appellant was duly and legally charged by the United States of Mexico with the crime, and on behalf of that government prayed the arrest. Of course whatever form of words was used, the complaint necessarily was upon information, but as appeared at the hearing it was filed by order of the Attorney General, upon request of the Secretary of State, enclosing a request for the extradition from the Mexican Government and a copy of proceedings in a Mexican Court finding that the crime was duly proved against the appellant and ordering his arrest, many pages of evidence being appended. This was enough. *Yordi* v. *Nolte,* 215 U. S. 227, 231, 232. *Rice* v. *Ames,* 180 U. S. 371, 375, 376. *Glucksman* v. *Henkel,* 221 U. S. 508, 514. The crime charged is embezzlement or peculation of the public funds between May, 1922, and February 1, 1923, while a public officer of the United States of Mexico, to wit, the Cashier of the Department of Special Taxes. The crime is within the treaty and sufficiently alleged. The warrant is said to be bad because it names Mariano Viamonte, and not Mariano Viamonte Fernandez, the appellant. He is named both ways in the proceedings and is identified by testimony. There is nothing in this objection, if a warrant is required.

The final objection is that there is no evidence that the defendant is guilty of the crime charged. This is rather a bold contention seeing that upon the evidence the appellant was Cashier in the Department of Special Taxes, had sole charge of the money, kept the books in his own handwriting, that those books disclose a considerable deficit in the cash, and that he fled the country. He is said to have gambled. On his books the appellant mingled two classes of accounts and by so doing made detection difficult if he was guilty. First there are the items

of cash actually received and paid out entered respectively under the heads ingress and egress. But besides these were other transactions called virtual in which he did not receive the cash but was to enter a series of debits and credits. These concerned the petroleum tax, which was a stamp tax. The taxpayers handed to the national treasurer their tax returns, called manifestations, paid their tax and received from him a memorandum receipt. The manifestation and receipt then were handed to the appellant. He forwarded the receipt to the comptroller and entered the amount in his egress column. He should then send the manifestation to the stamp department, which put on the proper stamps and returned it to appellant, the amount being entered as ingress. In the interval between the egress and the ingress, he appeared as having paid out so much money and could use that amount until it was necessary to enter the cross item. As the taxpayers were not very prompt in calling for their papers it was possible for him to keep their manifestations for a time without charging himself, withdraw the amount with which he should charge himself for them and present an account that was correct upon its face. By repeating the process it was possible to disguise an embezzlement for a considerable time. This is what from his books he seems to have done. It is unnecessary to go into greater detail. We are of opinion that probable cause to believe the defendant guilty was shown by competent evidence and that the judgment remanding the appellant must be affirmed.

Judgment affirmed.

MR. JUSTICE SUTHERLAND was absent and took no part in this decision.

DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF ATLANTIC COAST LINE RAILROAD, *v.* PRINGLE, TRUSTEE IN BANKRUPTCY OF ESTATE OF BOYD CO., INC.

DAVIS, FEDERAL AGENT FOR CLAIMS DUE IN OPERATION OF SEABOARD AIR LINE RAILWAY COMPANY, *v.* PRINGLE, TRUSTEE IN BANKRUPTCY OF ESTATE OF BOYD CO., INC.

BORLAND, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND FOURTH CIRCUITS.

Nos. 786 and 787 argued, No. 1085 submitted, May 4, 1925.—Decided May 25, 1925.

1. Under the Bankruptcy Act, as amended February 5, 1903, and June 15, 1906, debts owed the United States are not entitled to priority. So *held* of claims for freight, storage and demurrage, growing out of federal control of railroads, and claims on bills of exchange and checks. P. 317.
2. Section 64 (b) of the Bankruptcy Act, giving priority to debts "owing to any person who by the laws of the States or the United States is entitled to priority", *construed* with other provisions of this and prior bankruptcy acts, and *held* not to include the United States as a "person" and thus make applicable the priority provision of Rev. Stats. § 3466. *Id.*

Nos. 786, 787; 1 Fed. (2d) 860, 864, affirmed.
No. 1085, reversed.

CERTIORARI to three judgments of the Circuit Court of Appeals, the first two denying and the third allowing claims of the United States to priority of payment in bankruptcy proceedings. See also *In re Tidewater Coal Exchange,* 280 Fed. 648.

Mr. Jerome Michael, with whom the *Solicitor General* and *Messrs. A. A. McLaughlin, Alex Koplin, Henry Gale* and *Arthur M. Loeb* were on the brief, for petitioner in Nos. 786 and 787.

Messrs. N. B. Barnwell and *Godfrey Goldmark* for respondent, in Nos. 786 and 787.

Mr. Godfrey Goldmark, for petitioner in No. 1085, submitted.

The Solicitor General, Mr. Assistant Attorney General Letts and *Mr. Harvey B. Cox,* Special Assistant to the Attorney General, for the United States, submitted in No. 1085.

Mr. Justice Holmes delivered the opinion of the Court.

The first and second of these cases are claims for freight, storage and demurrage proved in bankruptcy proceedings by the federal agent, for which the agent asserts priority on the ground that such claims arising during federal control of the railroads in 1918 are debts due to the United States and are preferred by Rev. Stats. § 3466 and by the Bankruptcy Act of July 1, 1898, c. 541, § 64, amended by Acts of February 5, 1903, c. 487, § 14, 32 Stat. 800, and June 15, 1906, c. 3333, 34 Stat. 267. The third is a claim by the United States for amounts paid by the Postmaster General to the bankrupts for bills of exchange and checks drawn by the bankrupts and unpaid, together with protest fees, &c., as to which priority is asserted on the same grounds. The priority was denied in the first two cases by the Circuit Court of Appeals for the Fourth Circuit. 1 Fed. (2d) 860; *ibid.* 864. But it was allowed in the Second Circuit without any reported opinion, following an earlier case in that Circuit, *In re Tidewater Coal Exchange,* 280 Fed. 648.

All the three cases depend upon the question whether the Government has a right to the priority it claims. If that is denied the additional inquiries that would be necessary before the federal agent could prevail in the railroad cases need not be gone into. Therefore we take up that first. It may be assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. § 3466. That Act, as was said in *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160, "takes into consideration . . . the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment." It was passed with the United States in the mind of Congress as is shown by the exception of debts due as taxes levied by the United States from the discharge in § 17-a(1), the limitation on debts owing to the United States as a penalty in § 57-j, and the provisions as to priority in § 64 with which we are principally concerned. By 'a' of that section "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors." This taken by itself would seem to exclude other debts. But the section goes on in 'b' to give priority in the order named to "(5) debts owing to any person who by the laws of the States or the United States is entitled to priority," and the Government argues that by § 1(19) 'persons' shall include corporations and that the United States is a corporation and therefore within these words. Being within them, it is said, it is entitled to priority by a law of the United States, the well known Rev. Stat. § 3466. It is said that no other person except the United States itself can be discovered who is given the right by its laws.

We attach little value to this logical concatenation as against the direct effect of § 64, taken according to the

normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end. The States are mentioned in (5) before the United States, showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case. The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States. We are of opinion that to extend the definition of 'person' here to the United States would be 'inconsistent with the context' and therefore is within the exception at the beginning of § 1. We are confirmed in our opinion by the fact that in earlier bankruptcy acts a priority was given to the United States in express terms, and that, for instance in the Act of March 2, 1867, c. 176, § 28; 14 Stat. 517, 530, 'Fifth', persons entitled to priority by the laws of the United States are mentioned when the United States could not have been meant, having been fully secured by the same section, 'Second.' If it be legitimate to look at them (*Schall* v. *Camors,* 251 U. S. 239, 250) the bills that were before Congress when the present law was passed contained the clause relied upon but showed by their context that they could not refer to the United States. There was a change of purpose from that of the earlier acts. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.,* 224 U. S. 152, 158, *et seq.* Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation* v. *Wood,* 258 U. S. 549,

574, at a time when it was not necessary for the majority to speak upon it. The priority claimed by the United States is not given to it by the law.

Decrees in 786 and 787 affirmed.
Decree in 1085 reversed.

MR. JUSTICE SUTHERLAND was absent and took no part in this decision.

WELLER *v.* PEOPLE OF STATE OF NEW YORK.

ERROR TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK.

No. 349. Argued April 28, 29, 1925.—Decided May 25, 1925.

1. A state law forbidding and penalizing the engaging without a license in the business of re-selling theater tickets does not violate the Fourteenth Amendment. P. 325.
2. The provisions of the New York General Business Law, as amended, c. 590, 1922, requiring theater ticket brokers to give bond and obtain a license are separable and workable apart from those restricting the price at which the tickets may be resold, so that the validity of the former is independent of the validity of the latter. *Id.*

207 App. Div. N. Y. 337; 237 N. Y. 316, affirmed.

ERROR to a judgment of the Court of Special Sessions of the City of New York adjudging the plaintiff in error guilty of reselling theater tickets without a license, entered after successive affirmances by the Supreme Court, Appellate Division, and the Court of Appeals.

Mr. Louis Marshall, for plaintiff in error.

Chapter 590 of the New York Laws of 1922 is unconstitutional and void, because it deprives the defendant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

That the business of a ticket broker is a lawful one, that the pursuit of it cannot be prohibited, directly or indirectly, and that theatre tickets constitute property in the constitutional sense of the term, has been expressly adjudicated. *People ex rel. Tyroler* v. *Warden of the City Prison,* 157 N. Y. 116; *People ex rel. Fleischmann* v. *Caldwell,* 64 App. Div. 46; affd. 168 N. Y. 671; *People* v. *Marks,* 64 Misc. Rep. 679; *Collister* v. *Hayman,* 183 N. Y. 250; *Matter of Newman,* 109 Misc. Rep. 622.

The whole theory of such legislation is vicious and dangerous, and the precedent that would be created by sustaining the act now under consideration would be an invasion of liberty, calculated to work lasting injury not only to the individual but to the public welfare. There are limitations on the power of the legislature to fix the price of commodities or of services, or to limit the right to contract with regard to them. *People* v. *Budd,* 117 N. Y. 15, affd. *sub. nom. Budd* v. *New York,* 143 U. S. 517; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Adams* v. *Tanner,* 244 U. S. 590; *Fisher Co.* v. *Woods,* 187 N. Y. 90; *Producers Transportation Co.* v. *Railroad Commissioners,* 251 U. S. 230; *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570. Carefully adjudicated cases have denied the power of the legislature to fix the price of theatre tickets. *People* v. *Newman,* 109 Misc. 622; *Ex parte Quarg,* 149 Cal. 79; *People* v. *Steele,* 231 Ill. 340; *City of Chicago* v. *Powers,* 231 Ill. 531; *People* v. *Weiner,* 271 Ill. 74; *Chicago* v. *Netcher,* 183 Ill. 104.

The business of conducting a theatre, and consequently of selling or procuring tickets of admission, is not affected by a public interest, in the sense that the legislature may fix the price at which such tickets may be sold by brokers or limit the compensation chargeable by brokers for procuring them. *Charles Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; *Dorchy* v. *Kansas,* 264 U. S. 286.

Assuming that, if standing alone, that part of the statute requiring the taking out of a license and the giving of a bond could be sustained, the fact that, by compliance, the licensee would be estopped from questioning the other provisions, renders the act unconstitutional in its entirety; *Musco* v. *United Surety Co.,* 196 N. Y. 459; *Guffanti* v. *National Surety Co.,* 196 N. Y. 453; *Russo* v. *Illinois Surety Co.,* 141 App. Div. 690; *Huson* v. *Brown,* 90 Misc. 175; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *Pierce Oil Corp.* v. *Phoenix Refining Co.,* 259 U. S. 125; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 461; *Matter of Cooper,* 93 N. Y. 507; *Embury* v. *Conner,* 3 N. Y. 511; *Mayor, etc. of New York* v. *Manhattan Railway Co.,* 143 N. Y. 1. If the licensing provision of the act standing by itself were constitutional, the defendant could not be charged with a misdemeanor for non-compliance therewith if the price-fixing clauses of the act are invalid and he would be precluded from attacking them, because of his compliance with the licensing provision. *Ex parte Young,* 209 U. S. 123; *Harrison* v. *St. Louis & San Francisco R. R. Co.,* 232 U. S. 318; *Mercantile Trust Co.* v. *Texas, etc., Ry. Co.,* 216 Fed. 225. That a statute unconstitutional in a part essential and vital to its whole scheme cannot be enforced by the courts in its other provisions is likewise a well settled principle. *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Hill v. Wallace,* 259 U. S. 44; *Pollock* v. *Farmers Loan & Trust Co.,* 158 U. S. 601; *Howard* v. *Illinois Central R. R. Co.,* 207 U. S. 463; *Sherrill* v. *O'Brien,* 188 N. Y. 185; *Hauser* v. *North British & Mercantile Ins. Co.,* 152 App. Div. 91. The provision in § 174 of the statute " that in case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination

shall not affect its validity or effect of the remaining provisions of the article" does not militate against the authorities considered under the foregoing subdivisions of this point. *Hill* v. *Wallace,* 259 U. S. 70. In none of the courts below was there any attempt to sever the license provision from the price-fixing provision.

Mr. Robert D. Petty, with whom *Messrs. Joab H. Banton,* District Attorney of New York County, and *Felix C. Benvenga* were on the brief, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the Court.

Chapter 590, New York Laws 1922, added eight sections, 167–174, to the General Business Law of the State. They are copied in the margin.* Section 168 directs: "No per-

* § 167. *Matters of Public Interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§ 168. *Reselling of Tickets of Admission; Licenses.* No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by

son, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller." And § 173 declares every violation of the inhibition shall be a misdemeanor.

By an information in the Court of Special Sessions, New York City, the District Attorney accused plaintiff in error of engaging in the business of reselling theatre tickets without the license required by law. The evidence showed he was engaged in that business, and it was conceded he had never taken out a license or complied with Chapter

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proof satisfactory to the comptroller of the moral character of the applicant.

§ 169. *Bond.* The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the state of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the state of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction, and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.

§ 170. *Revocation of licenses.* In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving

590. His defense rested upon the claim that the statute is repugnant to the Fourteenth Amendment. The trial court adjudged him guilty and imposed a fine of twenty-five dollars. This was affirmed by the Appellate Division and by the Court of Appeals. 207 App. Div. 337; 237 N. Y. 316. In an extended opinion the latter court upheld the challenged enactment, but said nothing of the

ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§ 171. *Supervision of comptroller.* The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§ 172. *Restriction as to Price.* No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket, or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§ 173. *Violations; Penalties.* Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§ 174. *Constitutionality of Article.* In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.

possibility of sustaining the license provisions if those relating to resale prices were invalid.

Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

It is not and, we think, it cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the State we shall hold this provision severable and valid. *Brazee* v. *Michigan,* 241 U. S. 340. The statute itself declares (§ 174): "In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article." If § 172, which restricts resale prices were eliminated, a workable plan would still remain. See *Dorchy* v. *Kansas,* 264 U. S. 286.

The judgment of the court below is *affirmed.*

REAL SILK HOSIERY MILLS *v.* CITY OF PORTLAND ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 417. Argued April 27, 1925.—Decided May 25, 1925.

1. A municipal ordinance requiring that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure

a license by paying a fee and filing a bond conditioned to make final delivery of ordered goods, *held* an unconstitutional interference with interstate commerce as applied to the solicitors of a corporation engaged in manufacturing goods in another State and selling them direct to consumers on orders taken by the solicitors and sent to the home office of the corporation, the customers making advance deposits which were retained by the solicitors as their sole compensation and were credited to the customers on account of their purchases. P. 335.

2. An expressed purpose to prevent possible frauds is not enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. P. 336.

297 Fed. 897, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing the bill in a suit brought by the appellant corporation to enjoin the enforcement of a city ordinance requiring its salesmen to take out licenses and file bonds for security of customers.

Mr. John G. Milburn, with whom *Messrs. Joseph W. Welsh, Ralph Bamberger* and *John M. Gearin* were on the brief, for appellant.

Decisions of this Court have reduced within very narrow limits the questions raised by the record in this case. *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71; *Brown* v. *Maryland,* 12 Wheat. 419, 444; *Robbins* v. *Shelby Taxing Dist.,* 120 U. S. 489, 497, 498; *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150, 152; *Brennan* v. *Titusville,* 153 U. S. 289, 302.

The appellant's business which is affected by the ordinance is interstate commerce. The business consists of the obtaining of orders through representatives or solicitors in Portland from individual purchasers and the fulfillment of those orders, when received in Indianapolis, by shipment from that place direct to the purchasers in Portland. The transaction is simply a sale and delivery in one State of goods manufactured in another State

upon an order previously given and transmitted to the State in which the goods are manufactured, and is in all respects interstate commerce. *Robbins* v. *Shelby Taxing Dist., supra; Brennan* v. *Titusville, supra.* It is clear that the interstate character of the transaction as a whole cannot be affected by the manner in which the order may be obtained or by the terms of payment for the goods ordered; and it is immaterial whether they are paid for wholly or partly in advance or on final delivery insofar as the character of the transaction is concerned. In either case the transaction is interstate commerce and the representative of the appellant obtaining the order is engaged in interstate commerce.

The ordinance is a direct burden on interstate commerce and therefore invalid. *Robbins* v. *Shelby Taxing Dist., supra; Brennan* v. *Titusville, supra; Stockard* v. *Morgan,* 185 U. S. 27; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Stewart* v. *Michigan,* 232 U. S. 665; *Browning* v. *Waycross,* 233 U. S. 16; *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150; *Bowman* v. *Chicago & North Western Ry. Co.,* 125 U. S. 465; *Stoutenburgh* v. *Hennick,* 129 U. S. 141; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197. The ordinance in this case concerns only solicitors who collect any portion of the purchase price payable in advance. But the fact that a solicitor collects a portion of the purchase price in advance at the time an order is given in accordance with the terms of the order does not change his status or function with respect to the interstate sale in connection with which his service has been rendered, or the interstate character of the sale. Whether an ordinance is a direct or incidental burden on interstate sales is not determinable by how the purchase price is payable. Treating the ordinance as an attempted exercise of the police power, it is not only void as imposing a direct

burden on interstate commerce, but because it is unreasonable, arbitrary and unnecessarily burdensome. *Adams Express Co.* v. *New York,* 232 U. S. 14, 31. The direct and effective way to attack and suppress such frauds as the ordinance professes to be aimed at, is by criminal prosecutions. This Court is not bound by the recitals in the ordinance or its declared purpose. *Mugler* v. *Kansas,* 123 U. S. 623; *Dobbins* v. *City of Los Angeles,* 195 U. S. 223; *La Coste* v. *Dept. of Conservation,* 263 U. S. 545. If there be any real necessity for the regulation of solicitors selling the goods of a non-resident principal it is for Congress, and not for the various States or municipalities, to pass appropriate laws for such regulation. *Robbins* v. *Shelby Taxing Dist., supra; Stoutenburgh* v. *Hennick, supra; Lemke* v. *Farmers Grain Co., supra; Bowman* v. *Chicago & North Western Railway Co.,* 125 U. S. 465; *American Express Co.* v. *Iowa,* 196 U. S. 133; *Railroad Co.* v. *Husen,* 95 U. S. 465.

The theory of the opinion of the Circuit Court of Appeals as to the local character of the service of the appellant's solicitors is untenable. This is a clear misconception of the real transaction. The solicitors are employed by the appellant. Their function is to solicit orders on behalf of the appellant, and when obtained to reduce them to writing, sign them and receive the deposit on behalf of the appellant. The orders are transmitted to the appellant through a district sales manager's office located in the City of Portland. This is the indispensable initial step in the transaction. The total purchase price is stated in the formal order. It is the sum which the purchaser is obligated to pay to the appellant for the goods. A payment of a part of the purchase price is required in advance and is paid to the solicitor, not as money due from the purchaser to the solicitor, but as part of the purchase price of the goods. The payment required is retained by the solicitor under his arrange-

ment with the appellant as compensation for his service rendered to the appellant. That he retains it instead of remitting it to his principal does not affect the purchaser. The solicitor's part in the sale is concluded when he receives the order and advance payment and sends the order to the district sales manager just as any travelling salesman's function in connection with a sale is performed when he has obtained an order and forwarded it to his principal. There is obviously no basis in the actual facts for the statements in the opinion of the court below that the solicitor "receives nothing from the plaintiff", and "that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor", or for the description of the solicitor as "independent", and his business as "independent and self sustaining"; or for severing the solicitor's service from each transaction of sale as an entirety and treating it as a separate and independent transaction between the purchaser and the solicitor.

The advance payment is necessary as an inducement to the purchaser to take the goods when delivered and pay the balance of the purchase price; and, in case of their rejection by the purchaser owing to a change of mind or any similar cause, to recoup the appellant for the selection and packing of the goods and the expense of forwarding them and having them returned. Experience has shown that it materially tends to hold the purchaser to his order. For this reason the advance payment is indispensable.

Facing the problem of the payment of the compensation of thousands of solicitors all over the country and an advance payment being indispensable, the natural solution of it was to fix the payment at a sum equivalent to a workable compensation to the solicitor in connection with each order and allow him to retain it, thereby saving an open account with each solicitor and remittances from

him and to him. It is a natural and legitimate method of business and its operation in no way converts the purely interstate sales of the business into a combination of an interstate element, consisting of the receipt of the order, the transmission of the goods by mail C. O. D. as to the balance of the purchase price, and their delivery to the purchaser on payment of such balance, and of an intrastate element consisting of the obtaining of the order by the solicitor, the forwarding of it to the district manager's office for transmission to the mills, and his retention of the advance payment on the purchase price of the goods collected by him. *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21; *Coe* v. *Erroll,* 116 U. S. 517; *Hall* v. *Geiger-Jones Company,* 242 U. S. 539; *Plumley* v. *Massachusetts,* 155 U. S. 461, distinguished. To single out solicitors who collect any portion of the purchase price in advance of final delivery and subject them to discriminating and hostile legislation is a violation of the equality clause of the Fourteenth Amendment.

Mr. Frank S. Grant, with whom *Mr. Robert A. Imlay* was on the brief, for appellees.

The police power, from its very nature, is incapable of exact definition or limitation. It reaches out generally to control everything which affects the health, peace, safety and morals of the people, and as new conditions arise, and as public opinion creates new standards of valuation, it will reach out in a never ending procession of legislative enactments to cope with the situation. It is inevitable that contention will arise as to the power of the States and the power of the national Government. Hence, each individual case must, to a large extent, be decided upon its own merits. *Welton* v. *Missouri,* 91 U. S. 275. The State may by appropriate legislation protect local interests. Such legislation is valid under the Commerce Clause notwithstanding that interstate

commerce may to some extent be affected. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Sherlock* v. *Alling,* 93 U. S. 99; *Escanaba Co.* v. *Chicago,* 107 U. S. 678; *Barbier* v. *Connolly,* 113 U. S. 27; *Walling* v. *Michigan,* 116 U. S. 446; *Philadelphia etc., S. S. Co.* v. *Penna.,* 122 U. S. 326; *In Re Rahrer,* 140 U. S. 545; *Leloup* v. *Mobile,* 127 U. S. 640; *Hebe Co.* v. *Calvert,* 246 Fed. 711; *Missouri ex rel. Barrett* v. *Kansas National Gas Co.,* 265 U. S. 298; *State* v. *Leary,* 125 Atl. (R. I.) 353.

On various phases of legislation which have been declared within the reserved powers of States, and not a regulation of interstate commerce, see especially *International Textbook Co.* v. *District of Columbia,* 35 App. D. C. 307; *Chicago R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453; *Hennington* v. *Georgia,* 163 U. S. 299; *Nashville C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96; *United States* v. *Hart,* Pet. C. C. 390; *New Mex. ex rel.* v. *Denver & R. G. R. Co.,* 203 U. S. 38; *Compagnie Francaise, Etc.* v. *Louisiana State Board,* 186 U. S. 380; *Hebe Co.* v. *Calvert, supra; Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *N. Y., N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; *Sherlock* v. *Alling,* 93 U. S. 99; *Erie R. Co.* v. *Williams,* 233 U. S. 685; *Lakeshore & M. S. R. Co.* v. *Ohio,* 173 U. S. 285; *Texas Transport & T. Co.* v. *New Orleans,* 264 U. S. 150; *New York ex rel. Pa. Ry. Co.* v. *Knight,* 192 U. S. 21.

The situation presented by the case at bar is not dissimilar in principle to those cases where persons engaged in interstate transportation are required by the provisions of state statutes to be examined and licensed. *Smith* v. *Alabama,* 124 U. S. 465. A presumption should be indulged in that a statute was enacted in good faith. The declared purpose of the act is to be accepted as true unless incompatible with its meaning and effect. *Flint* v. *Stone-Tracey Co.,* 220 U. S. 107. It will be contended, that

the real purpose of the ordinance is to discriminate against non-resident manufacturers in favor of local business. There is nothing in the language to justify such a contention, nor is there any allegation in the bill upon which to base such a claim. It is not alleged or claimed that the ordinance is administered with an unequal hand, so as practically to make discriminations against non-resident manufacturers. See *Yick Wo* v. *Hopkins,* 118 U. S. 356. The declared purpose is to prevent the perpetration of fraud upon the citizens of Portland by fraudulent or irresponsible solicitors. It does not discriminate against goods, nor interfere in any way with the free intercourse in goods of a sister state, nor, except in an indirect and incidental manner, with the contract for the sale of such goods. It is aimed solely, at fraudulent practices of such a nature that they are necessarily of a local and not of a national character.

It would seem not only within the power of the State, but its positive duty, to devise some method for reaching the evils of a system so freighted with opportunities for fraudulent practices. The system is enlarging in its scope from year to year. The tendency, today, is to eliminate the middle man entirely. This may be well enough, but the system has built up an immense business in soliciting which is practically the only business of that character which is unregulated and unrestricted. For years individuals, engaged in soliciting for non-resident principals, have successfully hidden behind the provisions of the federal Constitution, and it has prevented legislation designed to reach solicitors of local concerns because of the inequality of such a measure. It is said in *Plumley* v. *Massachusetts,* 155 U. S. 461: " The Constitution of the United States does not secure to anyone the privilege of defrauding the public." Preventive measures are of infinitely greater benefit to society than an uncertain criminal or civil process, after the damage is done.

Standard Home Co. v. *Davis,* 217 Fed. 904; Freund, Police Power, § 272, p. 260; see *Crossman* v. *Lurman,* 192 U. S. 189; *Savage* v. *Jones,* 225 U. S. 501; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539; *Merrick* v. *Halsey & Co.,* 242 U. S. 568; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559.

We conclude from these cases that, in the absence of national legislation, a state statute, or municipal ordinance, designed to prevent fraudulent practices or fraudulent representations, is a valid exercise of the police power of the State in the interests of the local welfare, notwithstanding that the articles affected are articles of commerce and that interstate commerce is indirectly affected or burdened thereby. The fraud which the ordinance in question seeks to prevent is essentially a local matter and even though the act of soliciting may be an incident of interstate commerce, the indirect burden placed thereon by the ordinance does not contravene the Commerce Clause. The provisions of the ordinance are reasonably adaptable to accomplish the purpose intended—correction of this evil. The requirement of a bond insures the continuance in business of persons of character and responsibility only. The ordinance should be an assistance to commerce rather than a hindrance or burden, by eliminating the dishonest solicitor. The ordinance has to do with conduct not directly connected with any subject of commerce. There is nothing new in the principle that the personnel of business may be regulated on the basis of character and conduct. *Gundling* v. *Chicago,* 177 U. S. 183; *Bratton* v. *Chandler,* 260 U. S. 110. We have found but one case construing a statute in any degree similar to the ordinance in question. *Musco* v. *United Surety Co.,* 196 N. Y. 459. This ordinance is not distinguishable in principle from the law of Georgia which was the subject of the decision in *Western Union Telegraph Co.* v. *James,* 162 U. S. 650.

The ordinance does not violate the Fourteenth Amendment. *Merrick* v. *Halsey & Co.*, 242 U. S. 568.

Mr. David Paine filed a brief as *amicus curiae*, by special leave of Court.

Messrs. James W. Bayard and *Ralph B. Evans* filed a brief as *amici curiae*, by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant is an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Ind., and selling it throughout the United States to consumers only. It employs duly accredited representatives in many States who go from house to house soliciting and accepting orders. When a willing purchaser is found the solicitor fills out and signs in duplicate a so-called "order blank." This obligates appellant to make delivery of the specified goods and, among other things, states—

"The mills require a deposit of $1.00 [or other specified sum] on each box listed below. Your hosiery will be mailed you by Parcel Post c. o. d., direct from the Post Office branch in our mills. Pay the balance to the postman. As the entire business of the Real Silk Hosiery Mills is conducted on the Parcel Post c. o. d. basis, our representatives cannot accept your order unless the deposit is made. We do not accept full payment in advance. Do not pay more than printed deposit."

One of the copies is left with the purchaser; the other is first sent to the local sales manager and then forwarded to the mills at Indianapolis. In response thereto the goods are packed and shipped by Parcel Post c. o. d. direct to the purchaser. The solicitor retains the cash deposit, and this constitutes his entire compensation.

The appellant employs two thousand representatives who solicit in most of the important cities and towns

throughout the Union, and has built up a very large business—$10,000,000 per annum. Twenty operate in Portland, Ore.

May 16, 1923, that City passed an ordinance which requires that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond. The license fee is $12.50 quarterly for each person on foot and $25 if he uses a vehicle. The bond must be in the penal sum of $500 and conditioned to make final delivery of ordered goods, &c.

By a bill filed in the United States District Court for Oregon appellant challenged the ordinance and asked that its enforcement be restrained upon the ground, among others, that it interferes with and burdens interstate commerce and is repugnant to Art. I, § 8, Federal Constitution. The trial court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the Circuit Court of Appeals. 297 Fed. 897.

Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497; *Brennan* v. *Titusville,* 153 U. S. 289; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts,* 268 U. S. 203.

"The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate

commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

The decree of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.

CHEUNG SUM SHEE ET AL. *v.* NAGLE, COMMISSIONER OF IMMIGRATION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 769. Argued April 17, 20, 1925.—Decided May 25, 1925.

1. Alien Chinese wives and minor children, of Chinese merchants lawfully domiciled in the United States, are not mandatorily excluded from admission by the Immigration Act of 1924, which provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien is . . . not an immigrant, as defined in Section 3", and in that section classifies as a non-immigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." P. 344.
2. Such wives and children were guaranteed the right of entry by the Treaty of 1880. *United States* v. *Mrs. Gue Lim*, 176 U. S. 459. *Id.*
3. The Act of 1924 should be construed with a view to preserving this treaty right; and the legislative history and general terms of the act permit this. P. 345.
4. Such aliens, being in effect specified by the act itself as "non-immigrants", are not barred by § 5, which declares that an alien not particularly specified in the act as a non-quota immigrant or non-immigrant shall not be admitted as such "by reason of rela-

tionship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." P. 346.

QUESTION certified by the Circuit Court of Appeals, arising on the review of a decision of the District Court, (2 Fed. (2d) 995,) which refused relief by *habeas corpus* to Chinese aliens held for deportation by the immigration authorities.

Mr. Frederick D. McKenney and *Mr. George A. McGowan,* with whom *Messrs. John L. McNab, Jackson H. Ralston, Roger O'Donnell, George W. Hott, W. J. Peters, M. Walton Henry, J. P. Fallon, O. P. Stidger, W. G. Becktell,* and *Gaston Straus* were on the brief, for appellants.

Mr. Assistant Attorney General Donovan, with whom the *Solicitor General* was on the brief, for appellee.

There is a difference of opinion between the two departments of the Government which are directly concerned with the administration of the Act. The Department of Labor is of opinion that the Act requires the exclusion of these appellants. The Department of State is of opinion that the Act and the Treaty together require their admission. In view of the importance of this case, counsel for the Government feel it their duty to submit reasons in support of both opinions. Accordingly, in their brief is set forth the reasoning in support of the exclusion theory maintained by the Department of Labor; in an appendix, the opposing arguments of the State Department, as embodied in a memorandum prepared by the Solicitor for that Department. The appellants are clearly "aliens ineligible to citizenship." They are therefore excluded by § 13(c) of the Act, unless they can establish their right to enter as "treaty merchants" under § 3(6). Section 3(6) grants

admission to " an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." Can it be said that the wife or the minor child of a merchant comes here " solely to carry on trade "? The agent of a merchant is not himself entitled to enter as a merchant. *Tulsidas* v. *Insular Collector,* 262 U. S. 258. And this Court in the *Gue Lim Case* did not hold that the wife of a merchant was entitled to enter " solely to carry on trade," but merely decided that she was entitled to enter solely to reside with her husband, as she then had the right to do. The purpose of § 3(6) was to take away that right by granting the right of entry only to actual merchants, and not, as formerly, to merchants and their families. Any other construction would deprive the section of its meaning. At the time when the *Gue Lim* decision was rendered, no statutory definition existed of the term " merchant "; and the Court accordingly construed the language of the treaty as including both merchants and their families. The Court might have decided the *Gue Lim Case* differently had § 3(6) then been in existence. It was inserted at the request of the Secretary of State, for the purpose of safeguarding treaty rights, but in its final form is very different from the provision which the Secretary originally suggested; and it is possible that the effect of the alteration is to exclude the wives and children of merchants. Whatever might have been the result had Congress enacted, *totidem verbis,* either of the Secretary's suggestions, it is submitted that the case must be judged upon the law as it is written. The Committee Report indicates that Congress intended to " tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation." The effect of § 3(6), as actually passed by Congress, may be to deny the right of

entry to all who do not come here "solely to carry on trade." In opposition to this view counsel cite the case of *Anderson* v. *Watt,* 138 U. S. 694, 706, and other cases holding that the domicil of the husband is the domicil of the wife, and that the identity of the wife is, in a sense, merged in that of the husband. But has not this theory lost much of its force since the enactment of the Act of September 22, 1922, c. 411, 42 Stat. 1021, under which the citizenship of the wife no longer follows that of the husband? And the Immigration Acts often operate to prevent husband and wife from residing together in this country. Yet this Court, when appealed to on the ground of hardship, has declined to interfere. *Commisisoner of Immigration* v. *Gottlieb,* 265 U. S. 310; *Chung Fook* v. *White,* 264 U. S. 443; *Yee Won* v. *White,* 256 U. S. 399.

In the next place § 5 of the Act provides "An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." It may well be that the appellants have no right of entry in and of themselves; their right of entry is dependent, not upon their own status, but upon that of their husbands or fathers. And if that is so, then they are excluded by the operation of § 5. Congress has been careful to grant admission to the families of Chinese government officials § 3(1), and to the families of Chinese clergymen or professors §§ 4(d), 13(c) (2); and from this fact it may be inferred that Congress did not intend to grant admission to the families of Chinese merchants, according to the maxim *expressio unius. Lapina* v. *Williams,* 232 U. S. 78, 92; *United States* v. *Goldenberg,* 168 U. S. 95, 103. It is conceded that a strong presumption exists in favor of maintaining treaty rights. The right of these appellants

to enter this country is a right conferred, if not by the letter of the treaty, at least by the treaty as interpreted by this Court. But it is submitted that even treaty rights can not prevail against the language of the Immigration Act of 1924. And under §§ 5 and 13(c) of that Act, it is doubtful whether these appellants can enter.

Such is the contention of the Department of Labor; but this Court should also consider the careful and well-reasoned opinion of the Solicitor for the Department of State, before answering the question.

The following is excerpted from a memorandum by *Hon. Charles Cheney Hyde,* Solicitor for the State Department, which was appended to the brief of appellee:

Wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter. The courts of the United States, when interpreting the treaties of their country, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, *Ubeda* v. *Zialcita,* 226 U. S. 452, 454; that their agreement should be interpreted "in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose," *Tucker* v. *Alexandroff,* 183 U. S. 424, 437; and that its terms should be liberally construed, *Asakura* v. *Seattle,* 265 U. S. 332, 342; *Haunstein* v. *Lynham,* 100 U. S. 483; *Geofroy* v. *Riggs,* 133 U. S. 258; *Tucker* v. *Alexandroff, supra.*

The commercial treaties of the United States providing for the entrance and residence of nationals of one contracting party into the territories of the other for the purposes of trade have not made mention of the wives and minor children of such individuals. It seems to have been taken for granted that there is such unity of interest in the individual family that the head thereof, if given

the right to enter a country for purposes of trade, is the representative of an entity embracing his wife and children who are not to be dissociated from him. This conclusion is fortified by the fact that treaties with Japan, China, and other countries contemplate prolonged and undetermined residence for the purposes of trade, the occupation of dwellings, and by necessary inference the establishment of homes. [Citing treaties.]

It would scarcely be suggested that each of these treaties should be interpreted differently in accordance with the exact words used. Such literal construction could not give effect to the intent of the contracting parties, nor could it avail to carry out the general purposes for which such treaties are concluded. It is believed that the varying terms of all these treaties may be properly paraphrased thus: "The contracting parties agree that their citizens and subjects, respectively, shall have a right to come into the territories of the other for the purpose of carrying on international trade, and they are accorded the privilege of remaining indefinitely in the country, of establishing their homes and of bringing with them for this purpose the members of their families so long as they are here for that purpose."

An examination of the original signed copy of the treaty of 1880 with China, in the archives of the Department of State, reveals that there is nothing therein which can be regarded as a title, although in Malloy's compilation (Vol. 1, p. 237) it is given the caption, "Immigration Treaty." In so far as the Chinese treaty refers to merchants, and provides for their entry into the United States, it seems entirely reasonable and proper to consider it as a "treaty of commerce and navigation." It would be unreasonable to assume in the absence of convincing evidence that the United States and Japan, for example, sought, on the one hand, to give traders the right to enter, remain, and reside for an indefinite period for the purposes

of trade, and, on the other, to isolate them while exercising that privilege from their wives and minor children.

An important social policy well recognized in the Anglo-American system lies at the foundation of this principle. Our courts have recognized the identity of interest which exists between husband and wife. The wife is an integral part of the husband's sphere of activity. *Anderson* v. *Watt,* 138 U. S. 694. The Supreme Court of the United States in deciding *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, interpreted the treaty between the United States and China of November 17, 1880 (22 Stat. 826), in a manner that sustains this conclusion. See *In re Chung Toy Ho,* 42 Fed. 398; *Ex Parte Goon Dip,* 1 Fed. (2d) 811; *Ex Parte So Hakp Yon,* 1 Fed. (2d) 814; *Yee Won* v. *White,* 256 U. S. 399; *Woo Hoo* v. *White,* 243 Fed. 541; see also *In re Chin Hern Shu,* D. C. Mass., Dec. 11, 1924 (*unreported*).

It is never to be supposed that an Act of Congress overrides the provisions of a treaty unless its words are so clear that there is no escape from that conclusion. *Chew Heong* v. *United States,* 112 U. S. 536. Section 3(6) of the Immigration Act of 1924 classifies as a non-immigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of Commerce and Navigation." Section 13(c) provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien . . . is not an immigrant as defined in Section 3." If we assume that aside from the Act wives and minor children of merchants are given by the treaty a right to enter the United States, it is obvious that no argument for their exclusion under the Act could arise except for the words "solely to carry on trade," which appear in § 3(6). It is argued that this phrase was directed against the wives and children of merchants, on the ground that any other construction deprives this phrase of all meaning. However, such is not the case.

In view of its legislative history, it is believed that this phraseology was adopted with a desire to grant full rights to persons entitled to enter under treaties of commerce and navigation—to show that the treaty provisions referred to were only those provisions respecting privileges of commerce and navigation, and that the class of persons referred to was the merchant class within the scope of those provisions.

There is another apparent reason for the use of the phrase "solely to carry on trade" as used in § 3(6). The various treaties of commerce and navigation do not refer exclusively to merchants. A right of entry is also accorded to ships (and necessarily to their crews) and to temporary visitors. Congress had already provided for alien seamen in § 19 of the Act and for visitors or travelers in § 3(2). The phrasing of § 3(6) seems to have been adopted partly to avoid a conflict with or repetition of §§ 3(2) and 19, and was designedly supplemental thereto. The evidence is abundant and convincing that Congress itself not only had no desire to curtail the treaty right, but also deliberately undertook to respect the treaty right to enter of all who were clothed therewith.

Mr. Henry W. Taft filed a brief as *amicus curiae* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners are alien wives and minor children of resident Chinese merchants lawfully domiciled within the United States. They departed from China on the Steamship President Lincoln, and upon arrival at San Francisco, July 11, 1924, sought permanent admission to the United States. The Secretary of Labor denied their applications and gave the following reasons therefor—

"Neither the mercantile status of the husband and father, nor the applicant's relationship to him, has been

investigated for the reason that even if it were conceded that both these elements exist the applicants would be inadmissible as a matter of law. This is made necessary because of the inhibition against their coming to the United States as found in Paragraph (c) of Section 13 and that portion of Section 5 which reads as follows: 'An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.' "

The court below has inquired, Jud. Code § 239: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

Prior to July 1, 1924, petitioners, if otherwise unobjectionable, might have been admitted notwithstanding their race and nationality. *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, 466, 468; *Yee Won* v. *White,* 256 U. S. 399, 400, 401. But it is said they are absolutely excluded by the "Act to limit the immigration of aliens into the United States, and for other purposes," approved May 26, 1924, c. 190, 43 Stat. 153, applicable provisions of which follow—

" Sec. 13. . . . (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

" Sec. 3. When used in this Act the term ' immigrant ' means any alien departing from any place outside the

United States destined for the United States, except . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Sec. 5. When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

The present existing treaty of commerce and navigation with China, dated November 17, 1880, 22 Stat. 826, 827, provides—

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

An alien entitled to enter the United States "solely to carry on trade" under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, § 3(6), and therefore is not absolutely excluded by § 13.

The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July first when the present Immigration Act became effective. *United States* v. *Mrs. Gue Lim, supra.* That Act must be construed with the view to preserve treaty rights unless clearly

annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

In a certain sense it is true that petitioners did not come "solely to carry on trade." But Mrs. Gue Lim did not come as a "merchant." She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the Act now before us.

Nor do we think the language of § 5 is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the Act itself as "non-immigrants." They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago.

The question propounded by the court below must be answered in the *negative*.

CHANG CHAN, WONG HUNG KAY, YEE SIN JUNG ET AL. *v.* NAGLE, COMMISSIONER OF IMMIGRATION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 770. Argued April 17, 20, 1925.—Decided May 25, 1925.

1. Chinese women, being themselves ineligible to citizenship, do not become citizens of the United States by marrying American citizens. Rev. Stats. § 2169; Act of Sept. 22, 1922, c. 411, 42 Stat. 1022. P. 351.
2. Chinese women who, before the date of the Immigration Act of 1924, married American citizens of the Chinese race permanently domiciled in this country, were debarred by the Act from coming here to join their husbands, (no treaty right being involved,) since § 13 (c) forbids admission of aliens ineligible to citizenship, with certain exceptions which do not include such wives. P. 352.

3. Such Chinese wives, coming here to join their husbands, are immigrants as defined by § 3 of the Act. P. 352.
4. That consular officers must issue them visas does not signify that such wives must be admitted—in view of § 2 (g) of the Act, expressly declaring that an immigration visa shall not entitle an immigrant to enter if upon arrival he is found inadmissible under the immigration laws. *Id.*
5. The provision of § 4 of the Immigration Act, 1924, classifying wives and minor children of citizens of the United States residing here, etc., as non-quota immigrants, cannot be incorporated among the exceptions of § 13 (c) upon the theory that it was omitted by oversight. *Id.*
6. The hardships of a case, and suppositions of what is rational and consistent in immigration policy, cannot justify a court in departing from the plain terms of an immigration act. P. 353.

QUESTION certified by the Circuit Court of Appeals, arising upon appeal of a decision of the District Court, (see *Ex parte Chan Shee,* 2 Fed. (2d) 998), refusing relief by *habeas corpus* to the appellants, who were the husbands of four Chinese women detained by the immigration authorities, and the wives themselves.

Mr. Frederick D. McKenney and *Mr. George A. McGowan,* with whom *Messrs. Jackson H. Ralston, John L. McNab, Roger O'Donnell, George W. Hott, W. J. Peters, M. Walton Hendry, J. P. Fallon, O. P. Stidger, W. G. Becktell* and *Gaston Straus* were on the brief, for appellants.

A study of the provisions of the Act shows that by clause (a) of § 4, using the broadest language, the unmarried child under 18 years, or the wife, of an American citizen is a non-quota immigrant. To such it is the duty of the consular officer to issue a visa. The wife, for instance, does not have the right of entry because related to a non-quota immigrant or a non-immigrant, or because of being excepted from the operation of any other law regulating or forbidding immigration, as provided in § 5, but because she is the wife of an American citizen and her domicile is the domicile of her husband.

Under § 8 the consular officer, on satisfactory proof being furnished him that the applicant is entitled to be regarded as a non-quota immigrant, may issue an immigration visa to her.

In § 9, clause (b), any citizen of the United States claiming his wife under provisions of subdivision (a) of § 4, may file a suitable petition, and under clause (e) of the same section the Commissioner-General, finding the facts to be true and that she is entitled to be admitted to the United States as a non-quota immigrant under subdivision (a) of § 4, shall inform the Secretary of State of his decision, and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed to issue it, the only limitation upon the right to enter, consequent upon such action, being that if she seeks to enter as a non-quota immigrant she shall not do so if, on arrival, she is not found to be that sort of immigrant.

By § 13, clause (a), the Chinese wife of an American citizen has a right to admission as a non-quota immigrant if specified in the immigration visa as such and otherwise admissible under the immigration laws, the latter clause finding its natural purpose in the provisions as to health and character, of broad general nature.

We are next confronted with clause (c) of § 13, prohibiting, not the granting of visas, which in themselves recognize a right to admission, but prohibiting admission except under the provisions of sub-divisions (b), (d), and (e) of § 4 or because not an immigrant as defined in § 3.

Although the right to admission has been fully recognized three or four times over through the provisos directing the granting of visas, it is now argued that, if a visa must be granted, and such right cannot be disputed, yet the wife of an American citizen leaving China in the high hope of accompanying or joining her husband is to be

turned back on reaching an American port because "ineligible to citizenship." The two interpretations cannot stand. The right to papers authorizing admission is as strong in itself, as stated in the statute, as any power of rejection, because ineligible to citizenship, can possibly be believed to be. From the reports of the committees and the statements of the committee chairmen on the floor of the House, it is evident that Congress did not intend by this legislation to exclude from American soil the wife of any American citizen.

The only doubt arises under the Act because, while in § 13 express reference is made to subdivisions (b), (d) and (e) of § 4, by some apparent slip no reference was made to subdivision (a) of § 4 referring to the unmarried children under 18 years or the wife of a citizen of the United States.

That there was nothing but a slip and that the intent of Congress was unmistakably shown by all the prior sections to which we have alluded is only made the stronger by reference to subdivisions (d) and (e). Under (d) we find that a Buddist missionary, or a Chinese instructor may come into the United States and following his occupation remain here for the remainder of his life with his wife and children under 18 entering with or following him.

For decisions of lower courts as to right to admission of Chinese-born wives of American citizens, see *Ex Parte Goon Dip,* 1 Fed. (2d) 811; *Case of Chiu Shee,* 1 Fed. (2d) 798.

On the status of the Chinese wife of an American-born citizen before the Immigration Act of 1924, see *Tsoi Sim* v. *United States,* 116 Fed. 920; *Looe Shee* v. *North,* 170 Fed. 566; *Low Wah Suey* v. *Backus,* 225 U. S., 460; *Mackenzie* v. *Hare,* 239 U. S. 299; *Tinker* v. *Colwell,* 193 U. S. 473; *Anderson* v. *Watt,* 130 U. S. 695; *Maynard* v. *Hill,* 125 U. S. 211.

Under the law and the decisions as they stood up to July 1, 1924, there could have been no doubt as to the right of admission to the United States of the petitioners, and the burden rests upon the Government of showing that the Act manifests a clear intent to change this condition.

We should not submit this matter without strongly emphasizing the fact that the husbands of the women in whose behalf the writs of habeas corpus in these matters are sought are citizens of the United States permanently residing and domiciled therein, and that their rights as such citizens are before this Court. To hold that these women are debarred from admission to the United States under the Immigration Act of 1924 means that their husbands are to be permanently separated from them unless they abandon the country of their birth and citizenship, and take up their residence in some other land which permits their wives to reside with them.

Mr. Assistant Attorney General Donovan, with whom the *Solicitor General* was on the brief, for appellee.

Mr. Henry W. Taft filed a brief as *amicus curiae* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners, Chang Chan and three others, claiming to be native born citizens of the United States permanently domiciled therein, sought release from detention by the Immigration Commissioner of four young Chinese women, alleged to be their lawful wives wedded in China prior to July 1, 1924. On that day the young women were on the high seas as passengers upon the President Lincoln. Arriving at San Francisco, July eleventh, without immigration visés as provided for by § 9, Immigration Act of 1924, c. 190, 43 Stat. 153, they sought and were

finally denied permanent admission. In support of this action the Secretary of Labor said—

"Neither the citizenship of the alleged husband, nor the relationship of the applicant to him, has been investigated for the reason that even if it were conceded that both elements exist she would still be inadmissible, as Section 13 of the Act of 1924 mandatorily excludes the wives of United States citizens of the Chinese race if such wives are of a race or persons ineligible to citizenship, and the Department has no alternative than to recommend exclusion."

The court below inquires, Jud. Code, § 239: "Should the petitioners be refused admission to the United States either, (a) because of the want of a visé; or (b) because of want of right of admission if found to be Chinese wives of American citizens?"

This cause involves no claim of right granted or guaranteed by treaty and is therefore radically different from *Cheung Sum Shee et al.* v. *John D. Nagle, etc.*, this day decided, *ante*, p. 336.

The excluded wives are alien Chinese ineligible to citizenship here. Rev. Stat. 2169; Act May 6, 1882, c. 126, § 14, 22 Stat. 58, 61. Notwithstanding their marriage to citizens of the United States they did not become citizens and remained incapable of naturalization.

Prior to September 22, 1922, Rev. Stat. 1994 applied. It provided—

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Since that date c. 411, 42 Stat. 1021, 1022, has been in force. It provides—

SEC. 2. "That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States

by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws. . . ."

Sec. 13(c), Immigration Act of 1924, declares—

"No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under eighteen years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

Subdivisions (b), (d) and (e) of § 4 apply to immigrants previously lawfully admitted, immigrants who seek to enter as religious ministers or professors, and to students. They are not controlling here. An immigrant is defined in § 3 as "any alien departing from any place outside the United States destined for the United States," with certain exceptions, none of which describes the present applicants.

Taken in their ordinary sense the words of the statute plainly exclude petitioners' wives.

We cannot accept the theory that as consular officers are required to issue visés to Chinese wives of American citizens therefore they must be admitted. A sufficient answer to this is found in § 2(g)—

"Nothing in this Act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws."

Nor can we approve the suggestion that the provisions contained in Subdivision (a)* of § 4 were omitted from

* "An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9."

the exceptions in § 13(c) because of some obvious oversight and should now be treated as if incorporated therein. Although descriptive of certain "non-quota immigrants," that subdivision is subject to the positive inhibition against all aliens ineligible to citizenship who do not fall within definitely specified and narrowly restricted classes.

In response to the demand for an interpretation of the Act which will avoid hardships and further a supposed rational and consistent policy, it suffices to refer to what we have said in *Yee Won* v. *White,* 256 U. S. 399, 401, 402; *Chung Fook* v. *White,* 264 U. S. 443, 445, 446; *Commissioner, etc.* v. *Gottlieb,* 265 U. S. 310, 314.

The applicants should be refused admission if found to be Chinese wives of American citizens. It is unnecessary now to consider the requirements of the Act in respect of visés.

WALLACE BENEDICT, RECEIVER, *v.* RATNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 11. Argued October 5, 1923.—Decided May 25, 1925.

1. By the law of New York a transfer of property, as security for a debt, which reserves to the transferor the right to dispose of the property or to apply its proceeds for his own uses, is fraudulent and void as to creditors. P. 360.
2. This rule applies to the assignment of present and future book accounts as well as to assignment of chattels, since it does not result from the retention of ostensible ownership by the assignor, but from the fact that the reservation of dominion by him is inconsistent with the effective disposition of title and creation of a lien. P. 361.
3. *Held* that an assignment made by a mercantile corporation, more than four months before it was adjudged bankrupt, of its present and future accounts receivable as security for a loan, was void under the above rule, so that delivery of a list of accounts, and payments made within the four months, were inoperative to perfect a

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lien in the assignee, but were unlawful preferences, under the Bankruptcy Act. P. 364.

282 Fed. 12, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed an order of the District Court requiring a receiver and trustee in bankruptcy to pay over money collected from accounts receivable to a creditor of the bankrupt claiming them as security under an assignment, and denying the trustee's petition that the creditor be required to pay over collections made by him under the assignment.

Mr. Selden Bacon, for petitioner.

A contemporaneous agreement that, despite an assignment of property as collateral security to secure the assignee for a debt due him from the assignor, the assignor may continue to use and dispose of the property as his own, retaining and using the proceeds in his business, without accounting therefor in any way to his assignee, renders the assignment fraudulent and void as against creditors, not only in the case of ordinary chattel mortgages but also in the case of assignments confined to accounts receivable. *In re Leslie-Judge Co.,* 272 Fed. 886; *Russell* v. *Winne,* 37 N. Y. 591; *Skilton* v. *Codington,* 185 N. Y. 80; *Griswold* v. *Sheldon,* 4 N. Y. 581; *Southard* v *Benner,* 72 N. Y. 424; *Zartman* v. *First Natl. Bank,* 189 N. Y. 267; *In re Volence,* 197 Fed. 232; *Robinson* v. *Elliot,* 22 Wall, 513.

Cases implying that the rule is not based on any appearance growing out of possession but on the fraudulent character of the arrangement, we find in abundance. See cases above cited, and *Wood* v. *Lowry,* 17 Wend. 492; *Edgell* v. *Hart,* 9 N. Y. 213; *Vilas Bank* v. *Newton,* 25 App. Div. N. Y., 62, 66; *Mittnach* v. *Kelly,* 3 Abb. Ct. App. Dec. 301; *Gardner* v. *McEwen,* 19 N. Y. 123; *In re Marine Construction Co.,* 144 Fed. 649; *Worrall* v. *Smith,* 1 Camp. 322; *Paget* v. *Perchard,* 1 Esp. 205.

The decisions in *Sexton* v. *Kessler,* 225 U. S. 90, and in *Chapman* v. *Hunt,* 254 Fed. 768, in no way conflict with the rule we invoke.

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent, and more than the equivalent, of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

If the assignment was galvanized into actuality by Ratner's taking over the checks as they came in, during the last week before the bankruptcy, that galvanization process went no further than his actual receipts of about $12,000, and the decree for further payment to him of some $18,000 is erroneous. Moreover as to the $12,000 the transaction was preferential. The main question presented is of the utmost importance to the business community and to the administration of the Bankruptcy Act.

Mr. Louis S. Posner, for respondent.

An assignment of property to be acquired thereafter operates by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the assignor. Such lien becomes perfected and ripens into a right at law which is enforcible against third parties if, after the property is acquired, the assignee take possession thereof prior to an execution or attachment levy thereon, or the like, by third parties, or the appointment of a receiver upon the filing of a petition in bankruptcy by or against the assignor. *McCaffrey* v. *Woodin,* 65 N. Y. 463; *Thompson* v. *Fairbanks,* 196 U. S. 516.

The facts here constitute the equivalent, and more than the equivalent, of taking possession of the accounts re-

ceivable to the full extent that the nature of these choses in action permitted. And since this was done before any third parties had "fastened" a lien, it is enforcible against third parties, including the receiver in bankruptcy and his successor trustee. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 275–276; *Thompson* v. *Fairbanks, supra; McCaffrey* v. *Woodin, supra; Sexton* v. *Kessler,* 225 U. S. 90.

The agreement in question was not recorded because the recording acts of New York permit this to be done only with reference to "goods and chattels," and exclude choses in action from their operation. *Niles* v. *Methusa,* 162 N. Y. 546. The four-month rule does not apply to the situation, since the intervening acts by which possession was taken of the after-acquired accounts relate back to the date of the original agreement, which took place more than four months previously. *Bracket* v. *Harvey,* 91 N. Y. 214; *Thompson* v. *Fairbanks, supra; Sexton* v. *Kessler, supra.* Such cases as have been found which deal with the assignment of intangibles or choses in action, present or future, such as accounts, bonds, and the like, sustain the position of the appellee and entitle him to the proceeds of the balance of the accounts, at least of those accounts which were included in the list last delivered to him, until his loans are repaid in full with interest. *Stackhouse* v. *Holden,* 66 A. D. (N. Y.) 423; *Sexton* v. *Kessler, supra; Greey* v. *Dockendorff,* 231 U. S. 516; *In re Michigan Furniture Company,* 249 Fed. 974; *Union Trust* v. *Bulkeley,* 150 Fed. 510; *In re McCauley,* 158 Fed. 332. No question of good faith exists in the case based upon the secrecy of the transaction, which we maintain to be a condition inherent in it and which the courts so recognize. *Greey* v. *Dockendorff, supra; Stackhouse* v. *Holden, supra.*

It is the law in New York that a mortgage of goods and chattels wherein the mortgagor reserves the right of

disposal, for his own benefit, is deemed fraudulent in law and void. The rule rests in the original conception that the visible possession of personal property indicated ownership,—a condition which cannot in its nature apply to such intangible property as choses in action, and which has never been held so to apply in any decisions which we have been able to find or which the appellant cites. The doctrine in question, based upon the conceptions of reputed ownership in the days when rights of property had their beginnings, must be deemed to be greatly out of joint with modern conceptions of industry and modes of possession; in any event, the doctrine, if it cannot be disregarded, should at least be limited and held within its present confines rather than extended into a field where it never before has played a part and where it can but serve as an embarrassment to business. Such considerations of public interest as here exist point clearly that way, particularly since those who enter into business relations know full well that the utilization of accounts receivable, in order to keep business liquid, is one of the commonest practices of everyday business.

Mr. Justice Brandeis delivered the opinion of the Court.

The Hub Carpet Company was adjudicated bankrupt by the federal court for southern New York in involuntary proceedings commenced September 26, 1921. Benedict, who was appointed receiver and later trustee, collected the book accounts of the company. Ratner filed in that court a petition in equity praying that the amounts so collected be paid over to him. He claimed them under a writing given May 23, 1921—four months and three days before the commencement of the bankruptcy proceedings. By it the company purported to assign to him, as collateral for certain loans, all accounts present and future. Those collected by the receiver were, so far as

appears, all accounts which had arisen after the date of the assignment, and were enumerated in the monthly list of accounts outstanding which was delivered to Ratner September 23. Benedict resisted the petition on the ground that the original assignment was void under the law of New York as a fraudulent conveyance; that, for this reason, the delivery of the September list of accounts was inoperative to perfect a lien in Ratner; and that it was a preference under the Bankruptcy Act. He also filed a cross-petition in which he asked that Ratner be ordered to pay to the estate the proceeds of certain collections which had been made by the company after September 17 and turned over to Ratner pursuant to his request made on that day. The company was then insolvent and Ratner had reason to believe it to be so. These accounts also had apparently been acquired by the company after the date of the original assignment.

The District Judge decided both petitions in Ratner's favor. He ruled that the assignment executed in May was not fraudulent in law; that it created an equity in the future acquired accounts; that because of this equity, Ratner was entitled to retain, as against the bankrupt's estate, the proceeds of the accounts which had been collected by the company in September and turned over to him; that by delivery of the list of the accounts outstanding on September 23, this equity in them had ripened into a perfect title to the remaining accounts; and that the title so perfected was good as against the supervening bankruptcy. Accordingly, the District Court ordered that, to the extent of the balance remaining unpaid on his loans, there be paid Ratner all collections made from accounts enumerated in any of the lists delivered to Ratner; and that the cross-petition of Benedict be denied. There was no finding of fraud in fact. On appeal, the Circuit Court of Appeals affirmed the order. 282 Fed. 12. A writ of certiorari was granted by this Court. 259 U. S. 579.

The rights of the parties depend primarily upon the law of New York. *Hiscock* v. *Varick Bank of N. Y.*, 206 U. S. 28. It may be assumed that, unless the arrangement of May 23 was void because fraudulent in law, the original assignment of the future acquired accounts became operative under the state law, both as to those paid over to Ratner before the bankruptcy proceedings and as to those collected by the receiver;[1] and that the assignment will be deemed to have taken effect as of May 23. *Sexton* v. *Kessler*, 225 U. S. 90, 99. That being so, it is clear that, if the original assignment was a valid one under the law of New York, the Bankruptcy Act did not invalidate the subsequent dealings of the parties. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91. The sole question for decision is, therefore, whether on the following undisputed facts the assignment of May 23 was in law fraudulent.

The Hub Carpet Company was, on May 23, a mercantile concern doing business in New York City and proposing to continue to do so. The assignment was made there to secure an existing loan of $15,000, and further advances not exceeding $15,000 which were in fact made July 1, 1921. It included all accounts receivable then outstanding and all which should thereafter accrue in the ordinary course of business. A list of the existing accounts was delivered at the time. Similar lists were to be delivered to Ratner on or about the 23d day of each succeeding month containing the accounts outstanding at such future dates. Those enumerated in each of the lists delivered prior to September, aggregated between $100,000 and $120,000. The receivables were to be collected by the company. Ratner was given the right, at any time, to

[1] *Williams* v. *Ingersoll*, 89 N. Y. 508, 518–520; *Coats* v. *Donnell*, 94 N. Y. 168, 177. See *Rochester Distilling Co.* v. *Rasey*, 142 N. Y. 570, 580; *MacDowell* v. *Buffalo Loan, etc. Co.*, 193 N. Y. 92, 104. Compare *New York Security & Trust Co.* v. *Saratoga Gas, etc. Co.*, 159 N. Y. 137; *Zartman* v. *First National Bank*, 189 N. Y. 267.

demand a full disclosure of the business and financial conditions; to require that all amounts collected be applied in payment of his loans; and to enforce the assignment although no loan had matured. But until he did so, the company was not required to apply any of the collections to the repayment of Ratner's loan. It was not required to replace accounts collected by other collateral of equal value. It was not required to account in any way to Ratner. It was at liberty to use the proceeds of all accounts collected as it might see fit. The existence of the assignment was to be kept secret. The business was to be conducted as theretofore. Indebtedness was to be incurred, as usual, for the purchase of merchandise and otherwise in the ordinary course of business. The amount of such indebtedness unpaid at the time of the commencement of the bankruptcy proceedings was large. Prior to September 17, the company collected from accounts so assigned about $150,000, all of which it applied to purposes other than the payment of Ratner's loan. The outstanding accounts enumerated in the list delivered September 23 aggregated $90,000.

Under the law of New York a transfer of property as security which reserves to the transferor the right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to creditors, fraudulent in law and void.[2]

[2] *Griswold* v. *Sheldon,* 4 N. Y. 580; *Edgell* v. *Hart,* 9 N. Y. 213; *Russell* v. *Winne,* 37 N. Y. 591; *Southard* v. *Benner,* 72 N. Y. 424; *Potts* v. *Hart,* 99 N. Y. 168; *Hangen* v. *Hachemeister,* 114 N. Y. 566; *Mandeville* v. *Avery,* 124 N. Y. 376; *Skilton* v. *Codington,* 185 N. Y. 80; *Zartman* v. *First National Bank,* 189 N. Y. 267; *In re Marine Construction & Dry Docks Co.,* 135 Fed. 921, 144 Fed. 649; *In re Davis,* 155 Fed. 671; *In re Hartman,* 185 Fed. 196; *In re Volence,* 197 Fed. 232; *In re Purtell,* 215 Fed. 191; *In re Leslie-Judge Co.,* 272 Fed. 886. Compare *Frost* v. *Warren,* 42 N. Y. 204; also *Lukins* v. *Aird,* 6 Wall. 78; *Robinson* v. *Elliot,* 22 Wall. 513; *Smith* v. *Craft,* 123 U. S. 436; *Means* v. *Dowd,* 128 U. S. 273; *Etheridge* v. *Sperry,* 139 U. S. 266; *Huntley* v. *Kingman,* 152 U. S. 527; *Knapp* v. *Milwaukee Trust Co.,* 216 U. S. 545.

This is true whether the right of disposition for the transferor's use be reserved in the instrument [3] or by agreement *in pais,* oral or written;[4] whether the right of disposition reserved be unlimited in time [5] or be expressly terminable by the happening of an event;[6] whether the transfer cover all the property of the debtor [7] or only a part;[8] whether the right of disposition extends to all the property transferred [9] or only to a part thereof;[10] and whether the instrument of transfer be recorded or not.[11]

If this rule applies to the assignment of book accounts, the arrangement of May 23 was clearly void; and the equity in the future acquired accounts, which it would otherwise have created,[12] did not arise. Whether the rule applies to accounts does not appear to have been passed upon by the Court of Appeals of New York. But it would seem clear that whether the collateral consist of chattels

[3] *Edgell* v. *Hart,* 9 N. Y. 213, 216; *Zartman v. First National Bank,* 189 N. Y. 267, 270.

[4] *Russell* v. *Wynne,* 37 N. Y. 591, 595; *Southard* v. *Benner,* 72 N. Y. 424, 432; *Potts* v. *Hart,* 99 N. Y. 168, 172–173.

[5] *Southard* v. *Benner;* 72 N. Y. 424, 430; *Potts* v. *Hart,* 99 N. Y. 168, 172.

[6] *Zartman* v. *First National Bank,* 189 N. Y. 267, 270.

[7] *Zartman* v. *First National Bank,* 189 N. Y. 267, 269.

[8] *Russell* v. *Winne,* 37 N. Y. 591; *Southard* v. *Benner,* 72 N. Y. 424.

[9] *Potts* v. *Hart,* 99 N. Y. 168, 172.

[10] *Russell* v. *Winne,* 37 N. Y. 591, 593; *In re Leslie-Judge Co.,* 272 Fed. 886, 888.

[11] *Potts* v. *Hart,* 99 N. Y. 168, 171. N. Y. Personal Property Law, § 45; Laws, 1911, c. 626, authorizes the creation of a general lien or floating charge upon a stock of merchandise, including after-acquired chattels, and upon accounts receivable resulting from the sale of such merchandise. It provides that this lien or charge shall be valid against creditors provided certain formalities are observed and detailed filing provisions are complied with. It is possible that, if its conditions are performed, the section does away with the rule "that retention of possession by the mortgagor with power of sale for his own benefit is fraudulent as to creditors."

[12] *Field* v. *Mayor, etc. of New York,* 6 N. Y. 179.

or of accounts, reservation of dominion inconsistent with the effective disposition of title must render the transaction void. Ratner asserts that the rule stated above rests upon ostensible ownership, and argues that the doctrine of ostensible ownership is not applicable to book accounts. That doctrine raises a presumption of fraud where chattels are mortgaged (or sold) and possession of the property is not delivered to the mortgagee (or vendee).[13] The presumption may be avoided by recording the mortgage (or sale). It may be assumed, as Ratner contends, that the doctrine does not apply to the assignment of accounts. In their transfer there is nothing which corresponds to the delivery of possession of chattels. The statutes which embody the doctrine and provide for recording as a substitute for delivery do not include accounts. A title to an account good against creditors may be transferred without notice to the debtor[14] or record of any kind.[15] But it is

[13] *Smith* v. *Acker*, 23 Wend. 653; *Griswold* v. *Sheldon*, 4 N. Y. 580, 590; *Edgell* v. *Hart*, 9 N. Y. 213, 218; *Conkling* v. *Shelley*, 28 N. Y. 360. The statutes to this effect merely embody the common-law rule. But, in New York, an additional statute provides that unrecorded chattel mortgages under such circumstances are absolutely void as to creditors. New York Lien Law, § 230; Laws, 1909, c. 38, § 230, as amended 1911, c. 326, and 1916, c. 348. See *Seidenbach* v. *Riley*, 111 N. Y. 560; *Karst* v. *Kane*, 136 N. Y. 316; *Stephens* v. *Perrine*, 143 N. Y. 476; *Russell* v. *St. Mart*, 180 N. Y. 355. See *Stewart* v. *Platt*, 101 U. S. 731, 735. Compare *Preston* v. *Southwick*, 115 N. Y. 139; *Nash* v. *Ely*, 19 Wend. (N. Y.) 523; *Goodwin* v. *Kelly*, 42 Barb. (N. Y.) 194. In the case of a transfer of personal property by sale, retention of possession creates a rebuttable presumption of fraud. See *Kimball* v. *Cash*, 176 N. Y. Supp. 541; also *New York Ice Co.* v. *Cousins*, 23 App. Div. 560; *Rheinfeldt* v. *Dahlman*, 43 N. Y. Supp. 281; *Tuttle* v. *Hayes*, 107 N. Y. Supp. 22; *Young* v. *Wedderspoon*, 126 N. Y. Supp. 375; *Sherry* v. *Janov*, 137 N. Y. Supp. 792; *Gisnet* v. *Moeckel*, 165 N. Y. Supp. 82. In order to create a valid pledge of tangible personalty, there must be a delivery to the pledgee. *In re P. J. Sullivan Co.*, 247 Fed. 139, 254 Fed. 660.

[14] *Williams* v. *Ingersoll*, 89 N. Y. 508, 522.

[15] *Niles* v. *Mathusa*, 162 N. Y. 546; *National Hudson River Bank* v. *Chaskin*, 28 App. Div. 311, 315; *Curtis* v. *Leavitt*, 17 Barb. (N. Y.)

not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.

The nature of the rule is made clear by its limitations. Where the mortgagor of chattels agrees to apply the proceeds of their sale to the payment of the mortgage debt or to the purchase of other chattels which shall become subject to the lien, the mortgage is good as against creditors, if recorded.[16] The mortgage is sustained in such cases "upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt." The permission to use the proceeds to furnish substitute collateral "provides only for a shifting of the lien from one piece of property to another taken in exchange." *Brackett* v. *Harvey,* 91 N. Y. 214, 221, 223.

309, 364; *Young* v. *Upson,* 115 Fed. 192. In 1916, Section 230 of the New York Lien Law was amended to the effect that a mortgage, pledge, or lien on stocks or bonds given to secure the repayment of a loan is, if not recorded, absolutely void against creditors unless such securities are delivered to the mortgagee or pledgee on the day the loan is made. See N. Y. Laws, 1916, c. 348.

[16] *Conkling* v. *Shelley,* 28 N. Y. 360; *Brackett* v. *Harvey,* 91 N. Y. 214; *Spaulding* v. *Keyes,* 125 N. Y. 113; *Briggs* v. *Gelm,* 122 App. Div. 102. See *Robinson* v. *Elliot,* 22 Wall. 513, 524; *People's Savings Bank* v. *Bates,* 120 U. S. 556, 561.

On the other hand, if the agreement is that the mortgagor may sell and use the proceeds for his own benefit, the mortgage is of no effect although recorded. Seeming ownership exists in both classes of cases because the mortgagor is permitted to remain in possession of the stock in trade and to sell it freely. But it is only where the unrestricted dominion over the proceeds is reserved to the mortgagor that the mortgage is void. This dominion is the differentiating and deciding element. The distinction was recognized in *Sexton* v. *Kessler,* 225 U. S. 90, 98, where a transfer of securities was sustained.[17] It was pointed out that a reservation of full control by the mortgagor might well prevent the effective creation of a lien in the mortgagee and that the New York cases holding such a mortgage void rest upon that doctrine.

The results which flow from reserving dominion inconsistent with the effective disposition of title must be the same whatever the nature of the property transferred. The doctrine which imputes fraud where full dominion is reserved must apply to assignments of accounts although the doctrine of ostensible ownership does not. There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies,[18] the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit.

In the case at bar, the arrangement for the unfettered use by the company of the proceeds of the accounts pre-

[17] See note 18, *infra.*

[18] *Young* v. *Upson,* 115 Fed. 192. If it is agreed that the transferor may use the original collateral for his own purposes upon the substitution of other of equal value, the transfer is not thereby invalidated. *Clark* v. *Iselin,* 21 Wall. 360 (book accounts); *Sexton* v. *Kessler,* 225 U. S. 90 (negotiable securities); *Chapman* v. *Hunt,* 254 Fed. 768 (book accounts). Compare *Casey* v. *Cavaroc,* 96 U. S. 467.

cluded the effective creation of a lien [19] and rendered the original assignment fraudulent in law. Consequently the payments to Ratner and the delivery of the September list of accounts were inoperative to perfect a lien in him, and were unlawful preferences.[20] On this ground, and also because the payment was fraudulent under the law of the State, the trustee was entitled to recover the amount.[21]

Stackhouse v. *Holden*, 66 App. Div. 423, is relied upon by Ratner to establish the proposition that reservation of dominion does not invalidate an assignment of accounts. The decision was by an intermediate appellate court, and, although decided in 1901, appears never to have been cited since in any court of that State.[22] There was a strong dissenting opinion. Moreover, the case is perhaps distinguishable on its facts, p. 426. *Greey* v. *Dockendorff*, 231 U. S. 513, upon which Ratner also relies, has no bearing on the case at bar. It involved assignment of accounts, but there was no retention of dominion by the bankrupt. The sole question was whether successive assignments of accounts by way of security, made in pursuance of a contract, were bad because the contract embraced all the accounts. The lien acquired before knowledge by either party of insolvency was held good against the trustee.

Reversed.

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[19] Compare *Mechanics' Bank* v. *Ernst*, 231 U. S. 60, 67.

[20] *Schaupp* v. *Miller*, 206 Fed. 575; *Grimes* v. *Clark*, 234 Fed. 604; *Gray* v. *Breslof*, 273 Fed. 526, 527.

[21] *Mandeville* v. *Avery*, 124 N. Y. 376, 382; *Stimson* v. *Wrigley*, 86 N. Y. 332, 338; *Dutcher* v. *Swartwood*, 15 Hun (N. Y.) 31.

[22] It was cited in *Young* v. *Upson*, 115 Fed. 192 (Circ. Ct.); *In re Michigan Furniture Co.*, 249 Fed. 978 (D. Ct.); and in the opinion here under review.

MISSOURI PACIFIC RAILROAD CO. *v.* REYNOLDS-DAVIS GROCERY CO.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 329. Submitted April 21, 1925.—Decided May 25, 1925.

Where the final carrier named in the bill of lading on a through interstate shipment employs a carrier not named in the bill nor participant in the joint rate to switch the car for the rate named in its tariff from a point on the lines of the former carrier to the consignee's warehouse on the lines of the latter, both within the city named in the bill as destination, the first carrier is the delivering carrier and the second merely its agent for the purpose of delivery, so that the one is liable for loss of the goods while in the hands of the other. *Oregon-Washington R. R.* v. *McGinn*, 258 U. S. 409, distinguished. P. 368.

161 Ark. 579, affirmed.

CERTIORARI to a judgment of the Supreme Court of Arkansas which affirmed a judgment entered on a verdict against the Railroad in an action by the Grocery Company to recover damages for loss of a car-load of sugar.

Messrs. Thomas B. Pryor and *Vincent M. Miles* for petitioner. *Mr. Edward J. White* was also on the brief.

The entire charge for the transportation from Louisiana to Fort Smith was covered by tariffs on file with the Interstate Commerce Commission. A part of this charge was the amount paid the St. Louis-San Francisco Railway for transporting the car from the line of the Missouri Pacific to the warehouse of the respondent. This switching rate was properly a part of the "freight charges" and, therefore, the St. Louis-San Francisco shared in the freight charges. Notwithstanding the absolute liability of the initial carrier, under the Interstate Commerce Act, a presumption arises, in the absence of proof as to where the loss or damage to the shipment occurred, that the delivering carrier was negligent, in a suit against an inter-

mediate or delivering carrier. *Georgia etc. R. R.* v. *Blish Milling Co.,* 241 U. S. 190. In a suit for loss or damage to freight in transit, there is no presumption against an intermediate carrier, which is neither the initial nor the delivering carrier, that the loss or damage occurred on its line, and a recovery may be had against it only upon actual proof that the loss or damage occurred on its line. *Oregon, Washington R. R.* v. *McGinn,* 258 U. S. 409. The Interstate Commerce Commission has power to fix the charges for delivering cars on a private track. *Terminal Railroad* v. *United States,* 266 U. S. 17. *Grand Trunk Railway* v. *Michigan Railroad Commission,* 231 U. S. 457, held that Congress has not so taken over the whole subject of terminals, team tracks, switching tracks and sidings of interstate railways as to invalidate state regulations relative to the interchange of traffic. This Court in *United States* v. *Penna. R. R.,* 266 U. S. 191, upheld the power of the Commission to treat movements such as this as transportation and to regulate them.

The Missouri Pacific had not directly contracted with the respondent.

Under the Interstate Commerce Act as amended by the Transportation Act, § 15, Pars. 3 and 4, 41 Stat. 485, the Interstate Commerce Commission approved a tariff fixing the rate that the St. Louis-San Francisco might charge for moving this car under its own control and with its own locomotive and over its own line of railroad, to the door of respondent's warehouse. Prior to the time Congress entered this field, the Missouri Pacific Railroad Company might have made a private contract with the St. Louis-San Francisco Railway Company for such movement, but as the case stands the St. Louis-San Francisco Railway was performing a service as a common carrier under a tariff approved by the Interstate Commerce Commission, pursuant to authority granted it by an act of Congress.

Messrs. Joseph M. Hill, Harry P. Daily, and *John P. Woods,* for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought in a state court of Arkansas by Reynolds-Davis Grocery Company against the Missouri Pacific Railroad to recover for the loss of part of a carload of sugar shipped from Raceland, Louisiana, to Fort Smith, Arkansas, on a through bill of lading. The loss occurred within the city of Fort Smith while the car was in the possession of the Saint Louis-San Francisco Railroad. This carrier had been employed by the Missouri Pacific to switch the car from a point on its lines within the city to the consignee's warehouse, which lay within the city on the lines of the switching carrier. The Missouri Pacific, relying upon *Oregon-Washington Railroad & Navigation Co.* v. *McGinn,* 258 U. S. 409, requested the trial court to rule that, as the bill of lading provided that no connecting carrier should be liable for any damage which did not occur on its own lines, and delivery at the consignee's warehouse was part of an interstate shipment, the defendant was not liable, because it was neither the initial nor the delivering carrier. The court refused to rule as requested; the jury found for the plaintiff; and the judgment entered on the verdict was affirmed by the Supreme Court of Arkansas. 161 Ark. 579. This Court granted a writ of certiorari. 265 U. S. 577.

The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. It employed the

Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such.

Affirmed.

CHARLES SHERWIN ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 379. Argued April 16, 1925.—Decided May 25, 1925.

Section 9 of the Federal Trade Commission Act grants immunity from prosecution only where testimony is given or evidence produced before the commission in obedience to a subpoena issued by it, and not where information was furnished upon the demand made by an agent of the commission after the commission had requested such information by letter. P. 372.

290 Fed. 517; 297 *id.* 704, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction and sentence in a criminal case in the District Court in which the petitioner's plea of immunity was denied.

Mr. S. R. Sayers, with whom *Mr. W. P. McLean* was on the brief, for petitioners.

The Solicitor General and *Mr. Merrill E. Otis,* Special Assistant to the Attorney General, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Sherwin and Schwarz were indicted in the federal court for northern Texas, under § 215 of the Criminal Code, for

using the mails in consummation of a scheme to defraud; and also, under § 37, for a conspiracy to commit the offense. They filed in bar a plea of immunity under § 9 of the Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 723. Their claim was that the indictment rested upon information which the Commission had compelled them to give. There was a replication; issue was joined; a trial was had upon the plea; and under instructions of the court, the jury found against the defendants upon their plea of immunity. They were found guilty upon the various counts of the indictment and sentenced. *United States* v. *Lee,* 290 Fed. 517. The judgment was affirmed by the United States Circuit Court of Appeals. 297 Fed. 704. This Court granted a writ of certiorari. 265 U. S. 578. Whether the giving of the information under circumstances to be stated created an immunity is the sole question for decision.

The Federal Trade Commission Act in § 5 empowers and directs the commission to prevent the use of unfair methods of competition and provides for proceedings to that end. In § 6 it provides that the commission shall have power to investigate the practices of corporations engaged in interstate commerce; and may require of them special reports in writing, under oath or otherwise, concerning their practices. In § 9 it provides that the commission or its agents shall " have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against "; and " to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence." Methods of enforcing obedience to such orders are provided by § 9. Refusal " to attend

and testify, or to answer any lawful inquiry, or to produce documentary evidence . . . in obedience to the subpoena or lawful requirement of the commission" is punishable criminally under § 10. It is further provided by § 9:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Sherwin and Schwarz were the promoters of alleged gas and oil properties conducted under the names of General Lee Interests Nos. 1 and 2, and General Lee Development Interests. The commission addressed to the concern letters requesting, under §§ 5, 6, 9 and 10 of the Act, detailed information in writing concerning its organization and business. No reply was made thereto. Later, an agent of the commission, referred to as a special examiner, called in person at the office of the concern and demanded the information. This was at first refused, on the ground that the concern, being a common law trust, was not subject to the jurisdiction of the commission. The agent insisted that the Act required Sherwin and Schwarz to give the information and answers sought; pointed out that refusal to comply with the commission's request would subject them to the criminal penalties provided in the Act; and, in so doing, omitted to call to

their attention the provision granting immunity from subsequent prosecution under certain circumstances. Conferences were then had with their legal adviser. Thereupon, they gave the agent access to books and papers; furnished him copies of some documents; and answered freely the enquiries made by him. It does not appear that the commission, or any member thereof, ever issued any order in the matter. There was no hearing of any kind, unless the informal conversations of the agent with Sherwin and Schwarz could be called such. No subpoena from any source was ever served upon Sherwin or Schwarz or any other person connected with their business. No one made any answer under oath either orally or in writing. There was no claim by Sherwin or Schwarz of immunity, or that the giving of information might tend to incriminate them. The subsequent prosecution which resulted in the indictment was instituted by a post office inspector. It does not appear that the Federal Trade Commission had any part in the prosecution or communicated any of the information gained to any government officials who did have; or that any fact was elicited by the commission which connected Sherwin and Schwarz with the crime of which they were convicted.

The question is not, as in *Councilman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591; and *Hale* v. *Henkel,* 201 U. S. 43, whether the immunity provided by the Act is sufficiently broad to deprive the witness of his constitutional privilege against self-incrimination. It may be that, for this and other reasons, Sherwin and Schwarz could not have been compelled to furnish the information which they gave. See *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298. The question is not, as in *Glickstein* v. *United States,* 222 U. S. 139, and *Cameron* v. *United States,* 231 U. S. 710, whether an admitted immunity extends to the particular attempted use of the testimony. Nor is it necessary to

consider the question involved in *Heike* v. *United States,* 227 U. S. 131, whether the information given was beyond the protection of the immunity provision because not of an incriminating nature and but remotely, if in any way, connected with the transactions forming the basis of the later prosecution. The immediate question here is whether, under this particular immunity provision, the mere furnishing of information of whatever character creates an immunity which bars the prosecution. Compare *Tucker* v. *United States,* 151 U. S. 164, 167–169.

The question is said to be one of statutory construction. But, upon the facts stated, it is clear that there was no basis for the plea of immunity. The Act grants immunity only when the person testifies or produces evidence "before the Commission in obedience to a subpoena issued by it." Sherwin and Schwarz did nothing in obedience to a subpoena. None was issued. Whether the judgment below was right for other reasons also, we need not consider. The case is wholly unlike *United States* v. *Pardue,* 294 Fed. 543.

Affirmed.

RAY CONSOLIDATED COPPER COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 443. Argued January 13, 1925.—Decided May 25, 1925.

1. The term "capital stock" has no fixed meaning in taxing statutes, and must be interpreted in each case by reference to the context, the nature, purpose and history of the statute, and by other aids to construction. P. 376.
2. The Revenue Act of 1918 provides: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5000. In estimating the value

of the capital stock the surplus and undivided profits shall be included." *Held:*

(*a*) That "capital stock" here means the entire potentiality of the corporation to profit by the exercise of its corporate franchise; and the method for ascertaining the value, not being prescribed, is left to the sound discretion of the Commissioner of Internal Revenue subject only to the obligation to consider every relevant fact. P. 377.

(*b*) The net fair value of the corporate assets is clearly relevant; and adoption of this, rather than the value of the outstanding shares of stock as evinced by the average prices at which the shares were sold on the stock exchange, was not arbitrary nor an abuse of discretion. *Id.*

59 Ct. Cls. 686, affirmed.

APPEAL from a judgment of the Court of Claims denying a claim for recovery of the amount of an additional special corporation excise tax, paid under protest.

Mr. Arthur A. Ballantine, with whom *Messrs. Carroll A. Wilson* and *George E. Cleary* were on the brief, for appellant.

The Solicitor General, with whom *Messrs. Robert P. Reeder* and *Fred K. Dyar,* Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Revenue Act of 1918, February 24, 1919, c. 18, Title X, § 1000 (a) (1), 40 Stat. 1057, 1126, provides: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of the capital stock the surplus and undivided

profits shall be included." How the value shall be determined is the main question for decision.

Ray Consolidated Copper Company, a domestic corporation engaged in the business of mining and smelting, has a capital stock of $15,771,790, divided into 1,577,179 shares of common stock of the par value of $10 each. Under the above provision, the company filed, on July 30, 1920, with the appropriate collector of internal revenue a return for the special tax for the year ending June 30, 1921, in which it reported that the fair average value of its capital stock for the preceding year was $34,803,608.99. The value so reported was arrived at by finding the average selling price of the stock on the New York Stock Exchange during the calendar year 1919 and multiplying the price so found—about $22 a share—by the number of shares outstanding. The stock is listed on the New York Stock Exchange; was traded in almost daily; and the aggregate number of shares so sold during the year equalled nearly one-third of the total stock outstanding. The Commissioner of Internal Revenue refused to accept the company's valuation; took into consideration for the purpose of estimating the value of the capital stock, among other things, the value of the mining property theretofore established in connection with other federal taxes; concluded that the fair value of the capital stock considered as a whole was not materially less than the net fair value of the assets; fixed the value of the capital stock higher than the company had reported; and exacted an additional tax. Refund being denied, this suit was brought in the Court of Claims to recover the additional amount paid. Before the trial the Commissioner refunded a part of the additional tax. As to the balance, that court upheld the assessment. 59 Ct. Cl. 686. The case is here on appeal under § 242 of the Judicial Code.

The Company insists that the term "fair average value of its capital stock" means fair average value of the ag-

gregate shares of its stock and not the value of the corporate assets; that the fair average value of the shares, based upon *bona fide* sales of the stock in reasonable volume, was correctly stated in its return; that the aggregate value of the shares so determined by the fair average selling price of the individual shares must be adopted as the single standard for determining the value of the capital stock; that such determination cannot lawfully be modified by any consideration of the value of the corporation's assets; that the Commissioner based his determination upon the net fair value of the assets; and that the additional tax was, therefore, illegally assessed.

The tax is a special excise imposed on the privilege of carrying on business in the form of a corporation. Congress might have measured the value of the privilege by the net income of the year, as in the corporation tax, *Flint* v. *Stone-Tracy Co.,* 220 U. S. 108, 174; by the annual gross receipts, as in the sugar refiners' tax, *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; by the amount of capital employed, as in the bankers' tax, *Fidelity Title & Trust Co.* v. *United States,* 259 U. S. 304, 308; or by the fixed capitalization, as in the taxing acts of many states. It might have taken as the measure, the aggregate value of all of the outstanding shares of stock and have directed that their value be computed by multiplying the average selling price, during the year, of a single share by the total number of shares outstanding. Compare *The Delaware Railroad Tax,* 18 Wall. 206, 209, 231. But Congress did none of these things. It declared that the tax should be measured by the "fair average value of its [the corporation's] capital stock." In so doing, it used a term which has no fixed meaning in taxing statutes and it gave no directions for ascertaining such value, except that in "estimating" value "the surplus and undivided profits shall be included."

As the term capital stock has no fixed significance, it must be construed in a particular statute by reference to

the context, the nature and purpose of the statute, its history and other aids to construction. We think that, as here used, it means the entire potentiality of the corporation to profit by the exercise of its corporate franchise. *Central Union Trust Co.* v. *Edwards,* 287 Fed. 324, 328. As the method to be pursued in ascertaining the value is not prescribed, we think that it was left to the sound judgment and discretion of the Commissioner, subject only to the obligation to take into consideration every relevant fact. Compare *Louisville & Nashville R. R. Co.* v. *Greene,* 244 U. S. 522, 540.

The capital stock of a corporation, its net assets, and its shares of stock are entirely different things. Compare *Farrington* v. *Tennessee,* 95 U. S. 679, 686; *Tennessee* v. *Whitworth,* 117 U. S. 129, 136–137; *Wright* v. *Georgia R. R. & Banking Co.,* 216 U. S. 420, 425; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 111. The value of one bears no fixed or necessary relation to the value of the other. The net fair value of the assets was clearly a relevant fact bearing upon the value of the capital stock. It does not appear that the Commissioner refused to consider the selling price of the shares or other factors. He may have given much consideration to the selling price of the shares, and have concluded that, under the conditions prevailing in the year 1920, the average price at which relatively small lots were sold on the Stock Exchange was not a fair indication of the value of the capital stock. We cannot say that he acted arbitrarily or abused his discretion in concluding that " the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets." *Illinois Central R. R. Co.* v. *Greene,* 244 U. S. 555, 562. In *Hecht* v. *Malley,* 265 U. S. 144, 162–3, where the provision here in question was upheld as applied to a voluntary association without a fixed or designated share capital, the Collector had assessed the tax by " taking the

fair value of the assets of the Association over its liabilities, and calling the difference its capital stock."

Affirmed.

MR. JUSTICE SUTHERLAND dissents.

UNITED STATES *v.* DICKEY ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 768. Argued April 16, 17, 1925.—Decided May 25, 1925.

1. Assuming that no constitutional right of the tax-payer is invaded, the question whether income-tax returns shall be published or kept secret is addressed to the discretion of Congress. P. 386.
2. Section 257 (b) of the Revenue Act of June 2, 1924, directs the Commissioner of Internal Revenue to prepare, each year, and make "available to public inspection in such manner as he may determine, in the office of the collector of each internal revenue district and in such other places as he may determine, lists containing the name and post-office address of each person making an income-tax return in such district, together with the amount of the income-tax paid by such person." The same act (§ 1018) reenacts § 3167 Rev. Stats., which makes it a misdemeanor to print or publish in any manner whatever "not provided by law" any income return or any part thereof, etc. *Held,* in view of the legislative history of these provisions and the evident policy of the Act to secure publicity of the information authorized to be put into the lists, that publication by newspapers of the names and amounts of taxes so listed is not within the inhibition of § 3167. P. 385.

3 Fed. (2d) 190, affirmed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment accusing the editor and the managing editor of divers newspapers of printing and publishing parts of federal income-tax returns, in violation of § 1018 of the Revenue Act of June 2, 1924, reënacting Rev. Stats. § 3167.

The Solicitor General for the United States.

Section 3167, Rev. Stats. reënacted as § 1018 of this Revenue Act, has been a provision of the Income Tax Law since the first act adopted under the Sixteenth Amendment. It was not changed in the Revenue Act of 1924 nor was there any attempt from the introduction to the adoption of the act to change this provision.

The complete return required by the law and regulations is the "return," the printing or publishing of the whole or any part of which is prohibited by § 3167. The name of the taxpayer and the amount of his tax certainly are parts of this return. It can not be doubted that, at least prior to the enactment in 1924, publication of the name of an income taxpayer and the amount of his tax was under the law a crime. Was the law changed in this regard by subdivision (b)? As between §§ 257 and 1018 the latter is the last expression of the legislative will and as such prevails if between them exists, as we think there does not, an irreconcilable conflict. *Merchants National Bank of New Haven* v. *United States,* 214 Fed. 200. If the familiar rules of construction be applied and the two sections read together, their effect is to authorize the Commissioner of Internal Revenue to make available to public inspection, in the offices of Collectors of Internal Revenue, or such other places as he may determine, lists showing the names of taxpayers and the amounts of income tax, respectively, paid by them, but not to authorize the publication of such lists, for the reason that they comprise data derived from and constituting part of income-tax returns, the printing or publishing of which, unless authorized by law, is specifically prohibited.

The phrase "available to public inspection" does not import a right "to print or publish." *Pabst Brewing Company* v. *Crenshaw,* 198 U. S. 17. "Public" is defined as meaning "open to the knowledge or view of all; general; common; notorious . . . open to com-

mon or general use." So "available to public inspection" merely means open to all to examine and view. But "to print or publish" means something entirely different. "Publish" is defined, when used in connection with newspapers, as meaning "to bring before the public as for sale or distribution"; especially to print, or cause to be printed, and to issue from the press, either for sale or general distribution. The use of the word "print" in connection with "publish" in § 3167, Rev. Stats., is significant. It gives emphasis to the fact that the word "publish" as there employed is used in the sense of distribution by the press. The distinction between "inspection" and "print or publish" is shown in § 257 itself, in subdivision (a) thereof. So also a distinction is made by Congress in the section immediately following § 257. This gives the only authorization to "publish" income-tax data to be found in the Revenue Act of 1924. That by "inspection" as used in §§ 257 (a) and 257 (b) is meant only the right to examine or view and nothing more, is further shown by the fact that in the first proviso in 257 (a), giving certain congressional committees the right to "inspect" returns Congress deemed it necessary to affirmatively provide that the information so obtained "may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and House, as the case may be." The necessary inference is that, in the absence of this specific authority, the right to inspect would not carry with it the right to communicate the information so obtained even to the Congress itself.

If Congress had intended to open the doors to unlimited inspection, it would not have been so careful to make the right of inspection subject to the discretionary powers of the Commissioner of Internal Revenue. For this there were obvious reasons. The inspection may be asked for a legitimate purpose, or it may be asked from

idle curiosity, or even from an attempt to injure the credit of another. Many States have statutes which require the lists of stockholders to be available to the stockholders, but it has been held that such a right can not be exercised for an improper purpose. Similarly, in respect to the present law, Congress obviously intended that the Commissioner should allow a reasonable inspection—that is—for legitimate purposes.

That § 3167, Rev. Stats., was designed to meet just such contingencies is clearly shown when that section is viewed as a whole. It is in two distinct parts. The first part relates to the divulging of information contained in returns by employees who, of course, have free access thereto, and the second part to the printing or publishing of any part of a return by any other person. Manifestly, by two such distinct provisions, it was intended to protect not only the source of information but also to guard it in any channel in which it might subsequently flow. As to the contention that this construction leads to an absurd result, in that it punishes one for publishing in printed form what he is at liberty to communicate orally, it is sufficient to say that such is quite frequently the case with regard to many laws. For instance, one may communicate by word of mouth information concerning lotteries which he may not print and send through the mails. Again, one may orally recite any portion of a copyrighted book which it would be unlawful for him to print or publish. Such examples could be multiplied indefinitely.

In construing these sections the fact that they are penal has not been lost sight of, but effect is to be given to the plain meaning of the language of penal statutes in the same manner as in the case of other statutes. *Bolles* v. *Outing Company,* 175 U. S. 262; *Wilson* v. *Wentworth,* 25 N. H. 245, 247.

As to whether a person has, in the absence of express statutory authority, the right to inspect and take memo-

randa from public records for the purpose of publication, See 34 Cyc. 594; *Buck* v. *Collins,* 51 Ga. 391; *In re License Docket,* 4 Pa. Dist. 162; 23 R. C. L. 160; *In re Caswell,* 18 R. I. 835, and Note 27 L. R. A. 82; *Belt* v. *Abstract Co.,* 73 Md. 289.

The provisions of Rev. Stats. § 3167 are within the powers conferred upon Congress by the Constitution. They do not constitute an invasion of the rights secured by the First Amendment.

Mr. M. H. Winger and *Mr. James A. Reed,* with whom *Mr. David M. Proctor* was on the brief, for defendants in error.

From 1798 to 1870 the law not only permitted, but required full publicity of tax returns. In the laws of 1870 to 1894 such limitations as were put upon publication of returns applied only to tax assessors and their deputies. In 1894 the law for the first time attempted to prevent newspapers from publishing the returns; but even this law permitted publication when "provided by law." The law of 1894 having, so far as its income tax provisions were concerned, been almost immediately declared to be unconstitutional, the provision relating to publicity of returns remained practically a dead letter until the Constitution was amended, and the law of 1913 enacted.

The law of 1913 greatly enlarged the right of publicity. It declared the returns to be public records; it made them open to inspection by all persons on order of the President; it gave the state officers the right to inspect the returns without the permission of the President, and it placed no limitation upon publicity of facts ascertained by the state authorities.

The law of 1918 further enlarged the right of publicity in two important particulars. It authorized stockholders to examine corporate returns, but imposed heavy penalties for publishing the facts thus learned; it introduced

an entirely new subject which did not relate to publicity of returns, but to the preparation by the Commissioner of lists containing the names and addresses of taxpayers, and the publication of such lists in the office of the Collector of Internal Revenue in each district, and in such other places as the Commissioner may determine.

In 1924 an effort was made in the House of Representatives to grant full publicity for all returns. This contention was compromised in the House by providing that the committees of Congress could have access to the returns and the decisions made thereon, and could report the facts to Congress, without limitation upon publicity of facts gathered by the committees of Congress, or the proceedings of Congress relative thereto. When the bill reached the Senate it was amended so as to provide full publicity of returns. In conference, the disputes between those who wanted secrecy and those who wanted absolute publicity was compromised by adding to the provision for the publication of lists of names and addresses of taxpayers, a provision that the amount of taxes paid should also be stated in the lists.

The clear intention of Congress was to preserve secrecy as to the private information contained in the returns, but to give full publicity in the published lists to the names and addresses of the taxpayers and the amounts ultimately paid.

The Federal Government cannot prepare a list of taxpayers, declare that list to be a public record, publish its contents to every person who cares to read and make it available to every person who cares to look at it, and then send a man to jail for talking or writing about that which the Government has already made public; and the imposition of any such penalty is in violation of the First and Tenth Amendments to the Constitution of the United States. If publication in a newspaper of any part of the

lists be a crime, then publication by word of mouth is equally a crime.

It is claimed that the publication of the lists interferes with the government in the collection of its taxes. The answer is that the tax has already been collected before the lists are made.

On the question of the right of free speech and liberty of the press, the only limitations which have ever been placed on these rights by the courts are included under one of four heads, blasphemy, immorality, sedition and defamation or libel, which are discussed at length in *State* v. *Shepherd,* 177 Mo. 205.

Mr. Justice Sutherland delivered the opinion of the Court.

An indictment was returned in the court below charging defendants in error as owner-editor and managing editor of several newspapers published at Kansas City, Missouri, with printing and publishing therein parts of certain designated federal income-tax returns, showing the names of the tax payers and the amounts of their income taxes. Demurrers were interposed to the indictment upon the ground that the facts set forth were not sufficient in law to charge any crime against the defendants, because the information so published was open to public inspection, constituted a public record available to the general public, and, consequently, was proper matter for news publication; and that if any statute attempted to forbid or penalize such publication, it contravened the First Amendment to the federal Constitution which prohibits Congress from making any law abridging the freedom of speech or of the press. The court below sustained the demurrers and dismissed the indictment. 3 Fed. (2d) 190.

The indictment is drawn under that part of § 1018 of the Revenue Act of June 2, 1924, c. 234, 43 Stat. 253, 344–346, which reënacts R. S. § 3167, copied in the

margin.[1] Section 257(b) of the same act, 43 Stat. 293, provides: "The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the name and the post-office address of each person making an income-tax return in such district, together with the amount of the income tax paid by such person."

The prohibition against publication contained in § 3167, it will be seen, is not absolute, but subject to possible qualification by other provisions of law. The language is that it shall be unlawful to print or publish in any manner "not provided by law" any income return or any part thereof, etc. On behalf of defendants in error, it is contended that § 257(b) effects such a qualification. To this the Government replies that the extent to which that provision goes is to authorize the Commissioner of Inter-

[1] "Sec. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

nal Revenue to make available for public *inspection* lists showing names of tax payers and amounts of taxes paid by them; and that this falls short of authorizing the *printing* and *publishing* of the information contained in the lists.

Something is said in the briefs, and was said at the bar, as to the wisdom, on the one hand, of secrecy, and, on the other hand, of publicity, in respect of tax returns. But that is a matter addressed to the discretion of the law-making department, with which the courts are not concerned, so long as no constitutional right or privilege of the tax payer is invaded; and there is no contention that there is any such invasion here, whichever view may be adopted. The problem, therefore, is, primarily, one of statutory construction, the disposition of which will determine whether the constitutional question as to the freedom of the press needs to be considered. For the purposes of the inquiry, we assume the power of Congress to forbid or to allow such publication, as in the judgment of that body the public interest may require.

The Commissioner is directed to make the lists of tax payers and amounts paid available for public inspection in the office of the collector and elsewhere as he may determine. His discretion in that respect is limited only by his own sense of what is wise and expedient. And the inquiry at once suggests itself: To what end is this discretion, so vested in him, to be exercised? The obvious answer is: To the end that the names and addresses of the tax payers and the amounts paid by them may be generally known. To the extent of the information authorized to be put into the lists, this is the manifest policy of the statute, with which the application of § 3167 to the present case, it fairly may be argued, will be out of harmony. Whatever one's opinion may be in respect of its wisdom, the policy having been adopted as an aid to the enforcement of the revenue laws or to the accomplishment

of some other object deemed important, it is not easy to conclude that Congress nevertheless intended to exclude and severely to penalize the effective form of secondary publicity now under consideration. Information, which everybody is at liberty to acquire and the acquisition of which Congress seemed especially desirous of facilitating, in the absence of some clear and positive provision to the contrary, cannot be regarded otherwise than as public property, to be passed on to others as freely as the possessors of it may choose. The contrary view requires a very dry and literal reading of the statute quite inconsistent with its legislative history and the known and declared objects of its framers.

Prior to the adoption of the Sixteenth Amendment, the policy in respect of tax publicity, as evidenced by congressional legislation, had not been uniform. Generally, the earlier acts had been liberal and the later ones restrictive in character. Section 3167 R. S. first appeared in substantially its present form, in the Act of August 27, 1894, § 34, c. 349, 28 Stat. 509, 557. It was reënacted by the Revenue Acts of 1913, 1916, 1919 and 1921, and by the existing Act of 1924. The Act of 1913, c. 16, 38 Stat. 177, provided that tax returns should be open to inspection only upon order of the President; but allowed state officers under certain conditions to have access to the returns showing the names and income of corporations, etc. The Act of 1919, § 257, c. 18, 40 Stat. 1086, in addition to this, allowed stockholders of any corporation to examine its returns upon conditions therein stated. That act further provided (p. 1087) that the Commissioner should cause to be prepared and made available to public inspection, etc., "lists containing the names and the post-office addresses of all individuals making income-tax returns in such district"; and this was expanded by the present law, § 257(b), Act of 1924, to include the amount of the income tax paid.

It is significant that, while these progressively liberal publicity amendments were being made, § 3167—to the general rule of which they were in terms opposed—was carried along by reënactment without change, plainly indicating that, in the opinion of Congress, by the application of the qualifying clause "not provided by law," the scope of the general rule against publication would become automatically narrowed to the extent of the liberalizing exceptions. The congressional proceedings and debates and the reports of the conferees on the disagreeing votes of the two Houses, which we have examined but think it unnecessary to review, strongly confirm our conclusion that Congress, understanding that this limitation would apply, intended to open the information contained in the lists to full publicity.

As a result, we hold that, to the extent provided by § 257(b), Congress meant to abandon the policy of secrecy altogether and to exclude from the operation of § 3167 all forms of publicity, including that here in question.

Judgment affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

UNITED STATES *v.* BALTIMORE POST.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 847. Argued April 16, 17, 1925.—Decided May 25, 1925.

Decided upon the authority of *United States* v. *Dickey, ante,* p. 378. 2 Fed. (2d) 761, affirmed.

The Solicitor General for the United States.

Mr. Newton D. Baker, for defendant in error.

The matter published by the defendant was no part of the income return, but merely a copy of the list

prepared and made available to public inspection by the commissioner.

It is the duty of the Commissioner, under the provisions of § 257 (b) of the Revenue Act of 1924, to prepare and make available for public inspection in each collection district, lists containing the name of each person making an income tax return and the amount of tax paid by him; and therefore the publication made by the defendant was not a printing or publishing of a part of an income return in a manner not provided by law in violation of Rev. Stats. § 3167.

If § 3167, interpreted in connection with § 257, forbids the printing in a newspaper of the name of the taxpayer and the amount of tax paid, contained in the lists open to public inspection, then to that extent § 3167 is unconstitutional, since it abridges the freedom of the press protected by the first amendment to the Constitution of the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case comes here from a judgment of the lower court dismissing the indictment, 2 Fed. (2d) 761, and is the same in all respects as No. 768, *United States* v. *Dickey et al.*, just decided, *ante*, p. 378. Upon that authority the judgment below is

Affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

UNITED STATES EX REL. RUTZ *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. FAUNTLEROY *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. STENECK *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. WANNER *v.* LEVY, U. S. MARSHAL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 935, 936, 937, 938. Submitted April 13, 1925.—Decided May 25, 1925.

An order made by a United States Commissioner, after hearing, in a removal proceeding (R. S. 1014), discharging the defendant for want of probable cause, may be persuasive but it is not controlling upon a like application made later in the same district to the District Judge. P. 393.

3 Fed. (2d) 816, affirmed.

APPEALS from judgments of the District Court quashing writs of *habeas corpus*.

Messrs. Herbert Pope, Frank E. Harkness and *Benjamin M. Price,* for appellants.

Morse v. *United States,* 267 U. S. 80 decided only that a discharge in removal proceedings did not preclude an arrest in the jurisdiction where the indictment was returned and a trial on the indictment, and expressly recognized that the effect of such a discharge in subsequent removal proceedings presented a different question.

The passing remark in *United States* v. *Haas,* 167 Fed. 211, to the effect that " the decision of a committing magistrate refusing to hold a prisoner for trial *or removal* . . . is not *res adjudicata*" was not necessary to the de-

cision and is entitled to little weight. The report shows that counsel for the defense admitted that a decision of a committing magistrate in removal proceedings was not "technically *res adjudicata*" and therefore the question was not in controversy. Moreover, the authorities cited in the opinion have nothing to do with removal proceedings, but deal only with preliminary examinations before committing magistrates where the question was whether an accused should be held for a crime committed in the jurisdiction where the arrest took place. The court appears to have jumped to the conclusion that because a decision in such a proceeding was not *res judicata,* a decision of an examining magistrate in a removal proceeding could not be *res judicata.* But the distinction between the two proceedings is fundamental. This court has often held that in the class of cases first mentioned the preliminary hearing can be entirely dispensed with without violating any constitutional right of the accused. *Goldsby* v. *United States,* 160 U. S. 70; *Lem Woon* v. *Oregon,* 229 U. S. 586; *Ocampo* v. *United States,* 234 U. S. 91. But in *Tinsley* v. *Treat,* 205 U. S. 20, this court squarely held that when a proceeding was brought under § 1014 with a view to removing the accused to another district, a preliminary hearing was a constitutional right of the accused and that the exclusion of evidence in rebuttal of the accusation was a violation of the Constitution. It is, we submit, impossible to reconcile this decision with the view advocated by the Government that an order of discharge in a removal proceeding is not only not technically *res judicata* but is a mere idle gesture having no legal consequence, since it may be immediately nullified by a new warrant and another arrest. *In re Wood,* 95 Fed. 288.

Where an issue has been judicially determined, whether that adjudication is technically *res judicata* or not, there is a well settled rule that another judicial tribunal exer-

cising concurrent jurisdiction has no power to retry or redetermine the same issue unless there is a showing of arbitrary action or exceptional impropriety in the judicial conduct of the first trial or hearing. *United States* v. *Oppenheimer,* 242 U. S. 85; *Johnson Company* v. *Wharton,* 152 U. S. 252; *New Orleans* v. *Citizens' Bank,* 167 U. S. 371; *Lane* v. *Watts,* 234 U. S. 525; *Noble* v. *Union River Logging R. R.* 147 U. S. 165; *Howe* v. *Parker,* 190 Fed. 738; *Ross v. Stewart,* 227 U. S. 530; *Ross* v. *Day,* 232 U. S. 110; *Marquez* v. *Frisbie,* 101 U. S. 473; *United States* v. *Yeung Chu Keng,* 140 Fed. 748; *Ex parte Wong Yee Toon,* 227 Fed. 247.

Decisions on the effect of a discharge in a *habeas corpus* proceeding have a distinct bearing upon the question here involved. Even where the accused has been remanded this court has indicated that in many circumstances the prior decision remanding the accused should be given controlling weight. *Salinger* v. *Loisel,* 265 U. S. 224; *Wong Doo* v. *United States,* 265 U. S. 239.

There are particular reasons why the general rule as to the effect of a former adjudication should be held to apply to removal cases under § 1014 where the defendant has been discharged after a full hearing. As we have already pointed out, the right to a hearing is firmly based upon the Constitution itself and any infringement of that right is not mere error but a violation of the constitutional rights of the accused. *Harlan* v. *McGourin,* 218 U. S. 442.

The Solicitor General for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

The appellants in these several appeals were indicted in the Federal District Court for the Northern District of Ohio, along with other persons and a number of cor-

porations, for a violation of the Sherman Act. Proceedings were brought under § 1014 R. S. before a United States commissioner to remove them from Illinois to the trial district in Ohio. After a hearing the commissioner ordered their discharge for want of probable cause. Subsequently, similar proceedings were instituted before a federal district judge of the Illinois district, and appellants were taken into custody by the United States marshal upon a warrant issued by the district judge. Thereupon, in advance of a hearing, they sued out writs of *habeas corpus* in the court below seeking to be discharged upon the ground that the proceedings before the district judge were without authority of law and in violation of their constitutional and statutory rights. The specific ground relied upon was that their discharge by the commissioner for want of probable cause after a hearing was an adjudication upon that question and a bar to a second proceeding. The court below held otherwise and entered orders quashing the writs. 3 Fed. Rep. (2d) 816. The Government has moved this Court to dismiss the appeals or affirm the judgments for lack of substance and on the ground that the appeals were taken solely for delay. The motion to affirm must be sustained.

Under state law it has uniformly been held that the discharge of an accused person upon a preliminary examination for want of probable cause constitutes no bar to a subsequent preliminary examination before another magistrate. Such an examination is not a trial in any sense and does not operate to put the defendant in jeopardy. *Marston* v. *Jenness,* 11 N. H. 156, 161–162; *Nicholson* v. *The State, ex rel. Collins,* 72 Ala. 176, 178; *Ex parte Crawlin,* 92 Ala. 101; *Ex parte Fenton,* 77 Cal. 183; *State* v. *Jones,* 16 Kan. 608, 610; *In re Garst,* 10 Neb. 78, 81; *In re Oxley and Mulvaney,* 38 Nev. 379, 383. The same rule applies in extradition proceedings. *In re Kelly,* 26 Fed. Rep. 852; *Collins* v. *Loisel,* 262 U. S. 426,

429. "The functions of the commissioner and the court in removal proceedings under § 1014 are of like character and exercised with like effect." *Morse* v. *United States,* 267 U. S. 80. The utmost that can be said is that the decision of a commissioner favorable to the accused is persuasive and may be sufficient to justify like action upon a second application; but it is not controlling. Undoubtedly, care should be exercised by the magistrate to whom a subsequent application for removal is made to see that the accused is not oppressed by repeated and unwarranted petitions for removal. *United States* v. *Haas,* 167 Fed. Rep. 211, 212; and see, generally, *Salinger* v. *Loisel,* 265 U. S. 224, 230–232. There is nothing to suggest that the judge to whom the second application was made here will fail in that respect.

Judgments affirmed.

UNITED STATES *v.* ROYER.

APPEAL FROM THE COURT OF CLAIMS.

No. 359. Argued April 30, 1925.—Decided May 25, 1925.

1. To constitute an officer *de facto,* it is not essential that there shall have been an attempted exercise of competent or *prima facie* power of appointment. P. 396.
2. The facts that the commanding general recommended an officer's promotion and notified him of his subsequent appointment, and that the officer accepted the office and performed its duties by direction of his superiors, are evidence that a vacancy in that rank existed. P. 397.
3. Claimant, having been recommended by the commanding general during the war for promotion from the office of lieutenant to that of major, and having assumed that rank by direction of the general based on notice from the adjutant general's office that the appointment had been made, and having performed his duties and received his pay as major, was a major *de facto,* although the actual appointment was to a captaincy; and he could not be required

thereafter to refund the amount received in excess of captain's pay. P. 397.

59 Ct. Cls. 199, affirmed.

APPEAL from a judgment of the Court of Claims allowing recovery of an amount deducted from the pay of an army officer.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. Randolph S. Collins* were on the brief, for the United States.

Mr. George A. King, with whom *Messrs. William B. King* and *George R. Shields* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On August 5, 1918, General Pershing, commanding the American Expeditionary Forces, recommended by cable to the Chief of Staff the appointment of respondent, then first lieutenant, as major in the Medical Reserve Corps. The Surgeon General of the Army, to whom the recommendation was referred, recommended an approval of the appointment of respondent as captain and this was ratified by the Secretary of War. On September 23, 1918, the Adjutant General cabled General Pershing that the appointment as major had been made, and five days later the Surgeon General's office in France notified the respondent that he had been commissioned as major and requested him to submit his letter of acceptance and oath of office without delay. Respondent submitted a letter of acceptance and executed an oath of office on October 18, 1918, and thereupon assumed the insignia of rank of major, performed the duties appropriate to that office and was so officially addressed. In fact, respondent had been appointed captain and not major; but subsequently, on February 17, 1919, he was promoted to the rank of major.

He was not informed until February 19, 1919, that there had been a mistake in the first notice of his appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. On the latter date there was deducted from his pay, as an overpayment, the sum of $240.19, being the difference between the pay of a captain and that of a major from October 18, 1918, to February 16, 1919. This suit was to recover that amount. The court below, upon the foregoing facts, gave judgment for respondent upon the ground that "having been ordered by competent authority to assume the rank of major, and having discharged the duties of that rank in good faith in time of war, and having been paid the emoluments of that rank in good faith by the officers who are intrusted with the duty of making such payments, he cannot be required to return the money so received to the Government." 59 Ct. Cls. 199.

The Adjutant General, from the nature of his office, is the appropriate channel through which information in respect of appointments and promotions is transmitted. U. S. Army Regulations, 1913, p. 14, paragraph 21; Dig. Op. Judge Advocate General, 1912, pp. 87–88. That officer having informed General Pershing that the appointment of respondent as major had been made, General Pershing was warranted in giving notice to respondent that he had been so appointed, and respondent was justified in accepting and acting upon it. Indeed in time of war and in the field of actual military operations it was his duty to do so. Was respondent, under these circumstances, a major *de facto?* The Government contends not upon the grounds: (1) there was no attempt to appoint him to the office of major by any officer possessing the power of appointment; (2) there is no proof that there was a vacancy in the office of major. Neither ground is tenable.

1. While some general expressions will be found in the decisions tending to support the Government's contention, the rule is well established that to constitute an officer *de facto* it is not a necessary prerequisite that there shall have been an attempted exercise of competent or *prima facie* power of appointment or election. The leading case is *State* v. *Carroll,* 38 Conn. 449, 456–466, 472, where the English and American cases are fully reviewed; *In re Ah Lee,* 5 Fed. Rep. 899, 907 *et seq.; Heard* v. *Elliot,* 116 Tenn. 150, 154. A good general definition is to be found in *Waite* v. *City of Santa Cruz,* 89 Fed. Rep. 619, 627, expressly approved by this Court in *Waite* v. *Santa Cruz,* 184 U. S. 302, 323: "A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." A shorter definition is that of the Supreme Court of Kansas, in *Jay* v. *Board of Education,* 46 Kan. 525, 527: "A *de facto* officer is one who is surrounded with the *insignia* of office, and seems to act with authority." Here, respondent occupied the office and discharged its duties in good faith and with every appearance of acting with authority; and, upon the facts heretofore recited, since he was not a mere intruder or usurper, he must be regarded as an officer *de facto,* within the spirit of the general current of authority.

2. Of course, there can be no incumbent *de facto* of an office if there be no office to fill. *Norton* v. *Shelby County,* 118 U. S. 425, 441. But the contention that there is no evidence of a vacancy in the office of major in the present case cannot be seriously considered. Everything was done upon the theory that there was such a vacancy; the Commanding General evidently determined that there was; and respondent entered upon and actually performed the duties of that office by direc-

tion of his superior officers. These facts are enough to establish the existence of the vacancy, for it is a well settled rule that all necessary prerequisites to the validity of official acts are presumed to exist, in the absence of evidence to the contrary. *Nofire* v. *United States,* 164 U. S. 657, 660–661.

We need not determine whether respondent might have maintained an action against the Government for unpaid salary; but, clearly, the money having been paid for services actually rendered in an office held *de facto,* and the Government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it. In substance the case is ruled by *Badeau* v. *United States,* 130 U. S. 439, 452, where this Court, referring to a similar situation, said: "But inasmuch as the claimant, if not an officer *de jure,* acted as an officer *de facto,* we are not inclined to hold that he has received money which, *ex aequo et bono,* he ought to return." See also, *Montgomery* v. *United States,* 19 Ct. Cls. 370, 376; *Bennett* v. *United States, id.* 379, 388; *Palen* v. *United States, id.* 389, 394.

Judgment affirmed.

REALTY HOLDING COMPANY *v.* DONALDSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 348. Argued April 28, 1925.—Decided May 25, 1925.

1. An allegation that a defendant in the District Court is a "resident" of the State in which the suit is brought is not a sufficient allegation of citizenship there; but the defect is amendable when such citizenship is conceded; and on appeal the amendment will be considered as made rather than send the case back for that purpose. P. 399.
2. A suit for specific performance of the covenants of a lease is a suit to recover upon a chose in action, within the meaning of Jud. Code,

§ 24, "First", and cannot be maintained in the District Court on the ground of diverse citizenship if the plaintiff sues as assignee of the lease and seeks only such additional relief as is purely incidental to the main object. P. 400.

294 Fed. 541, affirmed.

APPEAL from a decree of the District Court dismissing a bill for specific performance, for want of jurisdiction.

Mr. John R. Rood, for appellant.

Mr. John C. Spalding, with whom *Messrs. Sidney T. Miller, George L. Canfield, Lewis H. Paddock, Ferris D. Stone, Sidney T. Miller, Jr., Grant L. Cook, Joseph H. Clark, Harold H. Emmons, W. G. Bryant, George H. Klein, L. B. Gardner,* and *Frank L. Dodge* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The jurisdiction of the court below was invoked upon the ground of diverse citizenship, Jud. Code, § 24, First; and the court dismissed the bill under the limiting clause contained in that subdivision: "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." 294 Fed. 541.

The bill alleges that appellant is a Delaware corporation and appellee a "resident" of Michigan. This is not a sufficient allegation of appellee's Michigan citizenship. *Robertson* v. *Cease,* 97 U. S. 646, 648; *Wolfe* v. *Hartford Life Ins. Co.,* 148 U. S. 389; *Oxley Stave Company* v.

Butler County, 166 U. S. 648, 655. It was, however, conceded by appellee in the court below, as well as here, that she was in fact a citizen of Michigan; and the court below assumed the point. Since the defect may be cured by amendment and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made and dispose of the case. *Norton* v. *Larney,* 266 U. S. 511, 515–516; *Howard* v. *De Cordova,* 177 U. S. 609, 614.

Shortly stated, the bill alleges that appellee was the owner of certain real property in Michigan which she had leased to the Clifford Land Company, a Michigan corporation; that the Clifford Land Company had undertaken to finance for appellee the erection of a building upon such property; that appellant had executed and delivered to appellee two conveyances of other real property in Michigan as security for the erection of such building in accordance with the promises of the land company; that appellee had violated the terms of the lease in certain particulars set forth; and that appellant, "in order to protect its rights and property in the premises" etc., procured an assignment to it from the land company of the said lease. The specific relief prayed is a decree for "specific performance by the said defendant of her said several undertakings" and for an injunction against interferences with appellant under the lease.

The assignor, being a Michigan corporation, could not have prosecuted the suit in a federal court if no assignment had been made. The phrase "to recover upon any . . . chose in action," under the decisions of this Court, includes a suit to compel the specific performance of a contract or otherwise to enforce its stipulations. *Corbin* v. *County of Black Hawk,* 105 U. S. 659, 665; *Shoecraft* v. *Bloxham,* 124 U. S. 730; *Plant Investment Co.* v. *Key West Railway,* 152 U. S. 71, 76; *New Orleans* v. *Benjamin,* 153 U. S. 411, 432. An examination

of the bill of complaint discloses that the suit is primarily for a specific performance of the covenants of the lease. Additional relief sought is purely incidental to this main object. The case, therefore, falls within the doctrine of the foregoing decisions, and the court below was right in adjudging a dismissal. *Kolze* v. *Hoadley,* 200 U. S. 76, 83 *et seq.; Citizens Savings Bank* v. *Sexton,* 264 U. S. 310, 314.

The cases relied upon by appellant are not in point. *Brown* v. *Fletcher,* 235 U. S. 589, was a suit against a trustee by an assignee to recover an interest in an estate under an assignment by the *cestui que trust.* This Court held that the relation between trustee and *cestui que trust* was not contractual; that the rights of the beneficiary depended upon the terms of the will creating the trust; and that a suit by the beneficiary or his assignee against the trustee for the enforcement of rights in and to the property held for the benefit of the beneficiary could not be treated as a suit on a contract or a chose in action. The Court then said (p. 599): "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. [Citing cases.] The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title, and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to

recover property or an interest in property when the requisite value and diversity of citizenship existed."

Crown Orchard Co. v. *Dennis,* 229 Fed. 652, was a suit by the grantee of standing timber to enjoin the cutting and conversion of the timber,—in effect, a suit to prevent waste. There was no attempt to enforce any contractual obligation; and the court very naturally held that the case did not fall within the exception in § 24 of the Judicial Code. It was expressly assumed by the court that if the suit had been to enforce a contract or for specific performance, the rule would have been otherwise.

The distinction is between a cause of action arising out of the ownership or possession of property transferred by the assignment of a contract,—in which case the remedy accrues to the person who has the right of property or of possession at the time,—and a suit to enforce the obligations of the assigned contract. *Deshler* v. *Dodge,* 16 How. 622, 631; *Ambler* v. *Eppinger,* 137 U. S. 480. The present suit falls within the latter class. It is brought, not to recover property or to redress an injury to property which appellant had acquired through an assignment of a lease, but to enforce contractual obligations of the lease. No direct relief is sought in respect of appellant's lands conveyed as security, and they are affected only collaterally and incidentally. See *Kolze* v. *Hoadley, supra.*

Judgment Affirmed.

TOYOTA *v.* UNITED STATES

ON CERTIFICATE FROM CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 231. Argued March 18, 1925.—Decided May 25, 1925.

1. A person of the Japanese race, born in Japan, may not legally be naturalized under the seventh subdivision of § 4 of the Act of June 29, 1906, as amended May 9, 1918, 34 Stat. 601, 40 Stat. 542; nor under the Act of July 19, 1919, 41 Stat. 222. P. 407.

2. The seventh subdivision, *supra,* in permitting "any alien" who has rendered specified military or maritime service and fulfills other prescribed conditions, on presentation of the required declaration of intention, to petition for naturalization without proof of 5 years' residence in the United States; and in permitting "any alien" serving in the forces of the United States during the time the country was engaged in the late war to file his petition without such declaration or such proof of residence, was not intended in those cases to eliminate the distinction made in Rev. Stats. § 2169 based on color or race, but, like earlier acts using the same phrase, refers to aliens who might, consistently with that distinction, become citizens. P. 409.
3. In § 2 of the above Act of 1918, providing that nothing in the Act shall repeal or in any way enlarge Rev. Stats. § 2169 "except as specified in the seventh subdivision of this Act and under the limitation therein defined," the exception does not imply an intention to depart from the race or color distinction of § 2169 as to the aliens mentioned in the seventh subdivision but refers to the provision there made for naturalization of native-born Filipino service men. *Id.*
4. Prior to the Act of 1906, *supra,* citizens of the Philippine Islands were not eligible to naturalization under Rev. Stats. § 2169, because not aliens and therefore not within its terms. P. 410.
5. The Act of 1906, *supra,* § 30 of which extends the naturalization laws, with some modifications, to "persons not citizens who owe permanent allegiance to the United States and who may become residents of any State or organized Territory of the United States," did not disturb the distinction based on race or color, in Rev. Stats. § 2169. P. 411.
6. Prior to the Act of 1918, *supra,* Filipinos not being "free white persons" or "of African nativity" were not eligible to citizenship of the United States; but an effect of that act was to authorize the naturalization of those native-born Filipinos, of whatever race or color, having the qualifications specified in § 4, subdiv. seventh. *Id.*
7. The Act of July 19, 1919, *supra,* provided that "any person of foreign birth" who served in the forces in the late war should under certain conditions, "have the benefits of" the seventh subdivision of § 4 of the Act of June 29, 1906, *supra,* as amended. *Held* that "any person of foreign birth" is not more comprehensive than "an alien" in the latter act. P. 412.

QUESTIONS certified by the Circuit Court of Appeals, arising upon an appeal by Toyota from a decree of the District Court (290 Fed. 971) canceling his certificate of naturalization in a proceeding brought by the Government for that purpose under the Naturalization Act.

Mr. Laurence M. Lombard, for appellant.

The necessary inference from the repealing clause, Act of 1918, § 2, is that in subdivision 7 we shall find some class specified which but for the words "except as specified" would be restricted by Rev. Stats. § 2169. Obviously this must refer to a class of persons who under prior laws were not subject to naturalization. *Brown* v. *Maryland,* 12 Wheat. 419 at page 438.

Looking at subdivision 7, what persons are specified? None of its provisions has any bearing on the question except as they show that every provision of the 7th subdivision has in view the speedy naturalization of those engaged in any public service of the United States having relation to the conduct of the war. The natural meaning of these words is that any Filipino and any alien and any Porto Rican, all having the qualifications set forth, are the persons "specified" in the 7th subdivision.

As both Filipinos and Porto Ricans were already eligible to naturalization and needed nothing to save them from the limitation of Rev. Stats. § 2169, the words "except as specified" must have had reference to "any aliens" as the class as to which that section was repealed or enlarged.

This construction of the Act of May 9, 1918, is the only one which will give effect to all the words. From the language, it is clear that Congress intended to enlarge § 2169 as to certain persons. That section does not set forth the qualifications necessary to obtain naturalization, but states the races to whom the privileges of naturalization are limited. Therefore, any enlargement of it

must extend the privileges of naturalization to some race or races not heretofore eligible—not to all members of the race, released from the limitations of § 2169, but only to those bearing the qualifications required by subdivision 7.

The Government has argued that the addition was solely the inclusion of Filipinos and Porto Ricans. This cannot have been the fact because Filipinos and Porto Ricans could already be naturalized under § 30 of the Act of June 29, 1906, and therefore as to them any addition would be unnecessary and superfluous. *In re Bautista,* 245 Fed. 765; *In re Giralde,* 226 Fed. 826; *In re Mallari,* 239 Fed. 416; *In re Monico Lopez,* Naval Digest 1916, p. 207 (Supreme Court of D. C. 1915); 27 Op. Atty. Gen. 12; Letter of Solicitor Gen. Davis to Secretary of Labor, January 4, 1916, reaffirming opinion of Atty. Gen. Bonaparte.

All other aliens except Asiatics could of course be naturalized under § 2169; so, unless the words "except as specified" refer to "any aliens" as specified in subdivision 7 and these words in turn include in their meaning "Asiatics," the entire exception becomes superfluous. The words "any alien" as used in the naturalization laws are nowhere defined, and retain their natural meaning.

The Act of 1918 repealed part of the Act of June 30, 1914, and part of the Act of June 25, 1910, restating the repealed parts but omitting in the re-enactment of the Act of 1914 significant words used in the former act. Such omission implies an alteration in the purpose. As the language of the Act of May 9, 1918, is clear, congressional debates and committee reports are not admissible to influence the interpretation.

The weight of authority is in favor of the naturalization of the appellant. The records of the Bureau of Naturalization show that at least eighty-seven Asiatics have been naturalized in continental United States under

the Acts in question divided among ten naturalization districts. All but nine of these were naturalized prior to the enactment of the statute of July 19, 1919. In addition two hundred and thirteen Asiatics were naturalized by the United States District Court for the District of Hawaii.

The construction placed upon a statute by an executive department charged with its administration is entitled to great weight. The fact that, after the war was over and the need for further recruits had ceased, the Department altered the interpretation formerly placed on the Act of 1918, is of little value in showing the construction contemporaneously with its passage. Aliens having rendered military service upon promise of citizenship should not later have the citizenship withdrawn.

Appellant is entitled to naturalization under the Act of July 19, 1919.

Mr. Assistant Attorney General Donovan, with whom the *Solicitor General* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Hidemitsu Toyota, a person of the Japanese race, born in Japan, entered the United States in 1913. He served substantially all the time between November of that year and May, 1923, in the United States Coast Guard Service. This was a part of the naval force of the United States nearly all of the time the United States was engaged in the recent war. He received eight or more honorable discharges, and some of them were for service during the war. May 14, 1921, he filed his petition for naturalization in the United States district court for the district of Massachusetts. The petition was granted, and a certificate of naturalization was issued to him. This case arises on a petition to cancel the certificate on the ground that

it was illegally procured. § 15, Act of June 29, 1906, c. 3592, 34 Stat. 596, 601. It is agreed that if a person of the Japanese race, born in Japan, may legally be naturalized under the seventh subdivision of § 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918, c. 69, 40 Stat. 542, or under the Act of July 19, 1919, c. 24, 41 Stat. 222, Toyota is legally naturalized. The district court held he was not entitled to be naturalized, and entered a decree canceling his certificate of citizenship. 290 Fed. 971. An appeal was taken to the Circuit Court of Appeals, and that court under § 239, Judicial Code, certified to this court the following questions: (1) Whether a person of the Japanese race, born in Japan, may legally be naturalized under the seventh subdivision of § 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918, and (2) whether such subject may legally be naturalized under the Act of July 19, 1919. The material provisions of these enactments are printed in the margin.*

* "Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, . . . or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturaliza-

Until 1870, only aliens being free white persons were eligible to citizenship. In that year, aliens of African nativity and persons of African descent were made eligible. See *Ozawa* v. *United States,* 260 U. S. 178, 192. The substance of prior legislation is expressed in § 2169, Revised Statutes, which is: "The provisions of this Title [Naturalization] shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." A person of the Japanese race, born in Japan, is not eligible under that section. *Ozawa* v. *United States, supra,* 198.

It has long been the rule that in order to be admitted to citizenship, an alien is required, at least two years prior to his admission, to declare his intention to become a citizen, and to show that he has resided continuously in the United States for at least five years immediately preceding his admission. Revised Statues, §§ 2165, 2170;

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tion without proof of the required five years' residence within the United States if upon examination . . . it is shown that such residence cannot be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; . . . § 2 . . . Nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined: . . ." (Act of May 9, 1918, c. 69, 40 Stat. 542, 547.)

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906 . . . as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States." (Act of July 19, 1919, c. 24, 41 Stat. 222.)

subd. 1, § 4, c. 3592, 34 Stat. 596. But at different times, as to specially designated aliens serving in the armed forces of the United States, Congress modified and lessened these requirements. § 2166, Revised Statutes (Act of July 17, 1862, § 21, c. 200, 12 Stat. 594, 597); Act of July 26, 1894, c. 165, 28 Stat. 123, 124; Act of June 30, 1914, c. 130, 38 Stat. 392, 395. In each of the first two of these acts, the phrase "any alien" is used as a part of the description of the person for whose benefit the act was passed. In the last, the language is "any alien . . . who may, under existing law, become a citizen of the United States." Prior to this act, it had been held that the phrase "any alien," used in the earlier acts, did not enlarge the classes defined in § 2169, *In re Buntaro Kumagai,* (1908) 163 Fed. 922; *In re Knight,* (1909) 171 Fed. 299; *Bessho* v. *United States,* (1910) 178 Fed. 245; *In re Alverto,* (1912) 198 Fed. 688. The language used in the Act of 1914 merely expresses what was implied in the earlier provisions.

The seventh subdivision of § 4, of the act of 1918, permits "any native-born Filipino" or "any alien, or any Porto Rican not a citizen of the United States" belonging respectively to the classes there described, on presentation of the required declaration of intention, to petition for naturalization without proof of five years' residence within the United States; and the act permits "any alien" serving in the forces of the United States "during the time this country is engaged in the present war" to file his petition for naturalization without making the preliminary declaration of intention and without proof of five years' residence in the United States. The act of 1919 gave "any person of foreign birth" there mentioned, the benefits of the seventh subdivision of § 4. Evidently, a principal purpose of these acts was to facilitate the naturalization of service men of the classes specified. There is nothing to show an intention to eliminate from the

definition of eligibility in § 2169 the distinction based on color or race. Nor is there anything to indicate that, if the seventh subdivision stood alone, the words "any alien" should be taken to mean more than did the same words when used in the acts of 1862 and 1894. But § 2 of the act of 1918 provides that nothing in the act shall repeal or in any way enlarge § 2169 "except as specified in the seventh subdivision of this Act and under the limitation therein defined." This implies some enlargement of § 2169 in respect of color and race; but it also indicates a purpose not to eliminate all distinction based on color and race so long continued in the naturalization laws. If it was intended to make such change and to extend the privilege of naturalization to all races, the provision of § 2 so limiting the enlargement of § 2169 would be inappropriate. And if the phrase "any alien" in the seventh subdivision is read literally, the qualifying words "being free white persons" and "of African nativity" in § 2169 are without significance. See *In re Para,* 269 Fed. 643, 646; *Petition of Charr,* 273 Fed. 207, 213.

When the act of 1918 was passed, it was doubtful whether § 30 of the act of 1906 extended the privilege of naturalization to all citizens of the Philippine Islands. They were held eligible for naturalization in *In re Bautista,* 245 Fed. 765, and in *In re Mallari,* 239 Fed. 416. And see 27 Op. Atty. Gen. 12. They were held not eligible in *In re Alverto,* 198 Fed. 688, in *In re Lampitoe,* 232 Fed. 382, and in *In re Rallos,* 241 Fed. 686. But we hold that until the passage of that act, Filipinos not being "free white persons" or "of African nativity" were not eligible, and that the effect of the act of 1918 was to make eligible, and to authorize the naturalization of, native-born Filipinos of whatever color or race having the qualifications specified in the seventh subdivision of § 4.

Under the treaty of peace between the United States and Spain, December 10, 1898, 30 Stat. 1754, Congress

was authorized to determine the civil rights and political status of the native inhabitants of the Philippine Islands. And by the act of July 1, 1902, § 4, c. 1369, 32 Stat. 691, 692, it was declared that all inhabitants continuing to reside therein who were Spanish subjects on April 11, 1899, and then resided in the Islands, and their children born subsequent thereto, " shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain," according to the treaty. The citizens of the Philippine Islands are not aliens. See *Gonzales* v. *Williams,* 192 U. S. 1, 13. They owe no allegiance to any foreign government. They were not eligible for naturalization under § 2169 because not aliens and so not within its terms. By § 30 of the Act of 1906, it is provided: " That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law." (34 Stat. 606.)

Section 26 of that act repeals certain sections of Title XXX of the Revised Statutes, but leaves § 2169 in force. It is to be applied as if it were included in the act of 1906. Plainly, the element of alienage included in § 2169 did not apply to the class made eligible by § 30 of the act of 1906. The element of color and race included in that section

is not specifically dealt with by § 30, and, as it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended. " Persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State " may include Malays, Japanese and Chinese and others not eligible under the distinction as to color and race. As under § 30 all the applicable provisions of the naturalization laws apply, the limitations based on color and race remain; and the class made eligible by § 30 must be limited to those of the color and race included by § 2169. As Filipinos are not aliens and owe allegiance to the United States, there are strong reasons for relaxing as to them the restrictions which do not exist in favor of aliens who are barred because of their color and race. And in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity or descent the implied enlargement of § 2169 should be taken at the minimum. The legislative history of the act indicates that the intention of Congress was not to enlarge § 2169, except in respect of Filipinos qualified by the specified service. Senate Report No. 388, pp. 2, 3, 8. House Report No. 502, pp. 1, 4, Sixty-fifth Congress, Second Session. See also Congressional Record, vol. 56, part 6, pp. 6000–6003. And we hold that the words " any alien " in the seventh subdivision are limited by § 2169 to aliens of the color and race there specified. We also hold that the phrase " any person of foreign birth " in the act of 1919 is not more comprehensive than the words " any alien " in the act of 1918. It follows that the questions certified must be answered in the negative.

The answer to the first question is: *No.*

The answer to the second question is: *No.*

The Chief Justice dissents.

BANTON, DISTRICT ATTORNEY, *v.* BELT LINE RAILWAY CORP.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 465. Argued March 11, 12, 1925.—Decided May 25, 1925.

1. Where an order of the New York Public Service Commission establishing joint street railway routes with a maximum joint fare, long in force, became confiscatory as to one of the companies concerned and remained obligatory under the state law notwithstanding an application for relief pending before the commission on rehearing,—*held* that the company was not bound to await final action by the commission and to serve in the meantime without just compensation before suing in the federal court for an injunction. P. 415.
2. The right of a street railway company to enjoin enforcement of such an order—made by a State commission having power to establish equal and non-confiscatory rates—is not affected by the facts that another company, whose railway may benefit from the injunction through diversions of traffic from competitors, owns all the stock of the plaintiff and does not itself seek to have the order enjoined. P. 417.
3. Mere acceptance and putting into effect, by a street railway company, of an order of the New York Public Service Commission fixing a rate obligatory by the state law and which presumably was valid at the time, was not an agreement by that company to abide by the rate should it subsequently become confiscatory; nor is such consent to be imputed to a successor corporation because it was incorporated and acquired the first company's property while the order was in effect, where the acquisition was through foreclosure of a mortgage antedating the order, and under which the franchises of the first company passed unimpaired to the second, and where there is nothing in its certificate of incorporation or in the laws under which it was incorporated imposing on the second company an obligation to continue to serve for the fare fixed by the order. P. 417.
4. The power of a State to require street railways to provide reasonably adequate facilities and services even though compliance may be attended by some pecuniary disadvantage, cannot justify an order enabling passengers, by transferring from one line to

another, to ride on both for a fare so low as to deprive a company of any return on the value of the property used by it to perform the service; the State may not, under guise of regulation, compel the use and operation of a company's property for the public convenience without just compensation. P. 419.

5. The evidence in this case justifies the conclusion that resumption by the plaintiff street railway company of transfer business under an order establishing joint routes and a joint 5c fare, would require additional operating expenses in excess of the resulting increase of revenue, and that the company's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that business—hence the rate is confiscatory. P. 420.
6. In determining whether a rate fixed for transfer passengers constituting only part of the traffic of a street railway line is confiscatory, the cost of the transfer business is not the amount by which total operating expenses would be diminished by eliminating, or increased by adding, the transfer passengers; for those operating expenses which are incurred on account of all passengers carried and incapable of allocation to any class, should be attributed to the transfer passengers in fair proportion with others receiving like service. P. 421.
7. While a carrier has no constitutional right to the same rate of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. P. 421.
8. In a suit to enjoin enforcement of a rate fixed by a competent state commission, the presumption is that the order was based on sufficient evidence and the burden is on the plaintiff to establish its invalidity. P. 422.
9. A commission or other legislative body in its discretion may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate; rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate. P. 422.
10. A finding by a state commission that a street car rate is, by reason of changed operating conditions, "unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished," plainly imports that the rate is confiscatory. P. 422.

Affirmed.

APPEAL from a decree of the District Court enjoining enforcement of an order establishing joint street car routes and a maximum joint fare. See 273 Fed. 272.

Messrs. Howard Thayer Kingsbury and *M. M. Fertig,* with whom *Messrs. George P. Nicholson* and *George H. Stover* were on the briefs, for appellants.

Mr. Alfred T. Davison, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was commenced December 16, 1920, by appellee to enjoin the enforcement of an order of the New York Public Service Commission, First District, (succeeded by the Transit Commission), made October 29, 1912. The order established joint routes on street railways in New York City and prescribed five cents as the maximum joint fare. Appellee's street railway formed a part of some of such routes. The complaint alleged that the order deprived appellee of any return on the value of its property used to perform the service covered by the joint fare complained of, and violated the due process and equal protection clauses of the Fourteenth Amendment, and prayed injunction against the enforcement of the order in respect of certain lines with which its railroad connected. A temporary injunction was granted by a court of three judges. § 266, Judicial Code. 273 Fed. 272. A master took the evidence and reported that the order was confiscatory. The district court confirmed his findings and entered decree as prayed. Appeal was taken under § 238, Judicial Code.

1. Appellants contend that, when this suit was commenced, the rate making process was not completed, and that the appellee had not exhausted its legal remedies in the state tribunals. The point is without merit. The order complained of had been in force for more than eight

years. The laws of the State required it to be obeyed, and prescribed penalties for failure to comply with it. See § 56, Public Service Commission Law, c. 48, Consolidated Laws, New York. May 11, 1920, the receiver of the New York Street Railways Company applied to the commission to be relieved from the requirements of the order, and, May 18, appellee joined in that application and prayed for the elimination of the joint fare between its lines and the lines of other companies, except those of the Third Avenue Railway Company and the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company. May 22, appellee filed with the commission a revised joint tariff, to take effect June 22, eliminating the joint fare of five cents. But on June 18, the commission suspended this tariff, and so compelled appellee to continue to comply with the order of October 29, 1912. July 9, the commission found the fare of five cents too low and prescribed in its stead a joint fare of seven cents, to take effect September 13. Appellee, on July 23, applied for a rehearing under § 22 of the Public Service Commission Law. It alleged that the joint fare of seven cents would be confiscatory; and that the evidence submitted had no reference to a joint or through rate of seven cents. August 28, the receiver also applied for a rehearing. August 31, the commission granted a rehearing to commence November 5, and postponed the taking effect of the joint fare of seven cents until such time as the commission might fix, at or after the termination of the rehearing. On November 5, the rehearing was commenced, and the testimony was closed November 10. There has been no determination of the matter by the commission, and so the order fixing joint fares at seven cents never took effect. Neither the original application nor the petition for rehearing relieved appellee of the burden of compliance with the order of October 29, 1912. No application to the commission for relief was required by the state law. None was necessary

as a condition precedent to the suit. See *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 48; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S 274, 282. On the point under consideration, it must be assumed that the joint fare of five cents was confiscatory as alleged. The continued enforcement of that rate would operate to take appellee's property without just compensation and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the federal court to enjoin the enforcement of the rate. It was not bound to await final action by the commission and, if the rate was in fact confiscatory, to serve in the meantime without just compensation. See *Pacific Telephone Company* v. *Kuykendall*, 265 U. S. 196, 204; *Oklahoma Gas Company* v. *Russell*, 261 U. S. 290, 293; *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 326.

2. Appellants complain that appellee has not sought injunction against the operation of the order as to the lines of the Third Avenue Company,—which owns the stock of the appellee,—and asserts that a diversion of traffic from other lines to that company has resulted from the injunction. The lines, as to which the order was enjoined, are relieved by the decree from the obligation of dividing the joint fare of five cents. If the rates enjoined are confiscatory, appellee is entitled to relief, notwithstanding its obedience to the order in respect of other lines and fares. It was not bound to attack the prescribed rates as to all the routes. It is not suggested that the commission is without power to prescribe equal and non-confiscatory rates. The effect of the injunction on the business of the Third Avenue Company and its competitors is not involved in this suit; nor are they complaining.

3. Appellants insist that the appellee voluntarily assumed the obligation to carry transfer passengers pur-

suant to the order of October 29, 1912 for two cents each; and having been incorporated and having acquired its property subsequent and subject to such order, it is not entitled to complain of the order as an infringement of any constitutional right.

The commission had power to establish through routes and fix joint fares. The law required street railroad corporations to comply with every order made by the commission, and prescribed penalties to enforce such orders. See subd. 3, § 49; § 56, Public Service Commission Law, *supra*. The Central Park, North & East River Railroad Company, appellee's predecessor, accepted the order, and put in effect the prescribed joint fare of five cents. There is no suggestion that it was not bound to do so, or that the order was not then valid and binding on the company. A rate that is just and reasonable when prescribed, subsequently may become too low, unreasonable and confiscatory. See *Bluefield Company* v. *Public Service Commission,* 262 U. S. 679, 693; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 400. That company did not agree to serve for the prescribed joint fare of five cents, and was not bound to do so if the rate was found to be or if thereafter it should become, confiscatory. It did not surrender the protection of the Fourteenth Amendment.

The Central Park Company, many years before the order of October 29, 1912, was made, gave a mortgage on all its property, rights and franchises. November 14, 1912, one Cornell purchased at foreclosure sale. December 24, 1912, under § 9 (now § 96) of the Stock Corporation Law, c. 59, Consolidated Laws, New York, Cornell and others became incorporated as the Belt Line Railway Corporation, the appellee. That corporation through such sale and by virtue of the provisions of § 9 succeeded to " all the rights, privileges and franchises which at the time of such sale belonged to, or were vested in the cor-

poration last owning the property sold"; and became "subject to all the provisions, duties and liabilities imposed by law on that [the predecessor] corporation." The franchise of the mortgagor was not destroyed. *People* v. *O'Brien,* 111 N. Y. 1, 41, *et seq.* The rights of the mortgagee and of the purchasers were inviolable. *People ex rel. Third Avenue Ry. Co.* v. *Public Service Commission,* 203 N. Y. 299, 308. There is nothing in appellee's certificate of incorporation or the laws under which it was organized that imposes upon it any obligation to continue to serve for a portion of the joint fare of five cents. The commission's order constitutes no part of the charter of appellee; and we find no agreement by appellee, expressed or implied, to comply with the order. The district court rightly held that *Interstate Railway Company* v. *Massachusetts,* 207 U. S. 79, does not apply.

4. It is asserted that the transfer order was not confiscatory, because it was a reasonable service requirement, and also because the additional expense which would be involved by a resumption of transfers would not exceed the additional revenue which would be derived from transfer passengers.

The order was made under subd. 3, § 49, Public Commission Law, *supra.* Its purpose was to enable a passenger, by making a change from the car of one company to the car of another, to ride on the lines of both for a single fare of five cents. The service was not affected by the order. Change of cars remained necessary. The designation of transfer points and the requirement that transfer tickets be given and received by carriers were for the purpose of giving to the passenger the additional transportation without additional payment. The amount of the fare prescribed was not essential and had no relation to the use of connecting lines for a continuous journey. The State has power to require street railways and like utilities to provide reasonably adequate

facilities and services, even though compliance may be attended by some pecuniary disadvantage. *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79, 85, and cases cited. But that rule is not applicable here; and the cases referred to do not support appellant's contention. The commission under the guise of regulation may not compel the use and operation of the company's property for public convenience without just compensation.

The evidence sustains the finding of the master and the district court that the joint fare of five cents is confiscatory.

At the time of the foreclosure, appellee's predecessor, the Central Park Company, operated a street railway across town on Fifty-ninth Street and up and down town on the east side and on the west side of Manhattan Island from Fifty-ninth Street to the Battery. The order required the company to exchange transfers with the lines on First, Second, Third, Lexington, Madison, Sixth and Seventh Avenues, Broadway, and Eighth, Ninth and Tenth Avenues. In October, 1919, and February, 1920, the receiver of the New York Railways Company returned the leased lines on Eighth, Ninth and Madison Avenues to their owners, who were not named in or bound by the order. This eliminated some of the through routes. June 3, 1919, with the approval of the commission, appellee abandoned the line on the east side, and, March 24, 1921, abandoned the line on the west side. This left operated by appellee only the Fifty-ninth Street line from First Avenue to Tenth Avenue, and south on Tenth Avenue to Fifty-fourth Street. It then exchanged transfers at intersections of Fifty-ninth Street and First, Second, Third, Lexington, Sixth and Seventh Avenues, Broadway, and Tenth Avenue. The decree, following the prayer of the complaint, enjoins the enforcement of the order, except as to transfers at First and Third Avenues, Broadway and Tenth Avenue.

There is involved only the rates applicable to a part of the company's business. In this respect, the case is similar to *Northern Pacific Railway* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605, and *Northern Pacific Railway* v. *Department of Public Works of Washington,* 268 U. S. 39. The applicable law is plain. The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less attributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the State does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. *Northern Pacific Railway* v.

North Dakota, supra, 595, 596; *Norfolk & Western Ry.* v. *West Virginia, supra,* 609; *Interstate Commerce Commission* v. *Chicago G. W. Ry.,* 209 U. S. 108, 118.

It does not appear whether the commission, when making the order, acted without or upon sufficient evidence. *Northern Pacific Railway* v. *Department of Public Works of Washington, supra.* But the presumption is that the order was reasonable and valid, and the burden was on appellee to establish its invalidity. It is well known, and the court will take judicial notice of the fact, that the purchasing power of money has been much less since 1917 than it was in 1912, when the order was made; and that the cost of labor, materials and supplies necessary for the proper operation and maintenance of street railways has greatly increased. In the preamble to its order of July 20, 1920, prescribing a joint fare of seven cents instead of five cents, the commission stated: "The Commission after a careful consideration of the testimony and briefs submitted by counsel, being of the opinion that the convenience of the travelling public necessitates the continuance of the said transfers, but that the maximum joint rate of five cents fixed in the said order of October 29, 1920, [1912] is, by reason of the changed conditions under which the said railroad companies are operating, unjust, unreasonable, and insufficient to render a fair and reasonable return for the service furnished, it is ordered . . ." etc. Appellants argue that this does not amount to a finding that the joint fare of five cents is confiscatory. But clearly, the language properly may be taken to mean that the rate is too low and violates the Constitution. That is the plain import of the words used. A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property

used to perform the service covered by the rate. The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate, *Trier* v. *C., St. P., M. & O. Ry. Co.,* 30 I. C. C. 352, 355; *Holmes & Hallowell Co.* v. *G. N. Ry. Co.,* 37 I. C. C. 625, 635; *Dimmitt-Caudle-Smith Live Stock Co.* v. *R. R. Co.,* 47 I. C. C. 287, 298; *Detroit & M. R. Co.* v. *Michigan Railroad Commission,* 203 Fed. 864, 870. But the language above quoted does not show, and there is nothing to suggest, that the commission had in mind or intended any such distinction.

About the time the order of October 29, 1912, became effective, the carriers agreed upon a division of the joint fare. There was assigned to the appellee two cents and to the other carriers three cents out of each fare. This apportionment was accepted by the master and district court. It is not challenged by any assignment of error; and it does not appear that appellee was entitled to more.

The evidence shows that, upon the authorization of the commission, appellee issued capital stock to the amount of $734,000, bonds for $1,750,000, and a note for $73,091.53. The total is $2,557,091.53. But, because of abandonments, changes and lack of supplementing evidence, this figure is not a good indication of the cost or of the value of the property in use at the time of the trial. At the trial, appellee called a valuation engineer who, in May, 1921, had been employed by the commission to make a valuation of all the street railroads in New York City. His estimate of the cost of reproduction of appellee's property in 1921 was $2,859,754. He deducted from this $77,000 on account of errors in the inventory and $128,246, his estimate of the cost of putting the property in first-class condition, leaving $2,654,508. There

was other evidence of value. The master and district court found the value to be $2,600,000. Appellants contend that this finding is not sustained by the evidence. In the view we take of this case, it is not necessary to determine the value of the property, or whether total revenue exceeds total operating expenses and taxes by a sum sufficient to pay a reasonable return on the value of all the property. However, we are satisfied by the evidence that a fair and reasonable return on the value would be in excess of $91,154.58, the annual interest at five per cent. on the indebtedness of $1,823,091.53,—evidenced by the bonds and note.

There follows a statement showing by fiscal years, ended June 30, and for three months ending September 30, 1922, (1) the number of passengers carried at five cents each; (2) the number of joint rate passengers carried at two cents each; (3) the average revenue per passenger, exclusive of free transfer passengers; (4) the average cost per passenger, including operating expenses and taxes, but excluding any amount for depreciation or interest; (5) the average cost per passenger, exclusive of depreciation, but including interest at five per cent. on the company's bonds and note.

	(1)	(2)	(3)	(4)	(5)
1918.....	6,450,687	13,512,033	2.9 c.	2.75c.	3.20c.
1919.....	5,440,766	12,817,674	2.89c.	2.49c.	3.00c.
1920.....	7,186,735	10,171,479	3.2 c.	2.93c.	3.46c.
1921.....	8,119,325	7,948,148	3.5 c.	3.52c.	4.10c.
1922.....	8,100,009	5,720,102	3.68c.	2.92c.	3.58c.
*.....	1,690,229	1,426,923	3.6 c.	3.03c.	3.77c.

These figures show that the operating expenses and taxes, both before and after the injunction, substantially exceeded two cents, the amount received by appellee per transfer passenger. Exclusive of any allowance for a depreciation reserve or for interest, the average cost per

* Three months ended September 30, 1922.

passenger has been from about 24 per cent. to about 51 per cent. in excess of two cents; and, if interest on the debt at five per cent. be included, it appears that the excess has been from about 50 per cent. to 105 per cent. And the record shows that for some time prior to the injunction the total revenue from all sources, including revenue for transportation, advertising, rentals and interest on deposits, was less than a sum sufficient to cover operating expenses, taxes and interest on the debt, and also shows that both before and after the injunction such total revenue was not sufficient to yield a reasonable return on the value of the property, after paying operating expenses and taxes.

The master found that a resumption of the transfer traffic enjoined would result in an increase of revenue of $46,326.72 per year and of operating expenses of $105,900 per year. These findings were not confirmed. The district court found that the revenue would be increased by about $42,000 per year and operating expenses about $46,000 per year.

The evidence undoubtedly justifies the conclusion that a resumption of such transfer business would require additional operating expenses in an amount in excess of the resulting increase of revenue, and that appellee's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that business. It follows that the rate is confiscatory. We need not determine the value of the property attributable to the traffic in question or what would constitute a reasonable rate of return.

Decree affirmed.

MEEK *v.* CENTRE COUNTY BANKING CO. ET AL.

DALE *v.* CENTRE COUNTY BANKING CO. ET AL.

BREEZE *v.* CENTRE COUNTY BANKING CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 191, 192, 193. Argued March 13, 1924; reargued November 26, 1924.—Decided May 25, 1925.

1. When the petitioner in an involuntary bankruptcy proceeding dies before adjudication, the proceeding does not abate but under Rev. Stats. § 955 may be prosecuted by his personal representative. P. 428.
2. The Bankruptcy Act gives no authority to adjudge a partnership bankrupt upon a petition filed against it by but one of its members. P. 431.
3. Section 5c of the Bankruptcy Act providing that the court of bankruptcy having jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property, relates solely to the venue or the territorial jurisdiction of the court. P. 431.
4. A petition by a partner to have himself, the partnership and the other partners declared bankrupt, and not purporting to be a petition of the partnership or authorized by it, can not be regarded as a voluntary petition of the partnership. P. 432.
5. An involuntary petition against a partnership must be filed by creditors and allege an act of bankruptcy. P. 432.
6. The authority conferred on this Court by § 30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. P. 434.
7. General Order No. 8 and Form No. 2, in purporting to authorize one or less than all the partners to file a petition against the partnership without the consent of the others, do not relate to the execution of any of the provisions of the Act itself, and are therefore without statutory warrant and of no effect. P. 434.

8. A petition by a partner not maintainable against the partnership *held* not maintainable against non-consenting partners individually. P. 434.

292 Fed. 116, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals which affirmed orders of the District Court denying motions to dismiss, *pro tanto,* a petition in bankruptcy. General Order in Bankruptcy No. 8 and Form No. 2, were abrogated by order of May 25, 1925.

Messrs. Mortimer C. Rhone and *Ellis L. Orvis,* with whom *Messrs. Harry Keller* and *R. L. Bigelow* were on the briefs, for petitioners.

Messrs. Samuel D. Gettig and *Newton B. Spangler,* with whom *Mr. James C. Furst* was on the brief, for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These three cases involve the same proceedings which were before us at an earlier stage in *Meek* v. *Centre Banking Co.,* 264 U. S. 499. They rose out of a petition in bankruptcy filed by the respondent Shugert in a Federal District Court in Pennsylvania for the adjudication as bankrupts (a) of himself, (b) of a partnership styled the Centre County Banking Co., in which he and the present petitioners, Meek, Dale and Breeze, hereinafter called the defendants, were alleged to be members, and (c) of the defendants individually. The defendants resisted the petition in so far as it sought to have the partnership and themselves adjudged bankrupts, and moved to dismiss it to that extent. Orders denying these motions were entered by the District Court; and these, on petitions to revise, were affirmed by the Circuit Court of Appeals. 292 Fed. 116. Writs of certiorari were then granted. 263 U. S. 696.

Thereafter, but before the hearing in this court, Shugert died. The defendants then moved in this court that the proceeding in bankruptcy be dismissed as to them, both individually and as members of the partnership, on the ground that to that extent it abated by Shugert's death. Finding the petition to be in this aspect an involuntary and antagonistic proceeding, and there being then no adversary party before the court, we granted leave to any persons claiming to be representatives of Shugert's interest to appear within thirty days and apply for leave to be admitted as parties for the purpose of continuing the proceeding in his stead; stating that if this were done the question whether the proceeding should be dismissed as to the partnership and the defendants, or continued as to them by such representatives, would then be determined. *Meek* v. *Centre County Bank, supra,* p. 504. Thereafter the administrator of Shugert's estate seasonably appeared and applied for leave to be substituted in Shugert's place as the petitioner in the bankruptcy proceeding. The defendants renewed their motions to dismiss; and the cases have been heard both on this preliminary issue and on the merits of the controversy.

1. The first question to be determined is whether Shugert's death before an adjudication had been made under the petition, abated the bankruptcy proceeding as against the partnership and the individual defendants, or whether it may be continued against them by the administrator of his estate. When either of the parties in any suit in any court of the United States dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend the suit to final judgment. Rev. Stat. § 955. In *Schreiber* v. *Sharpless,* 110 U. S. 76, 80, a suit on a federal penal statute, in which the defendant had died before judgment, it was held that whether an action survives and may be continued under this section "de-

pends on the substance of the cause of action;" and that, since at common law actions on penal statutes do not survive and Congress had not established any other rule in respect to actions on federal penal statutes, the cause of action died with the person of the defendant and the suit could not be continued against his personal representative. We do not think, however, that the doctrine of this case applies to an involuntary proceeding in bankruptcy.

Such a proceeding, not being in the nature of a common law action, is not abated by any rule of the common law. And while there is no express provision in the Bankruptcy Act [1] that the cause of action survives the death of a petitioner before adjudication, we think that such survivorship accords with the "substance of the cause of action" and the nature and purpose of a proceeding in bankruptcy, which is not a mere personal action, but is essentially in the nature of a proceeding *in rem* for the benefit of all the defendant's creditors. And the filing of the petition brings his property *in custodia legis,* with a view to a determination of his status and the settlement and distribution of his estate. *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307; *Lazarus* v. *Prentice,* 234 U. S. 263, 266. We conclude that an administrative proceeding of this character, in which the property of the defendant is impounded for the benefit of all of his creditors, does not abate because of the death of the petitioner before adjudication and that its prosecution may be continued by his personal representative. The motions of the defendants to dismiss the proceeding by reason of Shugert's death are accordingly denied; and the administrator is granted leave to be substituted as the petitioner in the proceeding and to prosecute it in his stead.

2. This brings us to the consideration, on the merits, of the motions made by the defendants in the District

[1] Act of July 1, 1898, c. 541, 30 Stat. 544.

Court to dismiss Shugert's petition in so far as it sought the adjudication of the partnership and of themselves as bankrupts. The petition combined, in an anomalous and modified fashion, a "debtor's petition" and a "partnership petition" (Bankruptcy Forms, Nos. 1 and 2), with other averments. In it Shugert alleged that the partnership was insolvent and owed debts in excess of $1,000; that each of the partners was insolvent and they were unable, jointly or severally, to pay the partnership debts; that he and the partnership were willing to surrender their property for the benefit of their creditors and desired to obtain the benefits of the bankruptcy law; and that the defendants had not offered to join in the petition and he was not informed of their intention in the matter. It did not allege that either the partnership or the defendants had committed any act of bankruptcy. The prayer was that Shugert, the partnership, and the defendants individually, be adjudged bankrupt; that process be served upon the defendants; and that proceedings be had as provided by the bankruptcy law and General Order No. 8.

The defendants, who appeared specially, moved to dismiss the petition as against the partnership and themselves on the grounds, among others, that it was not authorized by the Bankruptcy Act and that the court had no authority under it to adjudge either the partnership or non-consenting partners bankrupt.[2] The orders of the District Court denying these motions were affirmed by the Circuit Court of Appeals on the ground that the petition was maintainable under § 5 of the Bankruptcy Act and General Order No. 8.

Section 5a of the Bankruptcy Act specifically provides that "A partnership, during the continuation of the partnership business, or after its dissolution and before the

[2] Two of the defendants also denied that they were members of the partnership.

final settlement thereof, may be adjudged a bankrupt." There hence can be no doubt that a partnership may be adjudged a bankrupt as a distinct legal entity. But since the Act does not specify when it may be adjudged a bankrupt, to determine this question reference must be had to the general provisions of the Act, in which, in accordance with § 1(19), the word " persons " is to be construed as including " partnerships." The Act makes provision for only two kinds of petitions upon which a person may be adjudged bankrupt; one, a voluntary petition filed by him; the other, an involuntary petition filed against him by creditors. As to the first, it is provided that any qualified person, except certain specified corporations, may file a petition to be adjudged a voluntary bankrupt, §§ 4, 59a; and as to the second, that creditors having provable claims of a specified amount against an insolvent debtor who has committed an act of bankruptcy within the preceding four months, may file a petition to have him adjudged a bankrupt, §§ 3b, 59b.[3] As there is no other provision authorizing the filing of a petition in bankruptcy, it necessarily results that there is no authority under the Act to adjudge a partnership bankrupt except upon its own voluntary petition or upon an involuntary petition filed against it by creditors; and none to make such an adjudication upon a petition filed against it by one of its members.

There is nothing in § 5c of the Bankruptcy Act, upon which the administrator relies, that has any application to this question. It merely provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property;

[3]At least three creditors are required unless all the creditors are less than twelve in number, in which case one creditor may file the petition. § 59b.

that is, it goes solely to the question of venue or jurisdiction of the bankruptcy court with reference to its territorial limits. See § 2. And the decision in *Francis* v. *McNeal,* 228 U. S. 695, only involved the question whether in a bankruptcy proceeding in which a partnership had been adjudged bankrupt under an involuntary petition filed against it by creditors, the court might administer the separate estate of a partner who had not been adjudged bankrupt individually.

It is clear that the present petition cannot be sustained as the voluntary petition of the partnership for its own adjudication in bankruptcy. It was filed and signed by Shugert alone, as the sole petitioner. It did not purport to be filed by the partnership, and was not signed by it or in its behalf. And while there was an incidental averment that the partnership desired to obtain the benefit of the bankruptcy law, there was no allegation that this statement was authorized by the partnership. On the contrary it was shown that the other partners had not joined in the petition and that their intention in reference to the matter was not known. In short, the petition was framed as an involuntary petition against the partnership and its non-consenting members, and its sufficiency must be tested as such. We are therefore not called upon to determine whether a voluntary petition filed in the name of the partnership by one member of the firm purporting to act in its behalf, could be sustained without an affirmative showing that it was filed at the instance or with the consent of the other partners.

It is also clear that the petition cannot be sustained as an involuntary petition filed against the partnership under the provisions of the Bankruptcy Act, since it was not filed by creditors, the only persons authorized to file such a petition, and furthermore did not allege that the partnership had committed an act of bankruptcy.

It is earnestly insisted, however, that the right of a partner to file such a petition against the partnership is

recognized by General Order in Bankruptcy No. 8. This General Order provides that any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt shall be entitled to resist the petition in the same manner as if it had been filed by a creditor of the partnership; that notice shall be given to him as in the case of a debtor petitioned against; that he shall have the right to appear at the hearings and make proof that the partnership is not insolvent and has not committed an act of bankruptcy, and make all defences which any debtor proceeded against might make; and that if an adjudication of bankruptcy is made upon the petition, such partner shall file a schedule of his debts and inventory of his property as required in cases of debtors against whom an adjudication is made. 172 U. S., Appendix, p. 656. It is supplemented by Bankruptcy Form No. 2, providing for a petition by less than all the members of a firm, alleging that they and the other partners owe debts which they are unable to pay in full, and that the petitioners desire to obtain the benefit of the Bankruptcy Act; and praying that the firm be adjudged bankrupt. 172 U. S., Appendix, p. 679.

It is clear that this General Order and Form contemplate that less than all the members of a partnership may file a petition for its adjudication as a bankrupt, without alleging either that it is insolvent or that it has committed an act of bankruptcy, and that any member of the partnership who refuses to join in the petition may resist it in the same manner as if the petition had been filed by a creditor. In seeking to have the partnership adjudged bankrupt as against the non-consenting partners resisting such an adjudication, it is manifestly an involuntary proceeding. *Meek* v. *Centre County Bank, supra,* p. 502.

The question of the effect of this General Order and Form are now for the first time presented to this court for determination.

The authority conferred upon this court by § 30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. *West Company* v. *Lea,* 174 U. S. 590, 599. And see *Orcutt Company* v. *Green,* 204 U. S. 96, 102.

General Order No. 8 was evidently taken from a like general order under the Bankruptcy Act of 1867, of which it is in the main a transcript; and Form No. 2 is largely a copy of a corresponding form prescribed under said earlier Act.[4] The Act of 1867, however, while not providing that a partnership could be adjudged a bankrupt as a separate entity, expressly provided that its property should be taken and administered in cases "where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners *or any one of them,* or on the petition of any creditors of the partners." 14 Stat. 517, c. 176, § 36. The former general order and form were, therefore, appropriate methods of procedure for carrying into effect the provision as to petitions by one of the partners. In the present Act, however, there is no corresponding provision for adjudging a partnership bankrupt or administering its property upon the petition of one of the partners. General Order No. 8 and Form No. 2, in purporting to authorize one or less than all of the partners to file a petition against the partnership without the consent of the others, do not relate to the execution of any of the provisions of the Act itself; and therefore are without statutory warrant and of no effect.

We conclude that Shugert's petition was not maintainable against the partnership. And, *a fortiori,* it was not

[4] Brightly's Bankrupt Law: Gen. Ord. No. 18, p. 105; Form No. 2, p. 142.

maintainable as an involuntary petition against the non-consenting partners individually.

The motions made by the defendants in the District Court to dismiss the petition as against the partnership and themselves individually should have been granted. The decree of the Circuit Court of Appeals is accordingly reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

Decree reversed.

DOMENICO DUMBRA ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 546. Argued April 20, 21, 1925.—Decided May 25, 1925.

1. A prohibition agent, appointed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, charged with enforcing the Prohibition Act, is authorized to receive and execute a warrant to search for contraband liquors. *Steele* v. *United States,* 267 U. S. 505. P. 436.
2. Upon a motion to quash a search warrant and for return of liquor seized under it, upon the ground that the warrant was issued without probable cause, in violation of the Fourth Amendment, because of the alleged inadequacy of the evidence set forth in the affidavit, the question whether, on trial had, the Government may succeed in condemning the liquor seized is not presented. P. 437.
3. The fact that one has a permit, under the Prohibition Act, to make and sell wines on his premises for non-beverage purposes, and is under bond, and the premises subject to inspection by internal revenue officers during business hours, does not preclude the issuance of a warrant, upon probable cause, to search the place for wines there possessed illegally for beverage purposes. P. 437.
4. Facts set forth in an affidavit *held* sufficient to show probable cause, justifying issuance of a search warrant. P. 438.

Affirmed.

ERROR to a final order of the District Court denying a motion to quash a search warrant and for return of fifty

barrels of wine which had been seized under it, under the Prohibition Act.

Mr. Charles Marvin for plaintiffs in error.

The Solicitor General, Assistant Attorney General Willebrandt, and *Mr. Mahlon D. Kiefer,* Special Assistant to the Attorney General, for the United States, submitted.

Mr. Justice Stone delivered the opinion of the Court.

This case comes to this Court on writ of error to the District Court of the United States for the Southern District of New York, for the review of an order of the District Judge denying a motion to quash a search warrant which had been granted by him authorizing the search of a grocery store at 514 East 16th Street and the adjoining premises number 512 East 16th Street, New York City, at which last mentioned place plaintiffs in error maintained a winery under permit from the Government. The warrant directed the seizure of any intoxicating liquor possessed in violation of the National Prohibition Act. Execution of the warrant resulted in the seizure of 74 bottles of wine from the grocery store at number 514 and 50 barrels of wine from the winery on the premises No. 512.

The motion was made to quash the search warrant in so far as it affected the premises 512 East 16th Street and for the return of the fifty barrels of wine seized on the premises. The sole grounds of the motion, which are the principal assignments of error here, were that the search warrant was issued without probable cause in violation of the Fourth Amendment of the Constitution and that the officer serving the warrant had no authority to receive and execute it.

The warrant was executed by a prohibition agent who was an agent and employee of the United States. He

was regularly appointed by the Commissioner of Internal Revenue; the appointment was approved by the Secretary of the Treasury and he was charged with enforcing the National Prohibition Act (§ 2, Title II, National Prohibition Act, October 28, 1919, c. 85, 41 Stat. 305, 308; § 6, Title XI, Espionage Act, June 15, 1917, c. 30, 40 Stat. 228).

The question as to the authority of a prohibition agent to receive and execute a search warrant is disposed of by the decision of this Court, *Steele* v. *United States,* 267 U. S. 505. In that case it was held that prohibition agents or employees of the United States have the power and authority to serve a search warrant under the provisions of the Espionage Act and the National Prohibition Act. Following that decision, we hold that the warrant here was served by an authorized officer and that no right of plaintiffs in error was infringed by reason of the method of service of the warrant.

The other stated ground of the plaintiffs' appeal confines us narrowly to a consideration of the question whether the affidavit on which the search warrant was issued afforded sufficient ground for the issue of the warrant under the laws and Constitution of the United States. We are not concerned with the question whether, on trial had, the Government may or may not succeed on its libel filed for the condemnation and forfeiture of the seized wines. The proceedings had and now under review do not go to the merits, but only to the sufficiency of the affidavit, on which the search warrant was issued, to set the machinery of the law in motion by way of the summary process of search and seizure.

Although the affidavit on which the warrant was granted does not disclose the fact, the plaintiffs in error, at all times material to the issues, were the holders of a permit of the Treasury Department issued pursuant to § 3 of the National Prohibition Act (41 Stat. 308) authoriz-

ing them to manufacture and sell wines upon the searched premises for non-beverage purposes. By the terms of the permit they were permitted to have on hand on the premises not more than 100,000 gallons of wine. They were required to give bond, pursuant to Treasury regulations, in the sum of $50,000. Their premises were subject to inspection of Internal Revenue officers during business hours. In view of these provisions of the permit and of the provisions of § 9 of the National Prohibition Act (41 Stat. 311) authorizing revocation of the permit in the case of its violation and for its temporary suspension pending proceedings for its revocation, the resort to the summary procedure of search and seizure, without disclosing, in the affidavit submitted to the judge issuing the warrant, that a permit had been granted, was, to say the least, disingenuous, and would seem to have been a harsh and unnecessary exercise of governmental power by the officials concerned.

But the permit issued did not authorize the possession of intoxicating liquors for beverage purposes by plaintiffs and it could afford no protection to one who possessed such liquors with intent to use them in violation of the National Prohibition Act. *Reid* v. *United States,* 276 Fed. 253. If possessed with such intent, they were subject to search and seizure under § 25 of the Act, (41 Stat. 315) and, if probable cause were shown, a warrant authorizing such search and seizure might be duly and lawfully issued. Under such circumstances search and seizure are not unauthorized or unconstitutional.

Section 25 of the National Prohibition Act, so far as pertinent to the present inquiry, reads as follows:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in

Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof."

Title XI of the Public Law approved June 15, 1917, known as the "Espionage Act," referred to in § 25 of the National Prohibition Act, lays down the procedure which must be followed upon the issue of search warrants. Section 5 (40 Stat. 228) requires that the warrant shall be issued only on affidavit "tending to establish the grounds of the application or probable cause for believing that they exist," and § 16 requires the restoration of the property seized if it appears "that there is no probable cause for believing the existence of the grounds on which the warrant was issued."

The Fourth Amendment of the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In Steele v. *United States, supra,* it was held that a search and seizure of intoxicating liquors possessed in violation of the provisions of the National Prohibition Law upon a warrant satisfying the requirements of the Fourth Amendment and the Espionage Act and issued upon probable cause shown was not an unreasonable search and seizure within the constitutional provision and was in accordance with the Constitution and statutes of the United States. In that case, quoting from *Carroll* v. *United States,* 267 U. S. 132, the Court said, with respect to the probable cause shown by the affidavit on which the warrant was issued, "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Without a detailed recital of the facts appearing in the affidavit upon which the warrant in the present case was issued, it will suffice to point out that the affidavit was made by an employee of the Prohibition Bureau who stated in it that at a time specified, he was present with another prohibition agent at the store, No. 514, adjoining the winery conducted by Dumbra & Co., who are the plaintiffs in error, at No. 512. That while in the store he saw Mrs. Dumbra and her son; that negotiations were then had by affiant with the son for the purchase of two gallons of wine; that the son went to the back of the grocery store behind a partition; turned to the right toward the winery and in a short time returned with the two gallons of wine for which the agent accompanying affiant paid Mrs. Dumbra. As they left No. 514 the son of Dumbra left the grocery with them and turned into the front door of the winery.

The affiant states that on another occasion he visited the grocery store, where he saw the son and negotiated with him for the sale of a gallon of wine. The son again went to the back of the store; turned toward the winery, requesting affiant to wait outside. Shortly thereafter the son came out of the front door of the premises at 512, the winery, delivered the wine to affiant and received payment for it. Affiant swore that he tasted the wine in each instance; that he was familiar with the taste of intoxicating liquor and that the wine in question contained more than one-half of one per cent. of alcohol; that at no time did he present any papers or authority for the buying of wine for sacramental or religious purposes. He states that from his investigation and purchases made by other agents he knew that wine was being sold from the grocery store and that the source of supply was the winery located at No. 512.

The statements of fact contained in the affidavit are based upon affiant's personal knowledge of what he saw; it sets forth evidentiary facts which in our opinion estab-

lish probable cause for the charge that intoxicating liquors were possessed at the premises searched with intent to use them in violation of the National Prohibition Act. Probable cause has been defined by this Court as "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." *Stacy* v. *Emory,* 97 U. S. 642, 645.

In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

The apparent readiness of members of the family of a person in control of the suspected premises to sell intoxicating liquors to casual purchasers without any inquiry as to their right to purchase, and the actual production of the liquor sold, in one instance from the premises suspected and in the other from the vicinity of those premises, under such circumstances as to lead to the inference that the suspected premises were the source of supply, gave rise to a reasonable belief that the liquors possessed on the suspected premises were possessed for the purpose and with the intent of selling them unlawfully to casual purchasers. Absence of a well-grounded belief that such was the fact could be ascribed only to a lack of intelligence or a singular lack of practical experience on the part of the officer.

There was, therefore, probable cause for the issuing of the warrant, and the search and seizure made pursuant to it were authorized by the statutes of the United States

and were not a violation of the Fourth Amendment. The motion to quash the warrant was properly denied, and the order of the District Court appealed from is

Affirmed.

KNEWEL, SHERIFF *v.* EGAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 622. Argued April 20, 1925.—Decided May 25, 1925.

1. A sentence of a state court in a criminal case can not be reviewed by *habeas corpus* in the federal court upon the ground that the information was insufficient as a pleading. P. 445.
2. Nor upon the ground that the information failed to allege venue, and that the state court denied the relator a constitutional right by holding the defect to have been waived under a state statute by failure to demur. P. 446.
3. Where a sheriff appealed to this court from a judgment of the District Court in *habeas corpus* discharging a state prisoner from his custody, and after going out of office, in collusion with the prisoner, moved a dismissal of the appeal—*Held* that the motion should be denied, and that motions of the sheriff's successor to be substituted and of the State to intervene should be granted. P. 447.

298 Fed. 784, reversed.

APPEAL from a judgment of the District Court in *habeas corpus,* discharging the appellee from custody of the appellant as sheriff.

Mr. Byron S. Payne, with whom *Messrs. Buell F. Jones,* Attorney General of South Dakota, *J. D. Coon* and *Samuel Herrick* were on the brief, for appellant.

Mr. George W. Egan, pro se.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on appeal from the District Court of the United States for the District of South Dakota from

an order and judgment of that court on writ of *habeas corpus,* discharging the appellee from the custody of the appellant as sheriff of Minnehaha County, South Dakota.

Appellee was charged, on information by the state's attorney of that county, with the presentation of a false insurance claim in violation of § 4271 of the Revised Code of 1919 of South Dakota. He was convicted of violation of the statute, after trial by jury, in the South Dakota Circuit Court in May, 1920, and was sentenced to serve a term in the state penitentiary. On appeal to the Supreme Court of the State, judgment of conviction was vacated and new trial granted. *State* v. *Egan,* 44 S. D. 273.

Egan was again brought to trial on the same charge in April, 1922, and was again found guilty, and sentenced to serve a term in the state penitentiary. Upon appeal to the Supreme Court of the State, the judgment of conviction was affirmed. *State* v. *Egan,* 195 N. W. 642.

Before the District Court, the appellee urged, as he urges here, two principal grounds for granting the writ, namely, that the information on which the conviction was had did not describe a public offense; that in it no venue was laid and that in consequence the trial court was without jurisdiction in the cause.

Section 4271 of the Revised Code of South Dakota, under which the conviction was had, so far as pertinent, reads as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, . . . is punishable by imprisonment in the state penitentiary not exceeding three years, or by fine not exceeding one thousand dollars, or both."

The information charged in substance that the Firemen's Insurance Company, a corporation of Newark, New Jersey, was empowered to do business in the State of South

Dakota and in pursuance of this authority insured certain property of petitioner located in Minnehaha County; that the property was destroyed by fire and that thereafter petitioner presented a false claim to its agents; the language of the information being " and that thereafter and on or about the 9th day of January, 1920, the said defendant, George W. Egan then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Co., who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

The Circuit Court of Minnehaha County, in which appellee's trial and conviction were had, by the provisions of the Constitution of South Dakota (§ 14, Article 5) and the Revised Code of South Dakota, 1919, § 4653, is given original jurisdiction of all actions and causes both at law and in equity and original jurisdiction to try and determine all cases of felony. It accordingly had plenary jurisdiction to try the charge of violation of § 3271 of the Revised Code which makes the presentation of false or fraudulent insurance claims a crime punishable by imprisonment in the state penitentiary, which, by § 3573 is made a felony. The Circuit Court is not limited in its jurisdiction by the statutes of the State to any particular county. Its jurisdiction extends as far as the statute law extends in its application; namely throughout the limits of the State. The only limitation in this regard, contained in the statute, is found in § 4654 which provides in substance that the issue of fact in any criminal case can only be tried in the court in which it is brought, or to which the place of trial is changed by order of the court.

Section 4771 provides that defendant may demur to the information when it appears upon its face " that the court is without jurisdiction of the offense charged." Section 4779 provides that objections to which demurrers may be

interposed under § 4771 are waived, with certain exceptions not here material, unless taken by demurrer.

Appellee pleaded "not guilty" to the indictment. His application, made later, to withdraw the plea and demur was denied, the court acting within its discretionary power. *State* v. *Egan,* 195 N. W. 642. The Supreme Court of South Dakota, in sustaining the verdict and upholding the conviction held that the information sufficiently charged a public offense under § 4271, 44 S. D. 273, and it also held that the objection to the failure to state the venue in the information was waived by the failure to demur. From the foregoing it will be observed that what appellee is really seeking on this appeal is a review on *habeas corpus* of the determination of the Supreme Court of South Dakota that the information was sufficient as a pleading and a determination that the decision of the state court holding that under the Revised Code of 1919 (§§ 4725, 4771, 4779) the appellee waived the objection that the information did not state the venue by not demurring, was a denial of his constitutional rights which can be reviewed on *habeas corpus.*

It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews* v. *Swarz,* 156 U. S. 272; *Bergemann* v. *Backer,* 157 U. S. 655; *In re Lennon,* 166 U. S. 548; *Felts* v. *Murphy,* 201 U. S. 123; *Valentina* v. *Mercer,* 201 U. S. 131; *Frank* v. *Mangum,* 237 U. S. 309.

A person convicted of crime by a judgment of a state court may secure the review of that judgment by the highest state court and if unsuccessful there may then resort to this Court by writ of error if an appropriate federal question be involved and decided against him; or, if he be imprisoned under the judgment, he may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction.

See *Ex parte Royall,* 117 U. S. 241. But if he pursues the latter remedy, he may not use it as a substitute for a writ of error. *Ex parte Parks,* 93 U. S. 18; *In re Coy,* 127 U. S. 731. It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins,* 3 Peters 193; *Ex parte Yarbrough,* 110 U. S. 651; *Ex parte Parks, supra; In re Coy, supra; Bergemann* v. *Backer, supra; Howard* v. *Fleming,* 191 U. S. 126; *Dimmick* v. *Tompkins,* 194 U. S. 540; *In re Eckart,* 166 U. S. 481; *Goto* v. *Lane,* 265 U. S. 393.

Appellee stands in no better situation with respect to the failure to allege venue in the information. A mere failure to allege venue and thus to show affirmatively that the crime was committed within the territorial jurisdiction of the court, does not deprive the court of jurisdiction over the cause and the sufficiency of the indictment cannot be called in question upon *habeas corpus.* Even though an indictment thus drawn might have been found defective upon demurrer or writ of error, it is not so fatal, upon its face, as to be open to collateral attack after trial and conviction. *United States* v. *Pridgeon,* 153 U. S. 48, p. 59; and see *State* v. *Egan,* 44 S. D. 273, 277.

Moreover, as this case was conducted in the state court, the ultimate question presented is whether the procedure established by the statutes of South Dakota providing that failure to allege venue in the information is waived, unless demurred to, is a denial of a constitutional right. With respect to that question, we hold, as

this Court has repeatedly held, that the judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted. The proper remedy is by writ of error. *Markuson* v. *Boucher,* 175 U. S. 184. And see *Baker* v. *Grice,* 169 U. S. 284, and *Tinsley* v. *Anderson,* 171 U. S. 101, 104. See also, with respect to review, on *habeas corpus,* of judgments of United States District Courts, *Riddle* v. *Dyche,* 262 U. S. 333, and *Craig* v. *Hecht,* 263 U. S. 255. The judgment of the District Court was without warrant under the decisions of this Court and must be reversed.

The appeal in this case was applied for by counsel for the appellant; an assignment of errors was filed and the appeal was allowed conditional upon filing the usual appeal bond. The bond was executed by appellant, and was duly approved and filed.

Later a motion was made to this Court by other counsel appearing for appellant for that purpose, to strike from the record the brief and argument filed on his behalf by the counsel by whom the appeal was taken, on the ground that appellant never authorized the preparation or presentation of any brief in this proceeding, and that he never authorized any attorneys to appear in this Court for him as appellant. Motion has also been made on the same ground by appellee to strike from the record the brief filed in behalf of appellant and to dismiss the appeal. The affidavit of appellant in support of appellee's motion purports to show that the appeal was taken by members of the bar representing the Attorney General of South Dakota, and that the appeal was taken without appellant's unqualified approval, and states that he is satisfied with the decision of the District Court in the premises and that he desires the appeal to be dismissed.

The attorneys who took the appeal have also filed a motion to substitute for the appellant one Boardman, who since the taking of the appeal has been duly elected sheriff in the place of appellant and who consents to the substitution. The State of South Dakota also has filed a motion by its Attorney General appearing by the counsel who took the appeal, to be allowed to intervene on this appeal. All the motions referred to are now pending.

The affidavit of appellant in support of appellee's motion to dismiss discloses an obviously collusive attempt by appellant and appellee to defeat the ends of justice by dismissing the appeal without the consent of any officer representing either the State or the present sheriff, who are the real parties in interest as appellants. Appellant in his affidavit admits that, while he was in office as sheriff, he took the present appeal and he executed the appeal bond. He is therefore in this Court as party appellant; the Court has full jurisdiction of the appeal and it cannot be withdrawn without its consent. The real parties in interest in prosecuting the appeal are the State and the present sheriff, who is a public officer representing the county and the State. The substitution of the sheriff as appellant should be made. (*Thompson* v. *United States,* 103 U. S. 480, at p. 483) and the State be allowed to intervene.

The motion to dismiss the appeal is denied.

The motions for substitution of the present sheriff for the appellant and for the intervention by the State are granted.

The order of the District Court discharging the appellee from custody is reversed and the case remanded to the District Court with direction to remand him to the custody of the present sheriff.

Reversed.

SOWELL *v.* FEDERAL RESERVE BANK OF DALLAS, TEXAS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 367. Argued May 1, 1925.—Decided May 25, 1925.

1. An action brought on a promissory note by a federal reserve bank, a federal corporation, is an action "arising under the laws of the United States," within the meaning of Jud. Code § 24, "First" (a). P. 453.
2. A federal reserve bank is not a national bank, subject to the provisions of Jud. Code § 24, "Sixteenth." *Id.*
3. The Assignee Clause, Jud. Code § 24, "First" (a), which forbids the District Court to take cognizance of an action on a chose in action by an assignee which could not have been prosecuted in that court if no assignment had been made, applies where the sole ground of jurisdiction is diversity of citizenship, but not where the ground is that the action arises under the laws of the United States. *Id.*
4. Failure to present a promissory note for payment at the payee bank, where it was payable and where the maker had sufficient funds, or to give notice of dishonor, *held* not a defense to an action against the maker by the endorsee holder, in view of provision in the note waiving "protest, notice thereof and diligence in collecting," and the Negotiable Instruments Law in Texas, giving effect to such provisions. P. 456.
5. A note made to the order of a bank in which the maker had a deposit was endorsed by the payee to another bank as partial security for a larger indebtedness owed by the first bank to the second. The payee bank became insolvent and the endorsee sued the maker on the note. *Held* that the maker was not entitled, merely in virtue of his equitable right of set-off as against the payee, to have the action stayed until the endorsee had exhausted other collateral held by it as security for the debt owed it by the payee—at all events, not in the absence of the payee as a party. *Id.*

294 Fed. 798, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment recovered in the District Court by

the Bank in an action against Sowell on his promissory note.

Mr. James D. Williamson, for plaintiff in error.

The assignee clause is a limitation upon the jurisdiction of the federal courts. Were this not so, the clause would be meaningless and ineffective. Any national bank of a foreign State could file suit as the assignee in the federal courts. The purpose of the clause would be defeated and, as Justice Story says in *United States* v. *Green,* 4 Mason 427, the door opened for fraud.

As an original proposition, the Federal Reserve Bank at Dallas had no cause of action against the defendant Sowell; there was no suit arising under the Constitution and laws of the United States. It is only by virtue of being assignee that it comes in and says a federal question is presented.

Kolze v. *Hoadley,* 200 U. S., 76, lays down the rule very broadly that under the Act of 1888, where the suit, no matter in what guise it shall be presented, is a suit to recover upon a promissory note or other chose in action by an assignee, the District Court has no jurisdiction unless the suit might have been prosecuted in such court to recover on the note if no assignment or transfer had been made. The Court further says that the bill or other pleading must contain an averment showing the suit could have been maintained by the assignor if no assignment had been made. *United States National Bank* v. *McNair,* 56 Fed. 323; *Parker* v. *Ormsby,* 141 U. S. 81. *Federal Reserve Bank* v. *Webster,* 287 Fed. 579, is not supported by authority. *Weyman* v. *Wallace,* 201 U. S. 230, distinguished. See *Houck* v. *Bank of Brinkley,* 242 Fed. 882; Act of January 28, 1915, 38 Stat., 803; *Bankers Trust Co.* v. *Texas Pacific Railroad,* 241 U. S. 295.

How can it be said that a suit on a promissory note as against the maker is one arising under the laws and

Constitution of the United States, when Congress has repeatedly said that the assignee of such note cannot sue thereon unless the assignor could have maintained his suit in the federal court? Is the language of the Act of 1915 as to jurisdiction more restrictive than the language of the assignee proviso of the Act of 1888, which is now a part of § 24 of the Judicial Code?

If jurisdiction exists in this case why not in favor of any national bank of a foreign state which, as an assignee, sues in the federal court on a note assigned to it by a citizen of the same State as the maker? The laws of the United States are just as much in controversy as in this suit. The national bank is organized under the laws of the United States. None of the provisions of its charter or its national incorporation are taken away by the proviso of 1882 that, for jurisdictional purposes, it shall be considered as a citizen of the state in which it is domiciled. It is still a federal corporation. See cases above cited and *Petrie* v. *Commercial National Bank,* 142 U. S. 644; *Leather Manufacturers' National Bank* v. *Cooper,* 120 U. S. 778. In *Commercial National Bank* v. *Simmons,* 6 Fed. Cas. 226, jurisdiction was expressly conferred under the Act of February 25, 1863, and in *United States* v. *Planters' Bank,* 9 Wheat. 904, by the Act under which the bank was organized.

The Federal Reserve Act, § 4, provides: "It [a federal reserve bank] shall have the power to sue and be sued, complain and defend in any court of law or equity." This does not confer jurisdiction on the federal court of suits by or against that bank, but leaves § 24 of the Judicial Code in full force and effect as to all of its provisions; and, for jurisdictional purposes, it cannot invoke its federal charter in violation of the assignee clause.

Under the Negotiable Instruments Law, where a note is payable at a bank, it is the duty of the holder to present it at the bank in due course of business for payment.

Where the holder of a negotiable note, payable at a bank which is, under the Negotiable Instruments Act, authorized to charge the note to the account of the maker, knows of the impairment of the financial condition of such bank, the holder is negligent in failing to notify the maker that his note is not paid, or to present the note to the maker for payment. If the maker be damaged on account of the negligence, he is relieved from liability.

Mr. Ethan B. Stroud, Jr., with whom *Messrs. Charles C. Huff* and *Joseph Manson McCormick* were on the brief, for defendant in error.

Mr. Justice Stone delivered the opinion of the Court.

Writ of error to the United States Circuit Court of Appeals for the Fifth Circuit to review its judgment, affirming a judgment for the plaintiff below of the District Court of the United States for the Northern District of Texas, in an action upon a promissory note.

Plaintiff in error, defendant below, a resident of Texas, executed his promissory note payable to the order of a national bank domiciled in Texas. The note was endorsed, before maturity, to defendant in error, also domiciled in Texas, as collateral security for an indebtedness owing by endorser to defendant in error, in excess of the amount of the note. Three principal grounds of error are assigned: (1) That the District Court was without jurisdiction as the plaintiff below was an endorsee of the note sued upon and as its endorser could not have brought suit upon the note against the maker in that court (Judicial Code, § 24, Subdivision First (c)); (2) that defendant in error as holder of the note failed to present the note for payment at the endorser bank where it was payable and where the maker had funds on deposit sufficient to pay it; (3) that the District Court refused to stay the suit until such time as the defendant should ex-

haust other collateral held by it as security for the indebtedness of the endorser.

Suit being brought by a federal reserve bank, incorporated under the laws of the United States, it is a suit arising under the laws of the United States (Judicial Code, § 24, First (a)). *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350. And as the defendant in error is not a national bank subject to the provisions of the Judicial Code, § 24, Subdivision Sixteenth, the District Court had jurisdiction of the suit unless jurisdiction is excluded by the so-called "Assignee Clause", Judicial Code, § 24, Subdivision First (c), which reads as follows:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made, . . ."

It is unquestioned that where the sole ground of jurisdiction is diversity of citizenship, such jurisdiction is excluded by the operation of this clause, and the question now presented is whether the clause has a like effect where the sole ground of jurisdiction is that the suit arises under the laws of the United States.

No inference as to the meaning of the assignee clause can be drawn from its relative position in § 24, and that of the clause giving jurisdiction of suits arising under the laws of the United States. Judicial Code, § 295.

The history of the clause, however, shows clearly that its purpose and effect, at the time of its enactment, were to prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist, and

not to deprive the federal courts of jurisdiction where it was conferred on grounds other than diversity of citizenship.

The assignee clause was incorporated in the Judiciary Act of 1789, § 11, in substantially its present form. Under that Act, jurisdiction could be invoked only by the United States, aliens, and in cases of diversity of citizenship. There was, therefore, no scope for its application in cases where jurisdiction depended upon the subject matter of the suit. Jurisdiction in cases arising under the laws of the United States (except for a brief period under the Act of February 13, 1801, 2 Stat. 92, 93) was not conferred until the Act of March 3, 1875, 18 Stat. 3, 470. Before that date jurisdiction over suits brought by federal corporations was denied unless their charters expressly authorized them to sue in the federal courts. Where such authority was granted, the assignee clause was held to be inapplicable and not to defeat the jurisdiction. *Commercial National Bank* v. *Simmons,* 6 Fed. Cas. 226, No. 3,062; *Bank of United States* v. *Planters Bank of Georgia,* 9 Wheat. 904. In that case, the court, in holding that the Bank of the United States might bring suit on a note endorsed to it by a citizen of the same State as that of the defendant maker of the note, pointed out that the purpose of the assignee clause was to prevent extending the jurisdiction of the court by the mere process of assignment and not to limit a jurisdiction conferred on other grounds. The Court said, at page 909:

"It was apprehended that bonds and notes, given in the usual course of business, by citizens of the same State, to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the federal Courts. To remove this inconvenience, the act which gives jurisdiction to the Courts of the Union over suits brought in by citizens of one State against the citizens of another, restrains that jurisdiction, where the suit is

brought by an assignee to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue, because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States."

Mr. Justice Story applied the same rule in the case of a claim assigned to the United States, holding that the assignee clause was not applicable, (*United States* v. *Green,* 4 Mason 426,) resting his decision both on the meaning and effect of the assignee clause, and on the effect of the Act of 1815, Chap. 253, conferring general jurisdiction on the federal courts over suits brought by the United States.

By the Act of 1875, 18 Stat. 336, jurisdiction of the federal courts was extended generally to all suits arising under the laws of the United States. Where such is the ground of jurisdiction, the assignee clause appears to us to be inapplicable, just as it had been held to be in cases in which the like jurisdiction was conferred by special corporate charter provisions or where jurisdiction was given generally over suits brought by the United States.

The precise question seems not to have been expressly passed upon by this Court since the Act of 1875. It, however, was necessarily involved in *Wyman* v. *Wallace,* 201 U. S. 230, in which the assignee clause would have defeated the jurisdiction attaching because of diversity of citizenship, but in which the jurisdiction was, nevertheless, upheld because the case was one arising under a law of the United States.

We think that a reasonable interpretation of the language of the clause in the light of its history, its obvious purpose at the time of its enactment, and judicial declarations as to its meaning and effect, and the fact that the provision for jurisdiction generally over suits arising under

the laws of the United States was enacted later, and without any exceptions, lead to the conclusion that it should be so applied as not to limit jurisdiction arising from the nature of the subject matter of the suit, as is the case in suits brought by or against corporations organized under the laws of the United States. *American Bank and Trust Co.* v. *Federal Reserve Bank, supra,* p. 356. We hold that the District Court had jurisdiction over the cause.

The note sued on contained a provision that the maker waived "protest, notice thereof and diligence in collecting." The Negotiable Instruments Law in force in Texas gives effect to stipulations waiving presentment, protest or notice of dishonor, contained in the body of the instrument, and provides that they are binding on all parties to it. (Revised Statutes, Texas, § 82, Art. 6001–a(3), 109, 110, 111.) Plaintiff in error was, therefore, bound by his waiver and the circumstance that defendant in error had knowledge of a deposit of the plaintiff in error with the payee bank sufficient to meet the note at maturity, did not, contrary to the express terms of the waiver, impose a duty on defendant in error to present the note for payment. Defendant's rights were unimpaired by its failure to make due presentation of the note or to give notice of its dishonor.

The contention of plaintiff in error that suit should have been stayed until defendant in error had exhausted its other collateral, is not founded upon any special equities growing out of fraud, agreement among the parties, or suretyship, or other special relationship, giving rise to any equity in the maker of the note. The note was held by defendant in error, together with other collateral, as security for the debt of the payee who is insolvent and indebted to plaintiff in error in an amount exceeding the note. In such a situation there is no scope for the marshalling of the security at the behest of the maker of the note. The equitable doctrine of marshalling

rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds. The debtor may not ordinarily invoke the doctrine, for by doing so he would disregard the express provisions of his contract on which the creditor is entitled to rely. The plaintiff in error is bound to pay his obligation according to its tenor. He cannot deny his own contract merely because his creditor has acquired other rights with which he may satisfy his debt and because he wishes to avail himself of an equitable set-off against the payee of the note. Had plaintiff in error set up any defense to the note, good as to the payee, such as fraud, or failure of consideration, he might, under the law of some jurisdictions, have urged such cases as *McBride* v. *Potter,* 169 Mass. 7, or *Second National Bank* v. *Magee,* 241 S. W. (Texas) 287, or *Van Winkle, etc. Co.* v. *Citizens Bank,* 89 Texas, 147, as a basis for the claim that, because of his special equities, affecting the inception of the note, the defendant in error should exonerate him by resorting to the other collateral, if shown to be sufficient to pay the note.

But plaintiff in error shows only the obligation of his note, presumptively valid both in the hands of the payee and the defendant in error, and claims that since he has an equitable set-off good against the payee of the note, he should be relieved of his own obligation until the collateral of the payee bank has first been applied to its satisfaction. But these circumstances, which do not in any way affect the validity of negotiable paper as such, can afford no foundation for equitable relief to the maker or for depriving the creditor of the full benefit of his security in accordance with his contract. To engraft upon the note the equity here asserted against an innocent holder would be to disregard its terms and impair its negotiability. Such authority as there is rejects it. *Hamsley* v.

National Park Bank, 147 Ga. 96; *Hass* v. *Bank of Commerce,* 41 Neb. 754; *Citizens Bank* v. *Giddings,* 84 N. W. (Neb.) 78; *Third National Bank* v. *Harrison,* 10 Fed. 243. And see *Union Bank of Georgetown* v. *Laird,* 2 Wheat. 390; *Myers* v. *Kendall* (La.), 76 So. 801. In any event, the other debtor of defendant in error was not before the court, and for that reason plaintiff was not entitled to the relief sought. *Dorr* v. *Shaw,* 4 Johns, Ch. 17, 18.

There is no error in the record and the judgment of the Circuit Court of Appeals is

Affirmed.

EDWARD HINES YELLOW PINE TRUSTEES *v.* ANNA F. C. MARTIN ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 363. Argued May 1, 1925.—Decided May 25, 1925.

1. Where a construction of a state statute affecting title to real estate has been repeatedly determined by decisions of the state courts and thus established as a rule of property in the State, the federal courts will follow those decisions without inquiring into the justice and sufficiency of the rule as an original proposition. P. 462.
2. Petitioners claimed title to land in Mississippi under a patent issued to a corporation under an act of the state legislature incorporating it and providing that the corporation should, within 60 days after the passage of the act, file with the Secretary of State a bond in a specified amount "with two or more good securities," and that, upon approval and filing of the bond, patents should be issued, upon demand of the company, signed by the Governor and countersigned by the Secretary of State. The State Supreme Court having repeatedly decided that a patent so issued was void because the bond filed and approved was executed by individuals only and not by the corporation and was therefore not a compliance with the statute, *held* that the rule thus established should be followed in a case arising in the federal court. P. 457.

296 Fed. 442, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree rendered by the District Court for the respondents in consolidated suits to quiet title brought by the petitioners.

Mr. T. J. Wills, with whom *Mr. T. W. Davis* was on the briefs, for petitioners.

Mr. Fleet C. Hathorn, with whom *Messrs. William H. Watkins* and *Clayton D. Potter* were on the briefs, for respondents.

Mr. JUSTICE STONE delivered the opinion of the Court.

Petitioners, complainants below, filed four bills in equity in the United States District Court for the Southern District of Mississippi against four different defendants to remove cloud on title of four plots of land separately described in the several bills. The suits thus brought were consolidated and tried by the District Court as one, upon an agreed statement of facts and documentary evidence, and a decree was rendered adjudging that the title to the lands in question was in defendants and denying the prayer of the bill. On appeal to the Circuit Court of Appeals, the decree was affirmed. 296 Fed. 442.

The lands in question were acquired by the State of Mississippi from the United States under Act of Congress approved September 28, 1850. Petitioners' title depends upon the validity of a patent issued June 27, 1871, by the State of Mississippi to the Pearl River Improvement & Navigation Company, a corporation from which petitioners derived their title by mesne conveyances. The title set up by the defendants was acquired by mesne conveyances under a second patent describing the same lands, issued by the State of Mississippi to Mitchell, December 7, 1883. The Mississippi Legislature, by Act approved April 8, 1871, incorporated the Pearl River Improvement & Navigation Company and provided that that company

should "within sixty days after the passage of this Act, file in the office of the Secretary of State a bond in the sum of $50,000, with two or more good securities," and that upon the approval and filing of the bond, "the said Secretary of State shall from time to time as demanded by said company make out a patent or patents which shall be signed by the Governor and countersigned by the Secretary of State, which patents shall vest the fee simple in said lands in this company." Within sixty days, the company filed a bond, executed by four individuals only, in the sum specified, and conditioned on the performance by the company of all duties imposed on it by the Act of April 8, 1871. The bond was approved by the Governor, and the patent of June 27, 1871, describing the lands referred to in that statute, including the lands involved in this litigation, was issued, signed by the Governor and countersigned by the Secretary of State.

The validity of petitioner's title depends upon the determination of the question whether the bond filed by the company was a compliance with the provisions of the statute so as to render operative the patent issued by the officials of the State to the company as a valid conveyance of the fee of the lands in question. Whether or not the bond was a compliance with the statute and the legal effect of the patent so far as other lands embraced within its description are concerned, are points which have been several times passed upon by the state courts of Mississippi and, once before the present litigation, were considered by the United States Circuit Court of Appeals for the Fifth Circuit.

In *Hardy* v. *Hartman,* 65 Miss. 504 (1888), which was an action of ejectment, the court, although referring to the fact that it did not appear from the record that any patent signed by the Governor and countersigned by the Secretary of State was ever issued to the company for the land in question, nevertheless rested its decision on its

holding that the Act of April 8, 1871, required, as a condition precedent to the validity of any patent issued pursuant to it, that the company should file in the office of the Secretary of State its own bond in the amount specified; that by filing a bond executed by individuals it had not complied with the condition and the patent was accordingly void.

In *Southern Pine Co.* v. *Hall,* 105 Fed. 84, decided in 1900, suit was brought as in the present case, to quiet the title of a plaintiff claiming under the company. In that case the Circuit Court of Appeals for the Fifth Circuit held that the true meaning of the statute, confirmed by the contemporary construction of it on the part of the Governor and the Secretary of State by their action in issuing the patent, was that the company should file a bond in the specified amount insuring an indemnity to the State in that amount. Having complied with the requirements of the statute by filing the approved bond of four solvent individuals, residents of the State, the patent issued to the company by the State of Mississippi was held to be valid and to pass a fee to the patentee.

In *Becker* v. *Columbia Bank,* 112 Miss. 819, decided in 1917, which was also a suit to quiet title of lands claimed under the patent of 1871, the Supreme Court of Mississippi reaffirmed the principle of its decision in *Hardy* v. *Hartman, supra,* saying that that " decision established a rule of property which should not now be disturbed " and that the failure to comply with the requirements of the statute as interpreted in *Hardy* v. *Hartman, supra,* rendered the purported patent to the company void and that the patentee took no title under it.

In *Edward Hines Yellow Pine Trustees* v. *State ex rel. Moore* (1924), 134 Miss. 533, the Supreme Court of Mississippi again affirmed and adopted the view laid down in *Hardy* v. *Hartman, supra,* saying at p. 534:

" We are not here concerned with the correctness of the decision in Hardy *v.* Hartman, supra, and the rule there

applied, whether correct or not, to titles derived through patents issued to the Pearl River Improvement & Navigation Company has become a rule of property and will not now be departed from."

The validity of titles derived under the same patent to the company appears to have been upheld in the case of *Hines et al., Trustees* v. *Martin* by the Supreme Court of Mississippi, decided without opinion February 4, 1924. 99 So. Rep. 825.

In all these cases the question ruled upon was whether the bond filed by the company complied with the requirements of the statute and whether the filing of a bond satisfying those requirements was a condition precedent to the execution of the patent and the vesting of title in the patentee. An answer to these questions involved an interpretation of the state statute and the application of it, as interpreted, as a rule of property determinative of rights in titles to land within the State. Both the meaning of statutes of a State and the rules of the unwritten law of a State affecting property within the State are peculiarly questions of local law to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts. *Walker* v. *State Harbor Commissioners,* 17 Wall. 648; *Barrett* v. *Holmes,* 102 U. S. 651; *Greekie* v. *Kirby Carpenter Co.,* 106 U. S. 379, 385; *McArthur* v. *Scott,* 113 U. S. 340; *Schley* v. *Pullman Car Co.,* 120 U. S. 575, 580; *Bucher* v. *Cheshire Railroad Co.,* 125 U. S. 555; *Ridings* v. *Johnson,* 128 U. S. 212, 224; *Heath* v. *Wallace,* 138 U. S. 573; *Bauserman* v. *Blunt,* 147 U. S. 647; *Balkam* v. *Woodstock Iron Co.,* 154 U. S. 177; *American Land Co.* v. *Zeiss,* 219 U. S. 47; *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U. S. 445; *North Laramie Land Co.* v. *Hoffman, ante,* p. 276; and follow rules of property declared by state courts; *Jackson ex dem St. John* v. *Chew,*

12 Wheat. 153; *Suydam* v. *Williamson,* 24 How. 427; *Williams* v. *Kirtland,* 13 Wall. 306; *League* v. *Egery,* 24 How. 264; *Smith Purifier* v. *McGroarty,* 136 U. S. 237; *Warburton* v. *White,* 176 U. S. 484.

When questions affected by the interpretation of a state statute or a local rule of property, arise in a federal court, that court has the same authority and duty to decide them as it has to decide any other questions which arise in a cause, and where state decisions are in conflict or do not clearly establish what the local law is, the federal court may exercise an independent judgment and determine the law of the case. See *Pease* v. *Peck,* 18 How. 595, 598; *Burgess* v. *Seligman,* 107 U. S. 20; *Barber* v. *Pittsburgh, etc., Railway,* 166 U. S. 83, 99; *Kuhn* v. *Fairmont Coal Company,* 215 U. S. 349. This Court has refused to follow a rule established only by single state decision, rendered after the rights involved in the case in the federal court accrued, *Kuhn* v. *Fairmont Coal Co., supra,* or a single decision when not satisfied that it is conclusive evidence of the state law. *Barber* v. *Pittsburgh, etc., Railway Co.,* 166 U. S. 83, 99. In *Burgess* v. *Seligman, supra,* this Court refused to follow decisions of the state court conflicting with a previous decision of the United States Circuit Court, in that case, with respect to the interpretation of a state statute, fixing the liability of stockholders of a corporation organized under the laws of the State as applied to a stockholder who was a non-resident of the State and who acquired his interest in the stock outside of the State. But where the rule is one affecting title to real estate within the State and has been repeatedly determined by decisions of state courts so that it is established as the law of the State, there has been no departure from the rule that the federal courts will follow the decisions of the state courts. *Jackson ex dem St. John* v. *Chew, supra; Green* v. *Neal,* 6 Pet., 291; *Suydam*

v. *Williamson,* 24 How., 427; *Walker* v. *The State Harbor Commission,* 17 Wall. 648; *Barrett* v. *Holmes,* 102 U. S. 651. And this is the rule even though the state rule is not approved. *Walker* v. *The State Harbor Commissioner, supra; Bucher* v. *Cheshire Railway Co.,* 125 U. S. 555; *Balkam* v. *Woodstock Iron Co.,* 154 U. S. 177. To avoid the uncertainty and injustice which result from "the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior to decide which is right" (*Brine* v. *Insurance Company,* 96 U. S. 627), this Court has not hesitated, when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions and to follow the state decisions, once it has become evident that they have established a "rule of property" as the settled law of the State. *Green* v. *Lessee of Neal,* 6 Pet. 291; *Suydam* v. *Williamson, supra; Fairfield* v. *County of Gallatin,* 100 U. S. 47; *Roberts* v. *Lewis,* 153 U. S 367, 376. And see *Bauserman* v. *Blunt, supra,* overruling a decision of the Circuit Court antedating a conflicting decision of the state court. We are, therefore, constrained in the present case to accept the view of the state courts as announced by them without inquiring, as an original proposition, into the justice and sufficiency of the rule which we follow.

In the argument before this Court, petitioners relied upon the effect of c. 118 of the Laws of Mississippi of 1873 as validating his title. This was a private act of the legislature of Mississippi which relieved the Pearl River Improvement & Navigation Company from some of its obligations under the Act of April 7, 1871, upon certain payments to be made by it to the state treasury, and provided that "all acts, deeds and proceedings whatever of the Pearl River Improvement & Navigation Company be and the same are hereby legalized, ratified and confirmed."

This appears to be the first occasion in the course of this litigation on which the existence of this statute and the claim of right under it by the petitioners, have been brought to the attention of the court, although it appears to have been before the state court, but not commented on, in *Becker* v. *Columbia Bank, supra* and *Hines Yellow Pine Trustee* v. *Martin, supra.* It is not referred to in the record here. By the agreed statement of facts the Act of April 8, 1871, and the patent issued to the Company are the only suggested source of title in the petitioners. No reference is made to the Act of 1873 in the assignments of error. The record gives no information as to the existing situation at the time it was passed; as to what lands had been conveyed by the Company or what lands retained. We are left uninformed as to whether the Company made the payments stipulated for in the statute. This Court is a court of review and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below. *McClellan* v. *Carland,* 217 U. S. 268, 283; *Bass, etc., Ltd.* v. *Tax Commission,* 266 U. S. 271, 285. And see *Davis* v. *Currie,* 266 U. S. 182 and *United States Fidelity & Guaranty Co.* v. *Woolridge, ante* p. 234.

In these circumstances, the petitioners can not be heard to claim anything in these cases under the Act of 1873, and beyond this, we decide nothing in respect to it.

Judgment of the Circuit Court of Appeals is

Affirmed.

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SELZMAN *v.* UNITED STATES.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 998. Submitted April 27, 1925.—Decided June 1, 1925.

1. Under the Eighteenth Amendment Congress has power to prevent or regulate the sale of denatured alcohol which is not usable as a beverage. P. 467.
2. The power of the Federal Government, granted by the Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative measures reasonably adapted to promote the purpose. P. 468.

Affirmed.

ERROR to a judgment of the District Court based on convictions under two indictments, the one charging conspiracy to violate the Prohibition Act and regulations, in offering denatured alcohol for sale without the required labels, the other charging sale of it for beverage purposes, etc.

Messrs. Gerald J. Pilliod and *J. C. Breitenstein,* with whom *Mr. B. H. Schwartz* was on the brief, for plaintiff in error.

The Solicitor General, with whom *Assistant Attorney General Willebrandt* and *Mr. Mahlon D. Kiefer,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Meyer Selzman was tried and convicted on two indictments in the District Court. The first charged him, Martin Bracker, Harry Porter and others with a violation of § 37 of the Criminal Code in conspiring to violate

§ 15, Title III, of the National Prohibition Act (enacted October 28, 1919, c. 85, 41 Stat. 305) and the regulations relating to the manufacture and distribution of industrial alcohol prescribed by the Commissioner of Internal Revenue, pursuant to the provisions of Title III of the Act, in that they knowingly offered for sale completely denatured alcohol in packages containing less than five wine gallons, without having affixed to the packages a label containing the words "Completely denatured alcohol", together with the word "Poison" and a statement of the danger from its use. *United States* v. *Grimaud,* 220 U. S. 506.

Selzman was also convicted under four counts of the second indictment of violating § 4 of Title II of the Act forbidding the sale of denatured alcohol for beverage purposes or under circumstances from which the seller may reasonably infer the intention of the purchaser to use it for such purpose.

This is a writ of error under § 238 of the Judicial Code, on the ground that the provisions of the Prohibition Act in respect to denatured alcohol under which these indictments were found exceed the power of Congress. Whether this is a sound contention is the only question for our decision.

It is said that the Eighteenth Amendment prohibits the manufacture, sale and transportation of intoxicating liquor for beverage purposes only, and that, as denatured alcohol is not usable as a beverage, the amendment does not give to Congress authority to prevent or regulate its sale, and that such authority remains with the States and is within their police power exclusively.

Reference is had to the part of § 1 of Title II of the Prohibition Act (41 Stat. 307), as follows:

"Sec. 1. When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy,

whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

This, it is said, is a proper construction and limitation of what the Eighteenth Amendment was intended to prohibit and excludes denatured alcohol, although intoxicating, because not fit for beverage purposes. The argument is without force.

In order that the uses of alcohol might not be lost to the arts by reason of the then heavy internal revenue tax, Congress made provisions (Act of June 7, 1906, c. 3047, 34 Stat. 217, Act of March 2, 1907, c. 2571, 34 Stat. 1250, and Act of October 3, 1913, c. 16, § IV, N, sub-sect. 2, 38 Stat. 114, 199) by which alcohol was made tax free if denatured so that it could not be used for a beverage and evade the federal tax on the potable article. Any attempt to recover the alcohol thus denatured for beverage purposes was punished. The plaintiff in error's suggestion is that this was then within the power of Congress because necessary to protect its power of levying an excise tax on liquor under Section 8, Art. 1, of the Constitution; but that as there is now no tax upon alcohol to protect, denatured alcohol has passed out of the domain of Congressional action. But surely the denaturing of alcohol is now as necessary in maintaining its use in the arts and prohibiting its use as a beverage, as it was formerly needed to permit its use in the arts and to prevent its consumption as a beverage without paying the tax. The power of the Federal Government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative meas-

ures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it. The conclusion is fully supported by the decisions of this Court in *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 282, and *National Prohibition Cases,* 253 U. S. 350, Par. 11. See also *Huth* v. *United States,* 295 Fed. 35, 38.

Affirmed.

CAMI, COMMISSIONER *v.* CENTRAL VICTORIA, LTD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 370. Submitted April 30, 1925.—Decided June 1, 1925.

1. Certiorari will not ordinarily be granted to review decisions of the Circuit Court of Appeals sustaining decisions of the Supreme Court of Porto Rico on local questions; but where the judgment of the Court of Appeals is a reversal, this Court cannot sustain a decision of the Porto Rico court without plausible grounds merely because the question is local. P. 470.
2. Porto Rican Act No. 9, of May 12, 1920, § 49, provides that municipal revenues shall embrace license taxes provided by Act No. 26, of March 28, 1914, "hereby declared to be in force", and "(f) any other . . . tax" that may be levied by two-thirds of the municipal assembly the object or matter of which is not also the object of any federal or insular tax. *Held* that a municipal tax of ten cents per cwt. on sugar manufactured in the municipality is unauthorized, because taxation of the business of sugar mills is

governed, and limits affixed, by the license tax provision in the Act of 1914. P. 471.
295 Fed. 809, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the Supreme Court of Porto Rico refusing to prevent collection of a municipal tax.

Mr. E. B. Wilcox, with whom *Mr. Juan B. Soto* was on the brief, for petitioner.

Mr. Francis G. Caffey, with whom *Mr. George W. Study* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to prevent the collection of a tax imposed by a municipal ordinance of Carolina, Porto Rico, on the ground that the ordinance is void. The Supreme Court of the Island upheld the tax, 30 P. R. 413, but the judgment was reversed by the Circuit Court of Appeals, 295 Fed. 809, following its decision on the same day in *Successors of C. & J. Fantauzzi* v. *Municipal Assembly of Arroyo,* 295 Fed. 803. A writ of certiorari was granted by this Court. 265 U. S. 577. Had the Circuit Court of Appeals deferred to the local interpretation of Porto Rican statutes, we should not have granted a writ. We repeatedly have stated the reason for such deference, and we believe that the appellate jurisdiction was granted with other ends in view than that of setting the local courts right in their interpretation of their own laws. But since the case has been decided the other way we cannot avoid dealing with the merits and we should not be warranted in reversing the decision under review unless we thought either that it was wrong or at least that there was such plausible ground for the judgment reversed by it, that the local decision ought not to be disturbed.

The Supreme Court of Porto Rico expressed an intelligible doubt whether a bill for an injunction would lie in this class of cases, but no error was assigned on that ground, and in view of our opinion on the merits there is no sufficient reason for opening that question. When we come to the merits we are compelled to agree with the Circuit Court of Appeals as we understand the reasoning of that Court.

On February 17, 1921, the ordinance complained of was passed, and imposed a tax of ten cents on every hundredweight of sugar manufactured in the municipality. The statutes affecting the power to levy this tax are set out more fully in the principal opinion below. We give only those that immediately determine the result. The Porto Rican Act No. 9 of May 12, 1920, § 49, provides that the municipal revenues shall consist of (d) License taxes provided by Act No. 26, of March 28, 1914, "which is hereby declared to be in force." "(f) Any other impost, excise or tax that may be levied by two thirds of the members of the municipal assembly, provided that the object or matter of taxation is not also the object or matter of any federal or insular tax." The Act of 1914 included in its Group C the business of sugar and molasses mills among those that municipalities were empowered to tax, and proceeded: "The rates of taxation for Group C are made as follows: For each $1,000 or fraction thereof in excess of the first $500 of volume of business transacted, up to $1,000,000 inclusive $0.25 a year," and over that, $0.125. As the Act of 1914 is taken up into that of 1920, it is difficult for us to believe that in one paragraph the latter Act gave power to tax up to a specified maximum and in another a general power limited only by the other principles of taxation. Therefore when in § 49 (f) the later Act allows 'any other impost, excise or tax' we think it must be taken to mean any tax on other objects of taxation not any other tax on those for which a limit already definitely is prescribed.

The petitioner argues that the Circuit Court of Appeals was mistaken in assuming that the maximum allowed by the Act of 1914 had been reached by a previous tax. The assumption is made however only for the purpose of admitting that an additional tax of the kind warranted by the Act of 1914 might be imposed within the limit of the maximum, and as it is not argued that this tax can be sustained as that which is authorized by the Act of 1914 it does not matter whether the limit under that Act had been reached or not. This is a different tax levied under an interpretation of the clause in the Act of 1920 authorizing other taxes, which in our opinion cannot be sustained. We think it unnecessary to add more to what has been said below.

Decree affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 13, Original. Order entered June 1, 1925, approving the final report of the receiver herein and terminating the receivership.

On consideration of the final report of the receiver, presented a week ago, it is ordered that the accounts, disbursements and transactions of the receiver shown in the report be approved.

And it appearing that all of the property and moneys which came into the possession of the receiver have been disposed of, disbursed and paid out in compliance with the instructions and orders of the Court; that all of the expenses of the receivership have been paid; that the receiver has stored the books of account, records and files of the receivership with the Security Storage Company of Washington, D. C., and has delivered the same as stored to the clerk of the Court, as directed in the order

of May 11, last; and that the receivership has served its purpose and is now ready to be closed:

It is considered, ordered and decreed that the receivership in this cause be, and it now is, declared at an end; and that the receiver be, and he now is, relieved and discharged from further duty, obligation and responsibility in the premises.

In terminating the receivership the Court expresses its high appreciation of the admirable service of the receiver in satisfactorily managing a large estate in novel and difficult circumstances.

FRICK ET AL. *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Nos. 122, 123, 124, 125. Argued December 7, 1923.—Decided June 1, 1925.

1. A state statute attempting to tax the transfer of tangible personal property having an actual situs in other States transcends the power of the State so attempting and contravenes the due process clause of the Fourteenth Amendment. P. 488.
2. The power to regulate the transmission, administration and distribution of tangible personal property on the death of the owner rests with the State of its situs, the laws of other States having no bearing save as that State expressly or tacitly adopts them; and then their bearing is attributable to such adoption and not to any force of their own. P. 491.
3. A law of Pennsylvania (Act No. 258, Ls. of 1919, 521) provides that where a person domiciled in the State dies seized and possessed of real or personal property, its transfer by will or intestate laws, whether the property be in that State or elsewhere, shall be taxed at specified percentages of the clear value of the property transferred, such value to be ascertained by deducting debts and expenses of administration from the gross value of the estate, but without making any deduction for taxes paid to the United States or any other State. *Held:* (1) That the law is not an escheat, but a tax, law. P. 492. (2) That a tax so levied was void in so far as based on transfer of decedent's tangible personal property in New York and Massachusetts, where

ancillary letters were granted, the property administered and transfer taxes imposed and collected. P. 496.

4. A State, being without power to tax directly the transfer of tangible personal property in another State, can not accomplish the same thing indirectly by taking the whole of the decendent's estate, including that foreign property, as the basis for measuring the tax on the transfer of that part of the estate which lies within its jurisdiction. *Maxwell* v. *Bugbee,* 250 U. S. 525, and *Plummer* v. *Coler,* 178 U. S. 115, distinguished. P. 494.
5. The State which created a corporation has power to tax the transfer of its stock on death of a stockholder, and to enforce the tax by means practically making the State a lienor in possession, irrespective of the decedent's domicil and the actual situs of the stock certificates. P. 497.
6. This power being superior to the jurisdiction over the stock of another State in which the decedent stockholder resided, the tax imposed by the State of the corporation must be paid before the stock can be brought into administration in the State of his domicil; and a statute of the domiciliary State (Penna. Ls. 1919, 521, *supra,*) which does not allow the value paid out of his estate for this purpose to be deducted in computing the domiciliary transfer tax, in effect taxes what is not within the State's jurisdiction and violates the due process clause of the Fourteenth Amendment. *Id.*
7. The federal "estate" tax and the Pennsylvania "transfer" tax both are imposed as excises on the transfer of property from a decedent, and both take effect at the instant of transfer, so that neither has priority in time over the other. P. 498.
8. The taxing power of federal and state governments is generally so far concurrent as to render it admissible for both to tax the same subject at the same time. P. 499.
9. Neither the United States nor the State in determining the amounts of its transfer tax is under any constitutional obligation to make any deduction on account of the tax of the other. Whether, if the estate were insufficient to pay both, the United States should be preferred, is not here involved. P. 500.

277 Pa. 242, reversed.

ERROR to judgments of the Supreme Court of Pennsylvania sustaining taxes assessed under the State transfer tax law. Petitions for writs of certiorari in these cases are denied.

Messrs. George Wharton Pepper and *George B. Gordon* for plaintiffs in error.

The Supreme Court of Pennsylvania having construed the statute as an exercise of the State's taxing power, it must stand or fall as such; it cannot be saved by an attempt to treat it as an escheat act. *Cope's Estate,* 191 Pa., 1.

In measuring the tax on the right of transmission, Pennsylvania had no right to include in the clear value of the estate tangible articles of personal property which had an actual and readily ascertainable situs in New York and Massachusetts.

When analyzed, a tax on property is seen to be a tax on the thing called ownership, which is merely a person's legally protected interest in the thing owned. A tax on transmission is a tax on the substitution of one person for another in respect of the relation between the person and the thing. While the distinction is entirely thinkable, there is no really sound or substantial reason for reaching in the one case a result different from that reached in the other.

Both before and after the decision in the *Union Transit Case,* 199 U. S. 194, are many decisions of this Court in which decisive emphasis was laid upon the distinction between tangible and intangible property, and where the nature of the tax as being a tax on property or merely a tax measured by the value of property was immaterial. Discussing *Pullman's Palace Car Co.* v. *Penna.,* 141 U. S. 18; *Delaware Lackawanna etc. R. R.* v. *Penna.,* 198 U. S. 341; *Weaver's Estate* v. *State,* 110 Iowa 328; *New York Central* v. *Miller,* 202 U. S. 584; *Southern Pacific* v. *Kentucky,* 222 U. S. 63; *Fidelity and Columbia Trust Co.* v. *Louisville,* 245 U. S., 54; *Bullen* v. *Wisconsin,* 240 U. S., 625; *Wallace* v. *Hines,* 253 U. S., 66.

In all these cases, except the *Pullman Case* and *Wallace* v. *Hines,* the act under review was passed by the State of

the domicile and was either a tax on the ownership of property or a tax on the use or transmission of property. In every case in which the property was intangible personalty the tax was upheld. In every case in which tangible personalty with a situs outside the domiciliary State was either sought to be taxed or to be included in the measure of the tax, the tax was adjudged invalid. The *Pullman Car Case* and the case of *New York Central* v. *Miller,* 202 U. S. 594, are not exceptions.

The limited power of each of the States to reach by taxation tangible personalty physically beyond its boundaries is in marked contrast with the plenary power of the United States to use its jurisdiction over its domiciled citizens as a basis for taxing their tangible personalty wherever it may be. *United States* v. *Bennett,* 232 U. S. 299.

Blackstone v. *Miller,* 188 U. S. 189; *Wheeler* v. *New York,* 233 U. S. 434; and *Maxwell* v. *Bugbee,* 250 U. S. 525 discussed and explained as consistent with the principles contended for.

In many of these cases there is more or less reference to one of the basic principles of taxation, which is that the citizen enjoys a protection of person and property, which is a reciprocal of the power of the sovereign to tax him. It is of course not possible to test the validity of a tax act by a specific relation between the amount or nature of the tax and the degree of protection afforded. Where a right which is the subject of tax cannot possibly have been conferred by the taxing State, but exists because of the act of another sovereignty, it may not lawfully be included in the tax. *Louisville Ferry Co.* v. *Kentucky,* 188 U. S. 385. Cf, *Baltic Mining Co.* v. Mass*achusetts,* 231 U. S. 68, *Looney* v. *Crane Co.,* 245 U. S. 178.

The right to impose a transfer tax upon personal property must necessarily be based upon the same jurisdictional fact as the taxation of the transfer of real estate.

We submit that it is the law that, while the transfer of intangible personalty can be taxed at the domicile of the owner, either *inter vivos* or upon death, that is true only because of the fiction *mobilia sequuntur personam.* Originally this theory applied to tangibles as well as to intangibles, but it has long since passed away as to anything except intangibles. This, because fiction, must yield to fact. These tangible articles, pictures, furniture, household stores, cows, horses, agricultural implements, have a real, physical existence and necessarily have a situs as surely as buildings and lands have. Their situs is in New York and Massachusetts, not in Pennsylvania. Therefore, this tax cannot be sustained upon authority of the maxim *mobilia sequuntur personam,* either under the decisions of this Court or under the decisions of the Supreme Court of Pennsylvania: *Eidman* v. *Martinez,* 184 U. S. 578; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395; *Commonwealth* v. *Delaware, Lackawanna etc. R. R.,* 145 Pa. 96; *Commonwealth* v. *American Dredging Co.,* 122 Pa. 386; *Hostetter's Estate,* 267 Pa. 193.

It is argued that, since there was property in Pennsylvania which did pass and which was undoubtedly subject to its jurisdiction, the State could impose such conditions as it pleased upon the transfer of that property; that when the residuary legatees came into Pennsylvania to get their share in the residuary estate, the State could say to them: "You shall take only what we see fit to allow you to take, and what you can take is only that which is left after we have deducted an *ad valorem* tax upon the value of all the property, adding to the value of the property within our jurisdiction the value of all real estate and all tangible personal assets located without our jurisdiction."

We submit that the levying of a capital tax, an *ad valorem* tax, a transfer tax, based upon any such theory

and actually producing such a result, is unjust, is confiscatory, is a violation of due process of law. The establishment of such a proposition would mean the overturning of the whole theory of taxation. At the decedent's death these tangible articles of personal property passed by virtue of the laws of Massachusetts and New York, not of Pennsylvania. *Harvey* v. *Richards,* 1 Mason, 381; *Blackstone* v. *Miller,* 188 U. S. 189; *In re Lorillard Griffiths* v. *Catforth,* 1922, 2 Ch., 638. It is a question for the common law of New York and Massachusetts how far they will recognize the laws of Pennsylvania as to the validity of a Pennsylvania will and of the succession to property located in New York and Massachusetts, and in so far as they do recognize it, they do so because such is the common law of New York and Massachusetts, not because it is the law of Pennsylvania. A State can not say that the tangibles which are in the State and within its taxing powers may be valued, for tax purposes, not at their actual value, but at the value of all decedent's estate everywhere. The legislature of Pennsylvania manifestly never intended to do so, but in plain language attempted to tax the transfer of property outside of the State. But be this as it may, we submit with confidence that no court in Christendom ever sustained any such proposition. It is not due process of law. *Knowlton* v. *Moore,* 178 U. S. 41, 76; *Maxwell* v. *Bugbee,* 250 U. S. 525, 529.

Upon the precise point there is no case decided by this Court or any other federal court. There is dictum in *Keeney* v. *New York,* 222 U. S. 525, 537. The decisions of the state courts are conflicting. *Weaver's Estate,* 110 Iowa, 328; *State* v. *Brevard,* 62 N. C. 141; *Joyslin's Estate,* 76 Vermont, 88; *Matter of Estate of Swift,* 137 N. Y., 77. Distinguishing: *Carpenter* v. *Pennsylvania,* 17 How. 456; *Hartman's Estate,* 70 N. J. Eq. 664; *State* v. *Spokane & Eastern Trust Co.* (Wash.), 211 Pac. 734.

The State of Pennsylvania has no power to levy an estate tax on the value of shares of capital stock of cor-

porations incorporated under the laws of other States without deducting the paramount taxes exacted by those other States as a transfer inheritance tax on such shares of stock. *The Matter of the Estate of Henry Miller,* 184 Calif. 674.

The State of Pennsylvania has no power to levy an estate tax on the value of the whole estate without deducting the paramount estate tax exacted by the United States. In the first place, this is inconsistent with the paramount taxing power of the United States. (Discussing the opinion of the court below in this case and in *Kirkpatrick's Estate,* 275 Pa. 271, in contrast with *Knowlton* v. *Moore,* 178 U. S. 41.) A state statute sustainable only upon a theory inconsistent with federal supremacy is invalid *per se,* even if in a particular case there happens to be enough money to pay the demands of both sovereignties.

In the second place, refusal to allow the deduction conflicts with the due process clause of the Fourteenth Amendment, both because of the injustice of the measure of the tax, and because the tax is thereby extended to property withdrawn from the state jurisdiction. *Jennie Smith's Estate,* 29 Pa. Dist. Rep. 917; *Hazard* v. *Bliss,* 43 R. I., dissent 431; *Hollis* v. *Treasurer and Receiver General,* 242 Mass. 163; *Flaherty* v. *Hanson,* 215 U. S. 515.

The State cannot directly impose a tax upon the portion of Mr. Frick's estate which the Federal Government has expropriated. It cannot do this, whether the Federal Government took it in kind or took it in money.

Mr. David A. Reed, with whom *Messrs. George W. Woodruff,* Attorney General of Pennsylvania, and *Maynard Teall* were on the brief, for defendant in error.

The State of domicile of a decedent may include in the measure of its transfer inheritance tax the value of all the personal property of such decedent, including tangibles

situated in other States. It is a fundamental principle that real estate descends pursuant to the law of its situs, without reference to the law of the owner's domicile, and that personal property, whether tangible or intangible, and wheresoever situate, descends pursuant to the law of the owner's domicile. The law of the domicile, therefore, may impose upon the transfer of tangible personalty such conditions by way of taxation or otherwise as it may deem expedient, provided the conditions are not forbidden by constitutional restrictions. It is mere metaphysics to argue whether the transfer is effected by virtue of the law of the situs or the law of the domicile; the fact is that tangible personal property passes according to and to no greater extent than provided by the law of the domicile. Wherever the property may be, the court administering it looks first to the law of the domicile. *Bullen* v. *Wisconsin,* 240 U. S. 625.

It is admitted that Pennsylvania may not constitutionally impose a tax upon tangible personal property situated outside the State. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194. But the Pennsylvania tax is not imposed upon any specific property whatever. A sum of money computed upon the value of the estate, such value being determined as of the date of death, is lawfully exacted by the Commonwealth for a privilege created by statute. The tax is an excise upon the privilege of transfer. It is not upon the privilege of receiving—affirmative legislation is not needed to permit acceptance of a gift—but upon the statutory privilege of transferring or transmitting property by will or intestacy. *Kirkpatrick's Estate,* 275 Pa. 271; *Knowlton* v. *Moore,* 178 U. S. 41; *United States* v. *Perkins,* 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283.

That such transfer inheritance taxes are not property taxes is necessarily implied in the conclusion that United States bonds or other clearly non-taxable securities are

properly included in the property upon which the tax is computed. *Plummer* v. *Coler,* 178 U. S. 115. Similarly, no one has doubted that the federal inheritance tax should be computed upon the obligations of a State, which the federal government may not tax directly.

Since a transfer inheritance tax is not a property tax, and since property which, by reason of its tax-exempt character, is beyond the jurisdiction of the taxing State may be included in the property upon the value of which the tax is computed, it would seem to follow as a corollary that personal property which, by reason of its geographical situation, is beyond the jurisdiction of the taxing State may, under some circumstances, be included. *Maxwell* v. *Bugbee,* 250 U. S. 525.

Where the situs of the property transferred is outside the taxing State, and the decedent was a non-resident of the taxing State, the transfer is not taxable. *Hood's Estate,* 21 Pa. 106. Where the property is real estate situated outside the taxing State, the transfer is not taxable. *DeWitt's Estate,* 266 Pa. 548; *Marr's Estate,* 240 Pa. 38. Where the property is intangible, the transfer is taxable, since the property passes according to the law of the domiciliary state. *Bullen* v. *Wisconsin,* 240 U. S. 625; *Blackstone* v. *Miller,* 188 U. S. 189; *Greves* v. *Shaw,* 173 Mass. 205; *Hostetter's Estate,* 267 Pa. 193. Where the property is a chose in action and therefore intangible, but is evidenced by a promissory note and hence has no existence apart from the paper upon which the obligation is written, and the paper has an actual physical situs within the taxing State, there, even though the deceased holder of the note was a non-resident of the taxing State, and the maker is also a non-resident, the note itself is within the control of the taxing State, and the transfer of it may be taxed. *Wheeler* v. *Sohmer,* 233 U. S. 434. Where the property is tangible personalty

situated in the taxing State, of which the decedent was a non-resident, since the property is within the jurisdiction and control of the taxing State, the transfer is taxable. *Coe* v. *Erroll,* 116 U. S. 517; *Blackstone* v. *Miller, supra.* Where the taxing State is also the State of the decedent's domicile, and where the property is tangible personalty having a situs outside the State—the case at bar,—there again the transfer is taxable. *Blackstone* v. *Miller,* supra.

In *Bullen* v. *Wisconsin, supra,* it was held that the domiciliary State could constitutionally impose an inheritance tax on the transfer of bonds kept outside the State. In *Carpenter* v. *Pennsylvania,* 17 How. 456, it was held that personal property situated outside the domiciliary State was subject to the inheritance tax thereof. The property expressly described in the report consisted of intangibles. It is not altogether clear whether any tangible property was involved, but the opinion does not suggest that the point would be material. In *Hartman's Estate,* 70 N. J. Eq. 664, it was squarely held that the transfer of tangible personalty owned by a resident decedent but situated outside the State, was taxable. In *Swift's Estate,* 137 N. Y. 77, the Court of Appeals of New York, with one dissent, reached the same conclusion. The same decision was reached by the Supreme Court of Washington in *Sherwood's Estate,* 211 Pac. Rep. 734. In *Weaver's Estate,* 110 Iowa 328, it was held that the transfer of certain tangibles having a foreign situs was not subject to state inheritance tax, but the decision was based entirely upon the intent of the legislature as expressed in the statute.

The law of England is in accord with the authorities above cited. *Matter of the Estate of Ewin,* 1 Crompton and Jervis, 150; *Attorney General* v. *Napier,* 6 Exch. Rep. 216; *Re Duchess of Manchester,* 81 L. Jour. Rep. N. S., 329 (1912).

The fact is that, though the tangible personalty here in question is situated in New York and Massachusetts,

it cannot be transferred by inheritance except with reference to the provisions of Pennsylvania law. The theory of plaintiffs in error is that Massachusetts and New York statutes have incorporated Pennsylvania law by reference, thereby changing it to Massachusetts or New York law. Our own theory is that by the comity of States (in this case evidenced by statutes) and the traditions of Anglo-Saxon jurisprudence, the domiciliary law is given extra-territorial effect in this situation. But whether the correct explanation be the one theory or the other, there can be no doubt of the fact, namely, that the transfer of this property cannot be effected without reference to the provisions of Pennsylvania law. That law is "needed to establish the inheritance." *Bullen* v. *Wisconsin, supra.* Plaintiffs in error lay special emphasis on the fact that statutes of New York and Massachusetts provide in express words that the property shall pass according to Pennsylvania law. But can it be doubted that the provisions of Pennsylvania law would be given effect in New York and Massachusetts even in the absence of such statutes? The statutes are merely declaratory of a familiar principle.

Plaintiffs in error have cited several cases wherein this Court has held to be invalid state statutes imposing capital stock and franchise taxes on domestic corporations when property having a situs outside the taxing State was included in the property taxed. Those were cases of taxes on property, hence have no application here, because the inheritance transfer tax of Pennsylvania is not a tax on property. *Union Refrigerator Case,* 199 U. S. at 211.

In *Looney* v. *Crane Company,* 245 U. S. 178, and *Wallace* v. *Hines,* 253 U. S. 66, involving corporation excise taxes held invalid because property outside the taxing State was included in measuring the amount, the complaining corporations were foreign corporations. The cor-

poration laws of foreign States are neither incorporated by reference nor given extraterritorial effect.

Whether a decedent's property be transferred by will or intestate succession, the real estate passes in accordance with the law of the situs—what the domiciliary law may provide is immaterial. But if the property be personalty, then, whether it be tangible or intangible, pictures or stocks, the persons entitled must be determined by reference to the provisions of the domiciliary law. As a matter of history and practice the line is drawn between real estate and personal property. *State Tax on Foreign Held Bonds,* 15 Wall. 300; *Bullen* v. *Wisconsin, supra.*

Inheritance taxes paid to Pennsylvania, to other States, and to the United States, are not deductible. *Kirkpatrick's Estate,* 275 Pa. 271. The stocks were transferred to somebody at the moment of the testator's death; if that were not so, they would have been for a considerable period without an owner. Pennsylvania was not required to adopt as the measure of its tax the value of the stocks to the executors, or their value for administration purposes in Pennsylvania, but very properly adopted market value at the date of the testator's death—when his interest ceased. As was pointed out by this Court in several cases above cited, the transfer of title to stocks of foreign corporations owned by this estate could not be effected without invoking the provisions of Pennsylvania law. *Blackstone* v. *Miller,* 188 U. S. 189, 207. The fallacy of the argument that the value of foreign property is reduced by the amount of inheritance taxes paid to foreign States lies in failing to observe the fundamental principle of inheritance taxation, namely, that the tax is not upon or out of the property, but upon the privilege of transfer. As well might it be argued that an inheritance tax computed upon the value of an estate including United States bonds is a taking or extinguishing of part of the value of the bonds. *Plummer* v. *Coler, supra.*

The argument that the federal estate tax must be deducted is based principally upon two propositions: First, Pennsylvania's refusal to deduct is an interference with the "paramount" taxing power of the United States; second, it is in violation of the due process clause of the Fourteenth Amendment. See *New York Trust Co.* v. *Eisner,* 256 U. S. 345. If either the state or the federal government be "paramount" in this field, it is the state and not the federal government. The privilege of transfer is granted, affirmatively and exclusively, by state legislation. Take that legislation away, and the privilege now taxed by Congress does not exist. If the State does not take the privilege away entirely, but limits it, as, for example, by conditioning it upon payment of a tax to the State, the privilege taxed by Congress is the privilege as so limited and so conditioned. The condition inheres in the privilege, and if the condition is not performed, there is no privilege for Congress to tax. Thus the State comes first. *Hyde* v. *Woods,* 94 U. S. 523. If plaintiffs in error are correct in their argument that Pennsylvania has interfered with the "paramount" taxing power of the United States, it is not enough that she deduct the amount of the federal tax. The State should withdraw entirely from the field of inheritance taxation; for if the federal taxing power in that field is "paramount," it is difficult to see why it is not also exclusive so long as Congress sees fit to tax the transfer of estates—as in the case of bankruptcy. That result would be anomalous, to say the least, since the subject of the tax is created by the State exclusively. So long ago as 1824, in *Gibbons* v. *Ogden,* 9 Wheat, 1, 198, Mr. Chief Justice Marshall pointed out that neither federal nor state taxing power is "paramount" in respect to the other. The argument that Pennsylvania's refusal to deduct the federal tax violates the due process clause of the Fourteenth Amendment reduces itself to the proposition that, before

the state tax accrues, the estate has already been reduced by the amount of the federal tax. This Court answered that argument very fully in *New York Trust Co.* v. *Eisner, supra.*

This question of deducting the taxes of other jurisdictions is not a new one. It has been raised in many state courts, and always has been dealt with as a problem of construing the particular statute. *Matter of Gihon,* 169 N. Y. 443; *Succession of Gheens,* 148 La. 1017; *Week's Estate,* 169 Wis. 316; *Bierstadt Estate,* 178 App. Div. (N. Y.) 836; *Penfold's Estate,* 216 N. Y. 171; *Matter of Sherman,* 179 App. Div. 497 (affirmed 222 N. Y. 540); *Sanford's Estate,* 188 Iowa 833; *Hazard* v. *Bliss,* 43 R. I. 431; *Kirkpatrick's Estate,* 275 Pa. 271; *Hooper* v. *Shaw,* 176 Mass. 190; *State* v. *Probate Court,* 97 Minn. 532; *People* v. *Pasfield,* 284 Ill. 450; *People* v. *Northern Trust Co.,* 289 Ill. 475; *Knight's Estate,* 261 Pa. 537; *Otto's Estate,* 257 Pa. 155; *Roebling's Estate,* 89 N. J. Eq. 163; *State* v. *First Calumet Trust & Savings Bank,* 71 Ind. App. 467; *People* v. *Bemis,* 68 Col. 48; *Corbin* v. *Townshend,* 92 Conn. 501; *Old Colony Trust Co.* v. *Burrell,* 238 Mass. 544.

New York Tr. Co. v. *Eisner,* 256 U. S. 345, held that state legacy taxes were not deductible before computation of the federal tax, and Revenue Act 1921, § 403(a) so provides.

Messrs. Carl Sherman, Attorney General of New York, and *Seth T. Cole* filed a brief as *amici curiae,* for the State of New York, by special leave of Court.

Mr. Justice Van Devanter delivered the opinion of the Court.

These four cases involve the constitutional validity of particular features of a statute of Pennsylvania imposing a tax on the transfer of property by will or intestate laws. Act No. 258, Pa. Laws 1919, 521.

Henry C. Frick, domiciled in Pennsylvania, died testate December 2, 1919, leaving a large estate. By his will he disposed of the entire estate—giving about 53 per cent. for charitable and public purposes and passing the rest to or for the use of individual beneficiaries. Besides real and personal property in Pennsylvania, the estate included tangible personalty having an actual situs in New York, tangible personalty having a like situs in Massachusetts, and various stocks in corporations of States other than Pennsylvania. The greater part of the tangible personalty in New York,[1] having a value of $13,132,391.00, was given to a corporation of that State for the purposes of a public art gallery, and the other part,[2] having a value of $77,818.75, to decedent's widow. The tangible personalty in Massachusetts,[3] having a value of $325,534.25, was also given to the widow. The will was probated in Pennsylvania, and letters testamentary were granted there. It was also proved in New York and Massachusetts, and ancillary letters were granted in those States. Under the laws of the United States the executors were required to pay to it, and did pay, an estate tax of $6,338,898.68; and under the laws of Kansas, West Virginia and other States they were required to pay to such States, and did pay, large sums in taxes imposed as a prerequisite to an effective transfer from a non-resident deceased of stocks in corporations of those States.

The Pennsylvania statute provides that where a person domiciled in that State dies seized or possessed of

[1] This consisted of rare paintings, rugs, furniture, bronzes, porcelains and other art treasures known as "The Frick Collection" and housed in a building in New York City specially constructed for the purpose.

[2] This consisted of furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage.

[3] This consisted of paintings, other objects of art, furniture, household furnishings, farming implements, etc., on Mr. Frick's estate at Prides Crossing.

property, real or personal, a tax shall be laid on the transfer of the property from him by will or intestate laws, whether the property be in that State or elsewhere; that the tax shall be 2 per cent. of the clear value of so much of the property as is transferred to or for the use of designated relatives of the decedent and 5 per cent. of the clear value of so much of it as is transferred to or for the use of others; and that the clear value shall be ascertained by taking the gross value of the estate and deducting therefrom the decedent's debts and the expenses of administration, but without making any deduction for taxes paid to the United States or to any other State.

In applying this statute to the Frick estate the taxing officers included the value of the tangible personalty in New York and Massachusetts in the clear value on which they computed the tax; and in fixing that value refused to make any deduction on account of the estate tax paid to the United States or the stock-transfer taxes paid to other States. In proceedings which reached the Supreme Court of the State the action of the taxing officers and the resulting tax were upheld by that court, 277 Pa. 242. The matter was then brought here on writs of error under § 237 of the Judicial Code.

The plaintiffs in error are the executors and an interested legatee. They contended in the state court, and contend here, that in so far as the Pennsylvania statute attempts to tax the transfer of tangible personal property having an actual situs in States other than Pennsylvania it transcends the power of that State, and thereby contravenes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

This precise question has not been presented to this Court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking

of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular State, the power to subject it to state taxation rests exclusively in that State, regardless of the domicil of the owner. *Cleveland, Painesville and Ashtabula R. R. Co.* v. *Pennsylvania,* 15 Wall. 300, 319, 325; *Louisville and Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 396; *Old Dominion Steamship Co.* v. *Virginia,* 198 U. S. 299; *Delaware, Lackawanna and Western R. R. Co.* v. *Pennsylvania,* 198 U. S. 341, 356; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 38; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 142.

In *Union Refrigerator Transit Co.* v. *Kentucky* the question presented was whether, consistently with the restriction imposed by the due process of law clause of the Fourteenth Amendment, the State of Kentucky could tax a corporation of that State upon its tangible personal property having an actual situs in other States. The question was much considered, prior cases were reviewed, and a negative answer was given. The grounds for the decision are reflected in the following excerpts from the opinion:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be

within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this Court in the *Foreign-held Bond case,* 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised. The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. . . ."

"The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs,* that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicil of the owner. . . ."

"The adoption of a general rule that tangible personal property in other States may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, [and] of stocks of goods and merchandise kept at branch establishments when already taxed at the State of their *situs,* but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the State where they are incorporated, though their char-

ters contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection."

In *United States* v. *Bennet,* 232 U. S. 299, 306, where this Court had occasion to explain the restrictive operation of the due process of law clause of the Fourteenth Amendment, as applied to the taxation by one State of property in another, and to distinguish the operation of the like clause of the Fifth Amendment, as applied to the taxation by the United States of a vessel belonging to one of its citizens and located in foreign waters, it was said:

"The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres . . ."

Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the State of its situs, and that the laws of other States have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own. *Mager*

v. *Grima,* 8 How. 490, 493; *Crapo* v. *Kelly,* 16 Wall. 610, 630; *Kerr* v. *Moon,* 9 Wheat. 565, 571; *Blackstone* v. *Miller,* 188 U. S. 189, 204; *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 589; *Hilton* v. *Guyot,* 159 U. S. 113, 163, 166.

The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the State. But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other States—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those States and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that State nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the States of the situs was not partial but plenary, and included power to regulate the transfer both *inter vivos* and on the death of the owner, and power to tax both the property and the transfer.

Mr. Justice Story said in his work on Conflict of Laws, § 550: "A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and dis-

position of it, to the same extent that it may exert its authority over immovable property." And in *Pullman's Car Company* v. *Pennsylvania,* 141 U. S. 18, 22, where this Court held the actual situs of tangible personalty rather than the domicil of its owner to be the true test of jurisdiction and of power to tax, it was said: "No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used."

In support of the tax counsel for the State refer to statutes of New York and Massachusetts evidencing an election by those States to accept and give effect to the domiciliary law regulating the transfer of personal property of owners dying while domiciled in other States; and from this they contend that the transfer we are considering was brought under the jurisdiction of Pennsylvania and made taxable there. We think the contention is not sound. The statutes do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it. They declare what law shall apply and require the local courts to give effect to it. And it should be observed that here the property was

administered in those courts and none of it was taken to the domiciliary State. Obviously the accepted domiciliary law could not in itself have any force or application outside that State. Only in virtue of its express or tacit adoption by the States of the situs could it have any force or application in them. Through its adoption by them it came to represent their will and this was the sole basis of its operation there. Burdick on American Constitution, § 257. In keeping with this view New York and Massachusetts both provide for the taxation of transfers under the adopted domiciliary law; and they have imposed and collected such a tax on the transfer we are now considering.

Counsel for the State cite and rely on *Blackstone* v. *Miller,* 188 U. S. 189, and *Bullen* v. *Wisconsin,* 240 U. S. 625. Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, and also in connection with other cases before cited, it is apparent that they do not support the tax in question.

We think it follows from what we have said that the transfer of the tangible personalty in New York and Massachusetts occurred under and in virtue of the jurisdiction and laws of those States and not under the jurisdiction and laws of Pennsylvania, and therefore that Pennsylvania was without power to tax it.

One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had

no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114, and cases cited; *Looney* v. *Crane Company,* 245 U. S. 178, 188; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 141; *Air-Way Corporation* v. *Day,* 266 U. S. 71, 81; *Wallace* v. *Hines,* 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company* v. *Kentucky,* 188 U. S. 385, 395.

The state court cited in support of its view *Maxwell* v. *Bugbee,* 250 U. S. 525, 539. The case is on the border line, as is evidenced by the dissent of four members of the Court. But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that State. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was

partly within and partly without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the State had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent, that rate was to be applied to the value of the property within the State in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was two per cent. There was no attempt, as here, to compute the tax in respect of the part within the State on the value of the whole. The Court sustained the tax, but distinctly recognized that the State's power was subject to constitutional limitations, including the due process of law clause of the Fourteenth Amendment, and also that it would be a violation of that clause for a State to impose a tax on a thing within its jurisdiction " in such a way as to really amount to taxing that which is beyond its authority."

Another case cited by the state court is *Plummer* v. *Coler,* 178 U. S. 115, where it was held that a State, in taxing the transfer by will or descent of property within its jurisdiction, might lawfully measure the tax according to the value of the property, even though it included tax-exempt bonds of the United States; and this because the tax was not on the property but on the transfer. We think the case is not in point here. The objection to the present tax is that both the property and the transfer were within the jurisdiction of other States and without the jurisdiction of the taxing State.

For the reasons which have been stated it must be held that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid.

The next question relates to the provision which requires that, in computing the value of the estate for the purpose of fixing the amount of the tax, stocks in corporations of other States shall be included at their full value without any deduction for transfer taxes paid to those States in respect of the same stocks.

The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those States the status of lienors in possession.[4] As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power. *Estate of Henry Miller,* 184 Cal. 674, 683. So much of the value as was required to release the superior claim of the other States was quite beyond Pennsylvania's control. Thus the inclusion of the full value in the computation on which that State based its tax, without any deduction for the tax paid to the other States, was nothing short of applying that State's taxing power to what was not within its range. That the stocks, with their full value, were ultimately brought into the administration in that State does not

[4] The nature of the tax and the provisions adopted for enforcing it are illustrated by c. 357, §§ 1, 2, 13, Laws Kansas 1915, p. 452; c. 33, §§ 1, 6, 7, Barnes' West Virginia Code, p. 586.

help. They were brought in through the payment of the tax in the other States out of moneys of the estate in Pennsylvania. The moneys paid out just balanced the excess in stock value brought in. Yet in computing the tax in that State both were included.

We are of opinion that in so far as the statute requires that stocks in corporations of other States be included at their full value, without deducting the tax paid to those States, it exceeds the power of the State and thereby infringes the constitutional guaranty of due process of law.

The remaining question relates to the provision declaring that, in determining the value of the estate for the purpose of computing the tax, there shall be no deduction of the estate tax paid to the United States. The plaintiffs in error contend that this provision is invalid, first, as being inconsistent with the constitutional supremacy of the United States, and, secondly, as making the state tax in part a tax on the federal tax.

In support of the contention we are referred to several cases in which state courts have held the federal tax should be deducted in determining the value on which such a state tax is computed. But the cases plainly are not in point. In them the state courts were merely construing an earlier type of statute requiring that the state tax be computed on the clear or net value of the estate and containing no direction respecting the deduction of the federal tax. An earlier Pennsylvania statute of that type was so construed. Later statutes in the same States expressly forbidding any deduction of the federal tax have been construed according to their letter. This is true of the present Pennsylvania statute. The question here is not how the statute shall be construed, but whether, as construed by the state court, it is open to the constitutional objections urged against it.

While the federal tax is called an estate tax and the state tax is called a transfer tax, both are imposed as

excises on the transfer of property from a decedent and both take effect at the instant of transfer. Thus both are laid on the same subject, and neither has priority in time over the other. Subject to exceptions not material here, the power of taxation granted to the United States does not curtail or interfere with the taxing power of the several States. This power in the two governments is generally so far concurrent as to render it admissible for both, each under its own laws and for its own purposes, to tax the same subject at the same time. A few citations will make this plain. In *Gibbons* v. *Ogden,* 9 Wheat. 1, 199, Chief Justice Marshall, speaking for this Court, said: "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of this power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other." Mr. Justice Story, in his Commentaries on the Constitution, § 1068, said: "The power of Congress, in laying taxes, is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property, without interfering with the action of the other." And in *Knowlton* v. *Moore,* 178 U. S. 41, 58–60, Mr. Justice White, speaking for this Court, said that "under our constitutional system both the national and state governments, moving in their respective orbits, have a common authority to tax many and diverse objects;" and he further pointed out that the transfer of property on death "is a usual subject of taxation" and one which falls within that common authority.

With this understanding of the power in virtue of which the two taxes are imposed, we are of opinion that neither the United States nor the State is under any constitutional obligation in determining the amount of its tax to make any deduction on account of the tax of the other. With both the matter of making such a deduction rests in legislative discretion. In their present statutes both direct that such a deduction be not made. It is not as if the tax of one, unless and until paid, presented an obstacle to the exertion of the power of the other. Here both had power to tax and both exercised it as of the same moment. Neither encroached on the sphere or power of the other. The estate out of which each required that its tax be paid is much more than ample for the payment of both taxes. No question of supremacy can arise in such a situation. Whether, if the estate were not sufficient to pay both taxes, that of the United States should be preferred (see *Lane County* v. *Oregon,* 7 Wall. 71, 77) need not be considered. That question is not involved here.

The objection that when no deduction is made on account of the federal tax the state tax becomes to that extent a tax on the federal tax and not a tax on the transfer is answered by what already has been said. But by way of repetition it may be observed that what the State is taxing is the transfer of particular property, not such property depleted by the federal tax. The two taxes were concurrently imposed and stand on the same plane, save as the United States possibly might have a preferred right of enforcement if the estate were insufficient to pay both.

In conclusion we hold, first, that the value of the tangible personalty in New York and Massachusetts should not have been included in determining the clear value on which the Pennsylvania tax was computed; secondly, that in determining such clear value the stocks in corporations

of other States should not have been included at their full value without deducting the transfer tax paid to such States in respect of those stocks; and thirdly, that there was no error in refusing to make any deduction from the clear value on account of the estate tax imposed by the United States.

Petitions for certiorari were presented in these cases, but as the cases are properly here on writs of error, the petitions will be denied.

Judgments reversed on writs of error.
Petitions for certiorari denied.

MILES, FORMER COLLECTOR, *v.* GRAHAM.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 53. Argued March 16, 1925.—Decided June 1, 1925.

1. Under Art. III, § 1, of the Constitution it is the duty of Congress definitely to declare the amount which a federal judge shall receive from time to time out of the public funds, and the times of payment; and the amount thus specified becomes his compensation which is protected against diminution during his continuance in office. *Evans* v. *Gore,* 253 U. S. 245. P. 506.
2. So *held* where the salary of a judge of the Court of Claims was fixed and the appointment was made after enactment of the "Revenue Act of 1918," which prescribed that the official compensation of all the federal judges should be included in their gross income in computing their income taxes.
3. This provision of the Revenue Act for taxation of income can not be treated as reducing the salaries of the judges of the Court of Claims specifically fixed by later enactment. P. 509.

284 Fed. 878, affirmed.

ERROR to a judgment of the District Court against an internal revenue collector in an action by a judge of the Court of Claims to recover a sum which the defendant had exacted of him as an income tax.

The Solicitor General, for plaintiff in error. *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief.

In *Evans* v. *Gore* this court did not suggest any doubt of the power of Congress to impose taxes which should apply to salaries of federal judges appointed after the enactment of the taxing statutes. The imposition of the tax in that case constituted a diminution of a salary already existing during the judge's continuance in office, and was therefore unconstitutional. But here, the judge was appointed after the enactment of the statute. It is submitted that, within the meaning of the Constitution, the diminution of the salary did not occur during his term of office.

The proceedings of the Constitutional Convention show that it did not intend that the provision for the protection of judicial salaries should apply to any diminution of the compensation of judges appointed to office after a statute making the diminution had been enacted.

While Article III, § 1, of the Constitution forbids Congress to tax a very small proportion of the persons embraced within the broad terms of § 213 of the Revenue Act of 1918, that section is not thereby rendered inoperative as to all other persons who come within its provisions. It is clear that Congress might constitutionally have imposed a tax which would have fallen upon the defendant in error after his appointment to office, and that, in enacting the law of 1918, Congress intended to authorize the tax which was collected from him. The law was a permanent taxing statute, dealing not merely with the taxes which might be collected for the year 1918 but with the taxes for years to come.

Messrs. William L. Rawls and *William L. Marbury* for defendant in error.

At the time of the assessment and collection of the taxes in question there was no validly existing law author-

izing their exaction. Section 213 of the Act of February 24, 1919, c. 18, 40 Stat. 1062, was before this Court in the case of *Evans* v. *Gore,* 253 U. S. 245, wherein it was held that the tax imposed in pursuance thereof upon the salary of a judge of an inferior court of the United States was contrary to the constitutional prohibition against the diminution of his salary during his continuance in office, and was therefore invalid. The intention being clear to tax all judges, the operation of the clause cannot be limited without re-writing it so as to give it a narrower scope than it was the intention of Congress it should have, a task which the courts will not assume. Where the legislative will is expressed in a single, indivisible provision, obviously incapable of modification without destroying its integrity, no separation or severance is logically or legally possible. *Hill* v. *Wallace,* 259 U. S. 44; *Child Labor Tax Case,* 259 U. S. 20; *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126.

In *Evans* v. *Gore, supra,* the power of Congress to impose a tax upon the compensation received for their services by judges was denied. This denial we understand was based both upon the specific prohibition in the Constitution against diminution of the compensation of the judges, and the limitation necessarily implied upon the taxing power from the erection by the Constitution of the three separate and independent departments of the Government. In any event it follows necessarily from the narrowest interpretation that can be put upon that decision, that the taxing power as attempted to be exercised with respect to the compensation of judges by the Act of 1918, even when confined in its application to those judges appointed thereafter, is in violation of the Constitution. It must be admitted, when the comprehensive nature of the taxing power is considered, that whatever amount is exacted by virtue of the Act of 1918 from a federal judge on account of his having received compensation as such from

the Government, cannot in any real sense be said to be exacted as a result of the exercise of the taxing power. If it were so taken in the exercise of that power, necessarily the amount exacted could be raised from time to time in the discretion of Congress, because the power once recognized acknowledges no limits. But admittedly the amount exacted from a judge at the time he assumes office cannot be increased thereafter by Congress without violating the express prohibition of the Constitution. This limitation, therefore, is so destructive of the asserted power to tax as to make it impossible with any regard to reality to describe the exaction mentioned as an exercise of that power.

The only question which remains open is whether, by regarding the Act of 1918 as simply a reduction of the salaries of such federal judges as should thereafter come into office, in an amount equal to the tax mentioned in the Act, it can be held to be a reduction of compensation in a manner authorized by the Constitution. Not only does the Constitution prohibit the diminution of the salary of the judges during their continuance in office, but it enjoins three things: first, that there shall be "a compensation" fixed and determined for the judges; second, that the judges shall "receive" the compensation so fixed and determined for their services; third, that they shall receive this compensation "at stated times."

An examination of the Act of 1918 respecting the time of payment of the tax therein attempted to be imposed upon the compensation of judges, and the method by which the tax thereon is to be ascertained, will show indisputably that the collection of a tax upon the compensation of judges thereunder will violate all of these express constitutional injunctions as to the certainty of the amount of compensation, the time of payment and the right to receive it.

The effect of these requirements, therefore, is to make it impossible by taxation or any other indirect means to

deal with the compensation of judges. Any change therein must be made directly, and in accordance with the specified requirements of the Constitution. If the Act of February 24, 1919, be regarded as an attempt by Congress to reduce the compensation of judges it plainly does not meet the requirements of the Constitution.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The defendant in error is a judge of the Court of Claims. He assumed the duties of that office September 1, 1919, when the statute (Act Feb. 25, 1919, c. 29, 40 Stat. 1156, 1157) declared that judges of that court should be entitled to receive "an annual salary of $7,500, payable monthly from the Treasury." He was required to pay to plaintiff in error, Collector of Internal Revenue, the income taxes for 1919 and 1920 prescribed by "An Act to provide revenue, and for other purposes," approved February 24, 1919, [the Revenue Act of 1918] c. 18, 40 Stat. 1057. In computing these his judicial salary was treated as part of his "gross income."

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (*including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States,* and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, *the compensation received as such*), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property;

also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . . ."

After payment and the necessary preliminary steps he instituted this proceeding to recover, upon the ground that the exactions on account of his salary were without authority of law. Judgment went for him in the trial court. It was there said—

"Unless he was taxable under the [Revenue] Act of 1918 [approved Feb. 24, 1919] he was not taxable at all. If he is taxable under that statute, he is so by virtue of a clause which applies to all the federal judges, irrespective of the time they came upon the bench. That clause as written has been held invalid. . . . When the clause which has been declared invalid is out of the Act, no other imposes the tax. What the court here is asked to do is to rewrite the pertinent portion of the statute in question so that it will read as did the provisions of the Acts of 1913 and 1916 relative to this general subject. But that would be for the court to do what Congress expressly decided not to do. With its eyes wide open to the possible consequences, it made up its mind to seek uniformity by imposing the tax upon all judges. Whether it would or would not have been willing to tax the minority, if the majority were immune, nobody knows, perhaps not even the members of that Congress itself, for upon that question they never were called upon to make up their minds."

Plaintiff in error now insists that, although the challenged provision of the Act of February 24, 1919, has been adjudged invalid as to all judges who took office prior to that date, it is obligatory upon those thereafter appointed.

Sec. 1, Art. III of the Constitution provides—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts

as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

Evans v. *Gore,* 253 U. S. 245, arose out of the claim that Judge Evans was liable for the tax upon his salary as prescribed by the Act now under consideration, although appointed before its enactment. We there gave much consideration to the purpose, history and meaning of the above-quoted section of the Constitution and, among other things, said—

"These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

"Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. . . ."

"The prohibition is general, contains no excepting words and appears to be directed against all diminution,

whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. . . .

"For the common good—to render him [the judge], in the words of John Marshall, 'perfectly and completely independent, with nothing to influence or control him but God and his conscience'—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support. . . ."

"Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing Act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

"We conclude that the tax was imposed contrary to the constitutional prohibition and so must be adjudged invalid."

Does the circumstance that defendant in error's appointment came after the taxing Act require a different view concerning his right to exemption? The answer depends upon the import of the word "compensation" in the constitutional provision.

The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out

of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

On September 1, 1919, the applicable statute declared: "The Chief Justice [of the Court of Claims] shall be entitled to receive an annual salary of $8,000, and each of the other judges an annual salary of $7,500, payable monthly." The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*.

The taxing Act became a law prior to the statute prescribing salaries for judges of the Court of Claims, but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of "gross income," "the compensation received as such" from the United States. From the "gross income" various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of "gross income," and to tax this as other salaries. This is forbidden by the Constitution.

The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.

The judgment of the court below is

Affirmed.

MR. JUSTICE BRANDEIS dissents.

PIERCE, GOVERNOR OF OREGON, ET AL. *v.* SOCIETY OF SISTERS.

PIERCE, GOVERNOR OF OREGON, ET AL. *v.* HILL MILITARY ACADEMY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Nos. 583, 584. Argued March 16, 17, 1925.—Decided June 1, 1925.

1. The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. P. 535.
2. The Oregon Compulsory Education Act (Oreg. Ls., § 5259) which, with certain exemptions, requires every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides, for the period during which the school is held for the current year, is an unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the Fourteenth Amendment. P. 534.
3. In a proper sense, it is true that corporations can not claim for themselves the liberty guaranteed by the Fourteenth Amendment, and, in general, no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power by the State upon the ground that he will be deprived of patronage;
4. But where corporations owning and conducting schools are threatened with destruction of their business and property through the improper and unconstitutional compulsion exercised by this statute upon parents and guardians, their interest is direct and immediate and entitles them to protection by injunction. *Truax* v. *Raich*, 239 U. S. 33. P. 535.
5. The Act, being intended to have general application, can not be construed in its application to such corporations as an exercise of power to amend their charters. *Berea College* v. *Kentucky*, 211 U. S. 45. P. 535.
6. Where the injury threatened by an unconstitutional statute is present and real before the statute is to be effective, and will

become irreparable if relief be postponed to that time, a suit to restrain future enforcement of the statute is not premature. P. 536.
296 Fed. 928, affirmed.

APPEALS from decrees of the District Court granting preliminary injunctions restraining the Governor, and other officials, of the State of Oregon from threatening or attempting to enforce an amendment to the school law,—an initiative measure adopted by the people November 7, 1922, to become effective in 1926—requiring parents and others having control of young children to send them to the primary schools of the State. The plaintiffs were two Oregon corporations, owning and conducting schools.

Mr. Willis S. Moore, Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for appellant Van Winkle.

The Fourteenth Amendment does not remove or restrict the power of the State to enact laws necessary to promote the health, safety, peace, morals, education or general welfare of its people. *Munn* v. *People of Illinois,* 94 U. S. 278; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25; *Barbier* v. *Connolly,* 113 U. S. 27, 31; *Mugler* v. *Kansas,* 123 U. S. 623, 666; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Re Kemmler,* 136 U. S. 436, 449; *Crowley* v. *Christensen,* 137 U. S. 86; *Jones* v. *Brim,* 165 U. S. 180, 182; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Interstate Consol. Street R. Co.* v. *Massachusetts,* 207 U. S. 79; *McLean* v. *Arkansas,* 211 U. S. 539; *Middleton* v. *Texas Power & L. Co.,* 249 U. S. 152; *N. O. Gas Light Co.* v. *Louisiana Light, etc., Mfg. Co.,* 115 U. S. 650; *Slaughter House Cases,* 16 Wall. 22; *Stone* v. *Mississippi,* 101 U. S. 814; *Sanitary District of Chicago* v. *United States,* 266 U. S. 405.

The provisions of a corporation charter and of any law pursuant to which a corporation may have entered into

valid contracts, are subject to modification and annulment under the police power. *Boston Beer Co.* v. *Massachusetts, supra; Stone* v. *Mississippi, supra; The Mayor, etc.* v. *Miln,* 11 Pet. 102; *Eagle Insurance Co.* v. *Ohio,* 153 U. S. 449; *Chicago B. & Q. Co.* v. *Nebraska,* 170 U. S. 59; *Pacific Gas & E. Co.* v. *Police Court,* 251 U. S. 22; *Thornton* v. *Duffy,* 254 U. S. 361; *Chicago L. Ins. Co.* v. *Needles,* 113 U. S. 574.

As to minors, the State stands in the position of *parens patriae* and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. *State* v. *Shorey,* 48 Ore. 396; *Stettler* v. *O'Hara,* 69 Ore. 519; *State* v. *Bunting,* 71 Ore. 259; *Gibbons* v. *Gibbons,* 75 Ore. 500; *Merges* v. *Merges,* 94 Ore. 246; *State* v. *Bailey,* 157 Ind. 324; *Sturges & Burn Mfg. Co.* v. *Beauchamp,* 231 U. S. 320; *Muller* v. *Oregon,* 208 U. S. 412; *Starnes* v. *Albion Mfg. Co.* 147 N. C. 566; *People* v. *Ewer,* 141 N. Y. 129; *Berea College* v. *Commonwealth,* 123 Ky. 209; *State* v. *Jackson,* 71 N. H. 552; *Commonwealth* v. *Roberts,* 159 Mass. 372; *State* v. *Counort,* 69 Wash. 321; *Meyer* v. *Nebraska,* 262 U. S. 390; *In re Turner,* 49 Kan. 115; *Vanwalters* v. *Board of Children's Guardians,* 132 Ind. 567; *State* v. *Rose,* 125 La. 462; *Ex parte Powell,* 6 Okla. Cr. Pr. 495; *Egoff* v. *Board of Children's Guardians,* 170 Ind. 238; *United States* v. *Behrendsohn,* 197 Fed. 953; *Interstate Company* v. *Massachusetts,* 207 U. S. 79.

The statute does not interfere with religious liberty. *Permoli* v. *New Orleans,* 3 How. 589; *Brunswick Co.* v. *Evans,* 228 Fed. 991; *People* v. *Board of Education,* 245 Ill. 335; *Swafford* v. *Keaton,* 23 Ga. App. 238; *State* v. *Mockus,* 113 Atl. 39 (Me.); *Reynolds* v. *United States,* 98 U. S. 145; *Commonwealth* v. *Herr,* 229 Pa. St. 132; *Owens* v. *State,* 6 Okla. Cr. 110; *People* v. *Pierson,* 176 N. Y. 201; *Scales* v. *State,* 47 Ark. 476; *Commonwealth*

v. *Has,* 122 Mass. 40; *Philips* v. *Gratz,* 2 Pen. & W. 412; *Wilkes-Barre* v. *Garabed,* 11 Pa. Super. 355; *Smith* v. *People,* 51 Colo. 270.

The American people as a whole have unalterably determined that there shall be an absolute and unequivocal separation of church and state, and that the public schools shall be maintained and conducted free from influences in favor of any religious organization, sect, creed or belief. Art. I, Const. U. S.; Art. I, § 5, Oregon Const.; Art. VIII, § 3, *Id.; Knowlton* v. *Baumhover,* 182 Iowa 691; *Wilkerson* v. *Rome,* 152 Ga. 762; *Evans* v. *Selma Union High School District* (Cal., 1924), 222 Pac. 801; *Donahoe* v. *Richards,* 38 Me. 379.

The provisions of subdivision " d " of the act conferring upon county superintendents power to determine that a child is not being properly taught and to order him sent to a public school, do not invalidate the measure, but relate to a proper exercise of administrative power. The fact that the amendment to § 5259, Oregon Laws, contains new provisions in conflict with a succeeding section of the act, which was not amended, does not invalidate the amendment.

Mr. William D. Guthrie, with whom *Mr. Bernard Hershkopf* was on the brief, for appellee in No. 583.

This bill establishes a case of irreparable injury imminent to the appellee's business and property. *International News Service* v. *Associated Press,* 248 U. S. 215, 236; *Springhead Spinning Co.* v. *Riley,* L. R. 6 Eq. 551, 558; *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, 82; *Terrace* v. *Thompson,* 263 U. S. 197; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Kennington* v. *Palmer,* 255 U. S. 100.

Courts of the United States have jurisdiction because a federal constitutional right of the plaintiff-appellee was

invaded by the enactment in question. If the liberty of parents be unconstitutionally impaired by the enactment in suit, surely it must needs follow, by the same token and with irresistible logic, that the constitutional rights of the appellee are likewise directly and unconstitutionally abridged. *Truax* v. *Raich,* 239 U. S. 33, 38; *Nebraska District* v. *McKelvie,* 262 U. S. 404; *Terrace* v. *Thompson,* 263 U. S. 197, 215–6; *Packard* v. *Banton,* 264 U. S. 140, 143.

The enactment in suit is not a legitimate exercise of the police power of the State. The courts are entrusted with authority, and it becomes their solemn duty, to review the reasonableness and propriety of any attempted use of that power. *Child Labor Tax Case,* 259 U. S. 20, 37. This Court, like the court below, must know that the true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools; for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades. Such drastic and extraordinary legislation is a portentous innovation in America. Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from

the very beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions. In more recent times commonwealth colleges and universities have grown up. The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically proscribes, but to every private or religious preparatory school and every private or religious college or university in the land. The statute in suit is so unusual and extraordinary that it must arouse misgivings in the judicial mind upon even the slightest reflection. More than ever must it be borne in mind in judging it, as pointed out by the Chief Justice in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534, that "restraints must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception."

The statute abridges the freedom of four classes closely interrelated: (1) the freedom of the private and parochial schools, (2) the freedom of teachers engaged in those schools, (3) the freedom of parents and guardians, and (4) the freedom of children. There is nothing in the record which warrants even the suggestion that private and parochial schools in Oregon are in any respect inferior to the public schools. If, however, the contrary were the fact, the case would still be no different; for there would still not exist any valid reason for their total suppression. The State of Oregon has regulatory power adequate to every reasonable and proper need in this relation. Indeed, it has largely exercised it as its statutes demonstrate.

In the brief submitted on behalf of the appellant Governor, it is urged in justification for the enactment that it was necessary in order to prevent the teaching of disloyalty and subversive radicalism or bolshevism. Assuming, therefore, but only for the purposes of the argu-

ment, that there may be in fact such an evil as this appellant conjures up and that it is not a mere chimera, nevertheless, there is no reasonable necessity for any such prohibitory law as is now under discussion. This Court has emphatically held that the States have power to make criminal and forbid the teaching of disloyalty, sedition, or pacifism. *Gilbert* v. *Minnesota,* 254 U. S. 325. It has also declared "that this court and other courts have decided that a license or certificate may be required of a . . . school teacher." *Lehmann* v. *Board of Accountancy,* 263 U. S. 394, 398; *People* v. *American Socialist Society,* 202 N. Y. App. Div. 640.

Where regulation is so completely adequate, prohibition is unnecessary and constitutes mere arbitrariness and wanton abuse of power. Particularly must this be true, where the subject of the alleged prohibition is an ordinary, innocuous and useful calling, trade, or business. However the matter may stand as to nuisances and businesses tainted with vicious qualities, tendencies, or effects, there is no doubt that this Court has repeatedly and authoritatively refused to countenance destruction of honest and ordinary businesses charged with abuses which were readily remediable by regulation. *Adams* v. *Tanner,* 244 U. S. 590; *Meyer* v. *Nebraska,* 262 U. S. 390; *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* Id. 404, 410. See *Hamilton* v. *Vaughn,* 179 N. W. 553, 558 (Mich.); *Columbia Trust Co.* v. *Lincoln Institute,* 138 Ky. 804, 812–4.

That the assimilation of the foreigner is not a justification for any such prohibitory statute, was expressly decided in *Meyer* v. *Nebraska,* 262 U. S. 390, 402. But the fact is, that the whole contention is fallacious and merely a far-fetched extravagance or pretense. Oregon has no substantial unnaturalized immigrant problem. Eighty-five per cent of its population is native-born. Half of the remainder is naturalized and presumably Americanized.

Of the children of the seven and a half per cent. unnaturalized, only a small number attend private schools. The children of poor, ignorant foreigners do not attend private schools where tuition must be paid for; they generally go to the free public schools. The public school is not a "melting pot." Schools are, and obviously must be, located in given districts. If the neighborhood be American, the school there will have a similar character. If, however, it be situated in a poor and foreign quarter, the school will be attended almost entirely by children of the poorer class of foreigners. The child of a foreigner is quite as likely to be assimilated and Americanized in a private or parochial school as in a public school. But there was no claim that as a matter of fact and truth American history and the aims of our Governments were not being correctly taught in the private and parochial schools of the State, nor was there any suggestion that the children attending such schools were not being properly or adequately instructed in any fundamental principles of freedom and democracy or in reverence and righteousness. The private and parochial schools teach the same subjects as the public schools—whatever one does to inculcate and foster patriotism, the other can and does do quite as well.

No legislation can proscribe social discrimination, and the statute in the case at bar is singularly inappropriate to that end. Young children do not discriminate against each other; that is a characteristic of maturity. The picking and choosing of friends for reasons based upon money, creed, or social status come, not during elementary school days, but afterwards; and no force thus far vouchsafed to man has ever been equal to the destruction or elimination of social distinctions. How the act in suit could accomplish that result, no one can tell; and, as a reason for annihilating the appellee's useful and honorable business, it amounts to nothing. It is now intimated

that the statute was necessary in order to effectuate compulsory education. But the suggestion is clearly based upon false premises. The notion that private and public schools cannot exist in peace and harmony side by side, which underlies the act in suit, is not only contradicted by long experience, but is probably held by no competent educator.

Thus far we have considered the enactment in suit only in reference to the rights of the private and parochial schools and the teachers they employ. But there is involved in the case at bar a far more important group of individual rights, namely, the rights of the parents and guardians who desire to send their children to such schools, and the rights of the children themselves. Reflection should soon convince the court that those rights, which the statute seriously abridges and impairs, are of the very essence of personal liberty and freedom. *Tillman* v. *Tillman,* 26 L. R. A. (n. s.) 781, 785 (S. Car.). In this day and under our civilization, the child of man is his parent's child and not the State's. "Take away from the parents all care and concern for their children's education, and you make a social life an impossible and unintelligible notion." Pufendorf's Law of Nature and Nations, book VI, c. II, § 4. It need, therefore, not excite our wonder that to-day no country holds parenthood in so slight esteem as did Plato or the Spartans—except Soviet Russia.

It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent. *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400; *Taylor* v. *Beckham (No. 1),* 178 U. S. 548, 602–3. See also *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534; *Coppage* v. *Kansas,* 236 U. S. 1, 10, 14; *Smith* v. *Texas,* 233 U. S. 630, 636; *People* v. *Gillson,* 109 N. Y. 389, 398–9; *Tillman* v. *Tillman,* 26 L. R. A. (n. s.) 781, 785 (S. Car.).

The statute in suit trespasses, not only upon the liberty of the parents individually, but upon their liberty collectively as well. It forbids them, as a body, to support private and parochial schools and thus give to their children such education and religious training as the parents may see fit, subject to the valid regulations of the State. In that respect the enactment violates the public policy of the State of Oregon and the liberty which parents have heretofore enjoyed in that State. *Liggett* v. *Ladd,* 17 Ore. 89, 94. See also *Milwaukee Industrial School* v. *Superiors,* 40 Wis. 328, 332; *People* v. *Turner,* 55 Ill. 280; *State ex rel. Sheibley* v. *School District,* 31 Neb. 552, 556; *Trustees* v. *People,* 87 Ill. 303. In whatever light the act in suit be regarded, it must be manifest that, in the end, it embodies the pernicious policy of state monopoly of education.

The legislative power of a State in relation to education does not involve the power to prohibit or suppress private schools and colleges. The familiar statement that education is a public function means no more than that it is a function that the State may undertake, because it vitally interests and concerns the State that children shall be furnished the means of education and not left to grow up in ignorance. But the power of the State to provide public schools carries with it no power to prohibit and suppress private schools and colleges which are competent and qualified to afford what the State wants, namely, education. Thus, there is no question as to the power of the State to construct and operate public roads, bridges and other means of transportation; yet it would hardly be seriously contended that the State might under the police power forbid the further operation of all private highways, bridges and railroads. Whenever the State desires the use of any such existing facilities for some distinctly public purpose, it can take them only by the exercise of the power of eminent domain. *Los Angeles*

v. *Los Angeles Gas & Electric Corporation,* 251 U. S. 32, 38; *Green* v. *Frazier,* 253 U. S. 233; *Adams* v. *Tanner,* 244 U. S. 590.

The present case is wholly outside the principle that, where a State may enter upon an undertaking which can be conducted profitably and satisfactorily only as a monopoly, it may prevent competition or the continued use of competing facilities by condemning and destroying property under the power of eminent domain and just compensation. In its essence, the Oregon law is one strangling scientific investigation in private laboratories. The social interests menaced by the suppression of private educational institutions and the denial of liberty to pursue long rooted habits and traditions among our people are peculiarly of the character that the Fourteenth Amendment was most immediately designed to protect from state political action. *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 366. The Fourteenth Amendment had for its primary object the prevention of state legislation calculated to keep one class in subjection to another in respect of opportunities for economic and social advancement, the pursuit of happiness, and the exercise of fundamental rights comprehended in an essential individual liberty, among men fit for freedom. *Buchanan* v. *Warley,* 245 U. S. 60; *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404.

The statute impairs the obligation of the contract embodied in the appellee's corporate charter. *Dartmouth College case,* 4 Wheat. 518. The corporation laws under which the appellee exists as a corporation (Deady's Code, 1886, pp. 632–4, as amended by General Laws of Oregon for 1903, pp. 176–7) do not contain any provision empowering the State to alter, amend, or repeal the charter; and the constitutional provision which was in force in Oregon when the appellee was organized (§ 2, Art. XI), while permitting the corporation laws of the State to be

altered, amended, or repealed, nevertheless, expressly limited that power by providing that it was not to be exercised " so as to impair or destroy any vested corporate rights." In *Liggett* v. *Ladd,* 17 Ore. 89; *Lornsten* v. *Union Fishermen's Co.,* 71 Ore. 540, it was held that a corporation had a vested right to its corporate name which subsequent legislation could not impair. If that be so, *a fortiori* the right granted to the plaintiff-appellee upon its incorporation to maintain and conduct schools for pay, is likewise a vested right within the meaning of the Oregon constitutional provision above referred to; and, as such, may not be impaired or destroyed by the legislature. The enactment in suit is, consequently, void, not only because of this provision of the Oregon constitution, but also because it impairs the obligation of a contract in violation of section 10 of Article I of the Constitution of the United States. *Berea College* v. *Kentucky,* 211 U. S. 45, distinguished.

Mr. J. P. Kavanaugh, with whom *Messrs. Jay Bowerman, Dan J. Malarkey, Hall S. Lusk, E. B. Seabrook* and *F. J. Lonergan* were on the brief, for appellee in No. 583.

Messrs. George E. Chamberlain and *Albert H. Putney,* with whom *Mr. P. Q. Nyce* was on the brief, for the Governor of Oregon.

The assertion that this law impairs the obligation of contracts is clearly disposed of by *Berea College* v. *Kentucky,* 211 U. S. 45. A State cannot contract away any of its fundamental governmental powers.

It is now definitely settled that the Fourteenth Amendment did not radically alter the relations between the federal and state governments, or make the provisions of the Bill of Rights in the United States Constitution binding upon the state governments.

The charge that the statute violates the privileges and immunities of citizens of the United States is hardly

worthy of serious consideration. *Slaughter House Cases,* 16 Wall. 36; *Twining* v. *New Jersey,* 211 U. S. 78; *Hodges* v. *United States,* 203 U. S. 1; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349; *Corfield* v. *Coryell,* 4 Wash. 371; *Eadleigh* v. *Newhall,* 136 Fed. 941.

The statute does not deprive anyone of property without due process of law. *Mugler* v. *Kansas,* 123 U. S. 623; *Kidd* v. *Pearson,* 128 U. S. 1; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *Crane* v. *Campbell,* 245 U. S. 304. The principle of the non-liability of government for loss to business incidentally resulting from state legislation is not confined to business similar to the liquor traffic. *Madera Waterworks* v. *City of Madera,* 228 U. S. 454; *Hadacheck* v. *Sebastian,* 239 U. S. 394; *Tanner* v. *Little,* 240 U. S. 369; *Hebe Company* v. *Shaw,* 248 U. S. 297; *Purity Extract and Tonic Co.* v. *Lynch,* 226 U. S. 192.

Cases in which this Court has protected the right to labor, are not precedents in this case. There is a great distinction between the right to work and the right to have a private business protected as against public competition or the exercise of the police powers of the State.

In *Terrace* v. *Thompson,* 264 U. S. 197, it was held that "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself." Is "the safety and power of the State" less effected by the control of education than by the control of farm lands?

This Court has never held that there was a denial of due process of law where a private business was injured or even destroyed by state competition in a field in which a State might lawfully engage. If a State may engage at all in any field, the question of the effect of state competition upon private business is immaterial. The owners of private schools have even less basis for the claim that

their property is taken without due process of law through the enactment of a compulsory education law than the owners of property used for saloon purposes had when their business was interfered with by a state prohibition law. In the latter case the entire use of the property for the purpose for which it was intended was prohibited; in the former case the school is only deprived of certain prospective students. A private school might still be continued for students under or over the age limits set by the law. A properly qualified teacher in a private school might easily secure a position as one of the additional teachers who would be required by the public schools. No person in any business has such an interest in possible customers as to enable him to restrain the government from exercising any proper power because it might deprive him of such patronage. To state such a contention is to show its absurdity.

The case of the Hill Military Academy is no stronger under the law, than would have been the case of a merchant who had attempted to restrain the operation of the draft act, during the recent war, on the ground that the Government, by taking away certain of his customers, was depriving him of his property without due process of law. See *Munn* v. *Illinois,* 94 U. S. 113.

The Oregon law does not deprive any person of liberty without due process of law. The appellees are corporations. The liberty protected by the Fourteenth Amendment is that of natural, and not of artificial, persons. *Northwestern Nat. L. Ins. Co.* v. *Riggs,* 203 U. S. 243, 255; *Western Turf Ass'n.* v. *Greenberg,* 204 U. S. 359, 363. Nor can the appellees claim to have any such interests in the liberties of the school children of the State, or their parents. No person has the right to test the constitutionality of a law merely because it may affect the liberty of another person in whom he has no recognized legal interest. *Gusman* v. *Marrero,* 180 U. S. 81. *Truax* v. *Raich,* 239 U. S. 33, distinguished.

No claim can arise that the school children themselves are deprived, by this law, of liberty without due process of law. It will be admitted by all that children under sixteen years of age cannot be given liberty of choice as to their education; this must be under the control either of the State, or of their parents, or of both the State and their parents. If any persons have been deprived of liberty without due process of law it is the parents of the school children. The determination of this last point brings us to the question of the respective authority of the State and of parents over minor children.

Even in the freest country no person can possess absolutely uncontrolled liberty, either with respect to himself personally, or to his children. A parent cannot have a more complete right of control over the actions of his child than over his own actions. Liberty of all is subject to reasonable conditions deemed essential by the governing body to the safety, health, peace, good order and morals of the community. *Crawley* v. *Christensen,* 137 U. S. 86; *Jacobson* v. *Massachusetts,* 197 U. S. 11.

Under all governments, even those which are the most free and democratic in their character, the citizen must always owe duties to the State; and it necessarily follows that the State has an interest in making it certain (which can only be done by appropriate legislation) that the citizen is fitted, both in mind and body, to perform these duties. *Jacobson* v. *Massachusetts, supra.* The discretionary powers of a State are broad enough to permit it to decide that compulsory attendance at public schools is a proper "precautionary measure against the moral pestilence of paupers, vagabonds, and possibly convicts." *Mayor, etc. of New York* v. *Miln,* 11 Pet. 102.

The voters of Oregon who adopted this law had the right to act on the belief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of chil-

dren in the United States who were not attending public schools, was more than a coincidence. The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissentions and consequent weakening of the community against foreign dangers.

In *Mayor, etc. of New York* v. *Miln, supra,* this Court was considering the evil effects upon a State of the immigration of ignorant foreigners, unacquainted with, and lacking sympathy with, American institutions and ideals. In this connection, it should be remembered that the vast majority of children not now attending the public schools of Oregon who will be compelled to do so by the new statute, are either themselves immigrants or the children of immigrants. Surely a State can require of all immigrants admitted to the advantages and opportunities of life in the United States, that their children shall be taught by the State the English language, and the character of American institutions and government. *Meyer* v. *Nebraska,* 262 U. S. 390, distinguished.

The compulsory attendance of all children of school age at the public schools during the relatively short hours during which these schools are in session would not deprive the parents of any just rights. There would remain an abundance of time and opportunity for supplementary instruction either in religion or in the language, history, and traditions of the land of their ancestors. The ob-

jectionable feature about the Nebraska law was that it forbade the teaching of modern languages either in regular schools or in supplementary schools. The dicta in the *Meyer Case* would appear to be somewhat broader than can be supported by the previous decisions of this Court which are cited to support it.

The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

The exact question involved in the present case has never been passed upon by any American court. Perhaps the cases which come nearest are those on whether the school authorities have the right to exclusive control over the list of studies to be taken by pupils in the public schools, or whether the parents have a limited right of selection. The decisions on this question are in hopeless conflict. In New Hampshire (*Kidder* v. *Chelis,* 59 N. H. 473) Indiana (*State* v. *Webber,* 108 Ind. 31,) and Iowa (*State* v. *Mizner,* 50 Ia. 145,) the power of the public is held exclusive; while in Illinois (*School Trustees* v. *People,* 87 Ill. 303,) Oklahoma (*School Board District* v.

Thompson, 24 Okla. 1,) and Wisconsin (*Morrow* v. *Wood,* 35 Wis. 59,) some right of control has been held to belong to the parent. This Court has twice recently, in the child labor cases, (*Hammer* v. *Dagenhart,* 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20,) held that all questions relative to the care, control and custody of minor children belong exclusively to the State.

The Oregon law does not deny the equal protection of the law. The whole opposition arises from the fact that it is intended to bring about a greater equality in the operation of the school law of Oregon than has previously existed. A law which increases the uniformity of the application of a law cannot by any stretch of the imagination be classed as a law which denies the equal protection of the law. The new Oregon School Law merely removes an exception to the generality of the application of the former law. The right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to every other person in the State under similar circumstances and conditions. *Walston* v. *Nevin,* 128 U. S. 582; *Tinsley* v. *Anderson,* 171 U. S. 106; *Williams* v. *Arkansas,* 217 U. S. 79.

If the compulsory school laws of the other States are constitutional, this law must be held so. If a State may pass a law applying to a certain portion of the things or persons included in a general class, it can pass one applying to all in a general class, unless express exceptions are to be found in the prohibitions in the Federal Constitution. *Fisher* v. *St. Louis,* 194 U. S. 361. The constitutionality of the Oregon law can be sustained as an exercise of the police power of the State. The scope of this power is very broad. *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561; *Bacon* v. *Walker,* 204 U. S. 311; *Mayor, etc. of New York* v. *Miln,* 11 Pet. 102. This law may also be sustained under the powers of the State in connection with its duties to aid the United States in time of war. *Arver* v. *United States,* 245 U. S. 366; *Holdman* v. *United States,* 245 U. S.

474; *Ruthenberg* v. *United States,* 245 U. S. 480; *Cox* v. *Wood,* 247 U. S. 3; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211; *McKinley* v. *United States,* 249 U. S. 397. The power and duty to be prepared for war is shared by the state government. *Gilbert* v. *Minnesota,* 254 U. S. 325; *Halter* v. *Nebraska,* 205 U. S. 34.

The discretion of the States in the exercise of their powers is broad enough to justify a State in holding that a compulsory system of public school education will encourage the patriotism of its citizens, and train its younger citizens to become more willing and more efficient defenders of the United States in times of public danger. This is particularly true in view of the fact that if the Oregon School Law is declared unconstitutional there will be nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States, or at least the theory of the moral duty to refuse to aid the United States even in the case of a defensive war. If a State cannot compel certain children to attend the public schools it cannot compel any children to do so. An attempt to do so would be clearly a violation of the "equal protection of the laws" clause of the Fourteenth Amendment.

Mr. John C. Veatch, for appellee in No. 584.

Any restrictions upon the rights of the individual are arbitrary and oppressive unless intended to promote the public welfare and having a reasonable relation to that purpose. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *McLean* v. *Arkansas,* 211 U. S. 539. Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the Government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract. *C. B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549; *Atlantic Coast Line* v. *Goldboro,* 232 U. S. 559; *House* v. *Mayes,* 219 U. S. 270; *Reduction Company* v. *Sanitary Works,* 199 U. S.

306; *C. B. & Q. R. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561; *Lochner* v. *New York,* 198 U. S. 45. If it is within the power of the State to take away the business of the private schools in the elementary grades, it is equally within that power to take away their business in all grades. *Adams* v. *Tanner,* 244 U. S. 590.

This act is not designed and intended to promote compulsory education. It adds nothing to the standard of education, it does not broaden the educational field; the changing of the ages for compulsory school attendance is in no way affected by the clause relating to private schools. *Commonwealth* v. *Roberts,* 159 Mass. 372.

While no rule of law defines the limits of the State's power, the principle, based upon the universal decisions of the courts, is that the power shall not interfere with the rights of the individual, unless such interference is necessary to promote the public welfare and the restrictions placed upon the individual's rights have a real, substantial, and direct relation to the object to be accomplished. *Adkins* v. *Childrens Hospital,* 261 U. S. 525; *Truax* v. *Corrigan,* 257 U. S. 312; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Mugler* v. *Kansas,* 123 U. S. 623.

By special leave of Court briefs of *amici curiae* were filed by *Mr. Louis Marshall* for the American Jewish Committee; *Mr. Wm. A. Williams,* for the North Pacific Union Conference of Seventh Day Adventists; *Messrs. Chas. H. Tuttle, Chas. E. Hotchkiss, Alexander J. Field,* and *Woodson P. Houghton,* for The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States.

Mr. Justice McReynolds delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining

appellants from threatening or attempting to enforce the Compulsory Education Act * adopted November 7, 1922, under the initiative provision of her Constitution by the voters of Oregon. Jud. Code, § 266. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged Act, effective September 1, 1926, requires every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. There are

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Be it Enacted by the People of the State of Oregon:

Section 1. That Section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*—Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

(a) *Children Physically Unable*—Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Who Have Completed the Eighth Grade*—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from school*—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and

exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee, the Society of Sisters, is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and per-

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from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This Act shall take effect and be and remain in force from and after the first day of September, 1926.

sonal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between eight and sixteen. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds thirty thousand dollars—and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee, Hill Military Academy, is a private corporation organized in 1908 under the laws of Oregon, engaged

in owning, operating and conducting for profit an elementary, college preparatory and military training school for boys between the ages of five and twenty-one years. The average attendance is one hundred, and the annual fees received for each student amount to some eight hundred dollars. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the State Board of Education. Military instruction and training are also given, under the supervision of an Army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs long time contracts must be made for supplies, equipment, teachers and pupils. Appellants, law officers of the State and County, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged Act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that unless appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges (Jud. Code § 266) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the

deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that these schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy their owners' business and property. Finally, that the threats to enforce the Act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of chil-

dren under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs,* 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg,* 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax* v. *Raich,* 239 U. S. 33; *Truax* v. *Corrigan,* 257 U. S. 312; *Terrace* v. *Thompson,* 263 U. S. 197.

The courts of the State have not construed the Act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in *Berea College* v. *Kentucky,* 211 U. S. 45. No argument in favor of such view has been advanced.

Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be de-

prived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in *Truax* v. *Raich, Truax* v. *Corrigan* and *Terrace* v. *Thompson, supra,* and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184; *Nebraska District* v. *McKelvie,* 262 U. S. 404; *Truax* v. *Corrigan, supra,* and cases there cited.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity.

The decrees below are

Affirmed.

MARR *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 236. Argued November 19, 1924; restored to docket for reargument January 5, 1925; reargued March 12, 1925.—Decided June 1, 1925.

A Delaware corporation, organized for the purpose, took over the assets and continued the business of a New Jersey corporation, assuming its liabilities, after an exchange of stock, as follows: The New Jersey corporation had outstanding $15,000,000 of 7% preferred and $15,000,000 common stock, all shares of the par value of $100, and had accumulated a large surplus from profits,

the actual value of the common stock being $842.50 per share; the Delaware corporation had an authorized capital of $20,000,000 in 6% non-voting preferred stock and $82,600,000 in common, shares all of the par value of $100, and exchanged five shares of its common stock for every like share in the New Jersey corporation, and one and one-third shares of its preferred stock for every like share in the New Jersey corporation, making payments in cash to avoid fractional certificates; and thus all the stock of the New Jersey corporation was exchanged, except a few shares of preferred stock redeemed in cash, and the Delaware corporation had $7,600,000 of authorized common stock remaining which was sold or held for sale for additional capital. *Held* that the new securities thus received by an old stock-holder were not in effect a stock dividend; and that their value above the cost of his exchanged securities, bought by him prior to March 1, 1913, was taxable as income under the Act of September 8, 1916, and within the power of Congress so to tax, since the corporations were essentially different, being organized in different States and with different rights and powers, and since the shares exchanged represented different interests both because of these differences in the corporations and because a 6% non-voting preferred stock differs essentially from a 7% voting preferred stock, and common stock subject to the priority of $20,000,000 preferred and a $1,200,000 annual dividend charge differs essentially from a common stock subject only to $15,000,000 preferred and a $1,050,000 annual dividend charge. *Eisner* v. *Macomber,* 252 U. S. 159, and *Weiss* v. *Stearn,* 265 U. S. 242, distinguished. P. 539.

58 Ct. Cl. 658, affirmed.

APPEAL from a judgment rendered by the Court of Claims for the United States in a suit brought by the appellant to recover the amount of an additional income tax paid under protest.

Mr. William L. Frierson, for appellant.

The Solicitor General, with whom *Messrs. Nelson T. Hartson* and *Chester A. Gwinn* were on the brief, for the United States.

Messrs. James Byrne and *Arthur A. Ballantine* submitted a brief as *amici curiae,* by special leave of Court.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Prior to March 1, 1913, Marr and wife purchased 339 shares of the preferred and 425 shares of the common stock of the General Motors Company of New Jersey for $76,400. In 1916, they received in exchange for this stock 451 shares of the preferred and 2,125 shares of the common stock of the General Motors Corporation of Delaware which (including a small cash payment) had the aggregate market value of $400,866.57. The difference between the cost of their stock in the New Jersey corporation and the value of the stock in the Delaware corporation was $324,466.57. The Treasury Department ruled that this difference was gain or income under the Act of September 8, 1916, c. 463, Title I, §§ 1 and 2, 39 Stat. 756, 757; and assessed, on that account, an additional income tax for 1916 which amounted, with interest, to $24,944.12. That sum Marr paid under protest. He then appealed to the Commissioner of Internal Revenue by filing a claim for a refund; and, upon the disallowance of that claim, brought this suit in the Court of Claims to recover the amount. Judgment was entered for the United States. 58 Ct. Cl. 658. The case is here on appeal under § 242 of the Judicial Code.

The exchange of securities was effected in this way. The New Jersey corporation had outstanding $15,000,000 of 7 per cent. preferred stock and $15,000,000 of the common stock, all shares being of the par value of $100. It had accumulated from profits a large surplus. The actual value of the common stock was then $842.50 a share. Its officers caused to be organized the Delaware corporation, with an authorized capital of $20,000,000 in 6 per cent. non-voting preferred stock and $82,600,000 in common stock, all shares being of the par value of $100. The Delaware corporation made to stockholders in the New

Jersey corporation the following offer for exchange of securities: For every share of common stock of the New Jersey corporation, five shares of common stock of the Delaware corporation. For every share of the preferred stock of the New Jersey corporation, one and one-third shares of preferred stock of the Delaware corporation. In lieu of a certificate for fractional shares of stock in the Delaware corporation payment was to be made in cash at the rate of $100 a share for its preferred and at the rate of $150 a share for its common stock. On this basis all the common stock of the New Jersey corporation was exchanged and all the preferred stock except a few shares. These few were redeemed in cash. For acquiring the stock of the New Jersey corporation only $75,000,000 of the common stock of the Delaware corporation was needed. The remaining $7,600,000 of the authorized common stock was either sold or held for sale as additional capital should be desired. The Delaware corporation, having thus become the owner of all the outstanding stock of the New Jersey corporation, took a transfer of its assets and assumed its liabilities. The latter was then dissolved.

It is clear that all new securities issued in excess of an amount equal to the capitalization of the New Jersey corporation represented income earned by it; that the new securities received by the Marrs in excess of the cost of the securities of the New Jersey corporation theretofore held were financially the equivalent of $324,466.57 in cash; and that Congress intended to tax as income of stockholders such gains when so distributed. The serious question for decision is whether it had power to do so. Marr contends that, since the new corporation was organized to take over the assets and continue the business of the old, and his capital remained invested in the same business enterprise, the additional securities distributed were in legal effect a stock dividend; and that under the rule of *Eisner* v. *Macomber,* 252 U. S. 189, applied in

Weiss v. *Stearn,* 265 U. S. 242, he was not taxable thereon as income, because he still held the whole investment. The Government insists that identity of the business enterprise is not conclusive; that gain in value resulting from profits is taxable as income, not only when it is represented by an interest in a different business enterprise or property, but also when it is represented by an essentially different interest in the same business enterprise or property; that, in the case at bar, the gain actually made is represented by securities with essentially different characteristics in an essentially different corporation; and that, consequently, the additional value of the new securities, although they are still held by the Marrs, is income under the rule applied in *United States* v. *Phellis,* 257 U. S. 156; *Rockefeller* v. *United States,* 257 U. S. 176; and *Cullinan* v. *Walker,* 262 U. S. 134. In our opinion the Government is right.

In each of the five cases named, as in the case at bar, the business enterprise actually conducted remained exactly the same. In *United States* v. *Phellis,* in *Rockefeller* v. *United States* and in *Cullinan* v. *Walker,* where the additional value in new securities distributed was held to be taxable as income, there had been changes of corporate identity. That is, the corporate property, or a part thereof, was no longer held and operated by the same corporation; and, after the distribution, the stockholders no longer owned merely the same proportional interest of the same character in the same corporation. In *Eisner* v. *Macomber* and in *Weiss* v. *Stearn,* where the additional value in new securities was held not to be taxable, the identity was deemed to have been preserved. In *Eisner* v. *Macomber* the identity was literally maintained. There was no new corporate entity. The same interest in the same corporation was represented after the distribution by more shares of precisely the same character. It was as if the par value of the stock had been

reduced, and three shares of reduced par value stock had been issued in place of every two old shares. That is, there was an exchange of certificates but not of interests. In *Weiss* v. *Stearn* a new corporation had, in fact, been organized to take over the assets and business of the old. Technically there was a new entity; but the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State, with presumably the same powers as the old. There was also no change in the character of securities issued. By reason of these facts, the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same as if the par value of the stock in the old corporation had been reduced, and five shares of reduced par value stock had been issued in place of every two shares of the old stock. Thus, in *Weiss* v. *Stearn,* as in *Eisner* v. *Macomber,* the transaction was considered, in essence, an exchange of certificates representing the same interest, not an exchange of interests.

In the case at bar, the new corporation is essentially different from the old. A corporation organized under the laws of Delaware does not have the same rights and powers as one organized under the laws of New Jersey. Because of these inherent differences in rights and powers, both the preferred and the common stock of the old corporation is an essentially different thing from stock of the same general kind in the new. But there are also adventitious differences, substantial in character. A 6 per cent. non-voting preferred stock is an essentially different thing from a 7 per cent. voting preferred stock. A common stock subject to the priority of $20,000,000 preferred and a $1,200,000 annual dividend charge is an essentially different thing from a common stock subject only to $15,000,000 preferred and a $1,050,000 annual dividend charge. The case at bar is not one in which after the

distribution the stockholders have the same proportional interest of the same kind in essentially the same corporation.

Affirmed.

The separate opinion of MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER.

We think this cause falls within the doctrine of *Weiss* v. *Stearn,* 265 U. S. 242, and that the judgment below should be reversed. The practical result of the things done was but the reorganization of a going concern. The business and assets were not materially changed, and the stockholder received nothing actually severed from his original capital interest—nothing differing in substance from what he already had.

Weiss v. *Stearn* did not turn upon the relatively unimportant circumstance that the new and old corporations were organized under the laws of the same State, but upon the approved definition of income from capital as something severed therefrom and received by the taxpayer for his separate use and benefit. Here stockholders got nothing from the old business or assets except new statements of their undivided interests, and this, as we carefully pointed out, is not enough to create taxable income.

UNITED STATES *v.* GULF REFINING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 40. Argued April 15, 16, 1925.—Decided June 1, 1925.

1. Under Jud. Code § 240, certiorari may be granted by this Court, at the instance of the United States, to review a judgment of the Circuit Court of Appeals reversing a judgment of conviction in a criminal case and remanding the case to the District Court for a new trial. P. 544.

2. Where a commodity shipped in interstate commerce is included in more than one tariff designation, that which is the more specific will be held applicable; and where two descriptions and tariffs are equally appropriate, the shipper is entitled to the one specifying the lower rate. P. 546.
3. Evidence reviewed and *held* to establish that the shipments in question were not "gasoline" but "naphtha", and insufficient to prove that they were not "unrefined naphtha", within the meaning of a railroad tariff applicable. P. 546.
4. A lower rate properly may be applied to a product shipped in an unfinished condition in the course of manufacture than that applicable to it when finished. P. 548.
5. In a prosecution of a corporation under the Elkins Act on the ground that it received concessions through shipping its petroleum product as "unrefined naphtha" and not as "gasoline", under a tariff allowing a lower rate for the one than for the other, evidence of other and contemporaneous shipments of the same product to other places as "gasoline" under other tariffs offering no rate on "unrefined naphtha" had no tendency to prove that the product was not "unrefined naphtha" within the meaning of the tariff in question. P. 549.
6. Nor in such case, did description of the shipments as "gasoline", in compliance with regulations made by the Interstate Commerce Commission under the Transportation of Explosives Act requiring such and similar products to be shipped as "gasoline, casinghead gasoline or casinghead naphtha", have a tendency to prove, or amount to an admission by the defendant, that the gasoline rate was applicable or that the shipments were not "unrefined naphtha" within the meaning of the tariff, since the purpose of those regulations was to require a disclosure of the character of the shipments having regard not to rates but to the dangers to be guarded against. P. 550.

284 Fed. 90, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a conviction under the Elkins Act and remanding the case with directions to grant a new trial.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Messrs. R. L. Batts and *F. M. Swacker,* with whom *Messrs. H. L. Stone, Jr.,* and *James B. Diggs* were on the briefs, for respondents.

Mr. John F. Finerty, filed a brief as *amicus curiae,* by special leave of Court.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent was convicted in the district court for the eastern district of Oklahoma on 99 counts, charging that it received concessions and discrimination in rates on gasoline shipped by the Gypsy Oil Company between December 2, 1916, and March 12, 1919, from Keifer, Drumright and Jenks, Oklahoma, to defendant's refinery at Port Arthur, Texas, in violation of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended by the Act of June 29, 1906, § 2, c. 3591, 34 Stat. 584, 587. The Circuit Court of Appeals reversed the judgment and remanded the case with directions to grant a new trial. 284 Fed. 90. This Court granted a writ of certiorari. § 240, Judicial Code. 262 U. S. 738.

Defendant, insisting that this Court is without jurisdiction, made a motion to dismiss the writ. The determination of the matter was postponed to the hearing on the merits. In *United States* v. *Dickinson,* (1909) 213 U. S. 92, it was held that certiorari could not be granted in a criminal case at the instance of the United States. Act of March 3, 1891, c. 517, 26 Stat. 826, 828. But that act was modified by the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157, being § 240, Judicial Code, which is as follows: "In any case, *civil or criminal,* in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, *upon the petition of any party thereto,* any such case to be certified to the Supreme Court for its review and

determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." The words italicized above were added to the provisions of the Act of 1891. The phrase "upon the petition of any party thereto" is not limited by the context. The language, circumstances and history of the enactment make clear the intent of Congress to give this Court jurisdiction on the petition of the United States to bring up criminal cases on writ of certiorari. See 46 Congressional Record, pp. 2134, 4001. And the petition may be granted, notwithstanding the Circuit Court of Appeals remanded the case for a new trial and did not render a final judgment therein. *American Construction Co.* v. *Jacksonville Railway,* 148 U. S. 372, 385; *Forsyth* v. *Hammond,* 166 U. S. 506, 513. The motion to dismiss the writ is overruled.

The Circuit Court of Appeals said (p. 102): "It is our opinion that when all competent and relevant proof in the case is given a fair and impartial consideration the conclusion that the verdict is without support, is inevitable," and held that the district court erred in denying defendant's motion that a verdict be directed in its favor. The United States asserts that this was error.

The pertinent language of the act, defining the offense charged, is as follows: ". . . It shall be unlawful for any . . . corporation . . . to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier . . . or whereby any other advantage is given or discrimination is practiced." (34 Stat. 587.) The gist of each count is that the Gypsy Oil Company delivered gasoline to interstate carriers by

railroad at places in Oklahoma,—Keifer, Drumright and Jenks,—for transportation to Port Arthur, Texas, there to be delivered to defendant; and that defendant knowingly did accept and receive from the carriers a concession or discrimination in respect of such transportation, whereby the property was transported at a rate substantially less than the lawful rate for gasoline. It is not alleged what defendant represented the commodity to be or what, if any, tariff was applied. It was shown at the trial that all shipments referred to in the indictment were made as "unrefined naphtha", under tariffs specifying rates therefor substantially lower than the contemporaneous rates on gasoline between the same points. The rates then in force from Keifer are illustrative. They were "Oils: Petroleum Oil and its Products . . . listed under the head of 'Petroleum and Petroleum Products'", 39 cents per 100 pounds; "Gasoline in tank cars," 33 cents, and "Unrefined Naphtha in tank cars", 19½ cents.

Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. *U. S. Industrial Alcohol* v. *Director General,* 68 I. C. C. 389, 392; *Augusta Veneer Co.* v. *Southern Ry. Co.,* 41 I. C. C. 414, 416. And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. *Ohio Foundry Co.* v. *P., C., C. & St. L. Ry. Co.,* 19 I. C. C. 65, 67; *United Verde Copper Co.* v. *Pennsylvania Co.,* 48 I. C. C. 663. It follows that, if the property in question properly might have been described either as gasoline or as unrefined naphtha, the lower rate was lawfully applied, and defendant was not guilty. And the burden was on the United States to prove beyond a reasonable doubt that the property so shipped was gasoline and was not unrefined naphtha.

The substance of the evidence as to whether the shipments complained of were gasoline or unrefined naphtha

is given in the opinion of the Circuit Court of Appeals, and need not be repeated here. The first distillation of crude oil takes off the elements more volatile than kerosene, and these taken together are known as the "naphtha fraction". After treatment with sulphuric acid, this fraction is divided by further distillation into three products,—gasoline, the lightest, benzine, the intermediate, and naphtha, which is called "painter's naphtha", the heaviest. The gravity of such naphtha is around 54 degrees (Baumé). Casinghead gasoline is produced by compression of gases which come from oil wells. Like the lighter ends or elements first coming off in the distillation of crude oil, casinghead gasoline is highly volatile and dangerous to handle. Its gravity is about 88 to 90 degrees and its vapor tension is from 20 to 30 pounds to the square inch. During the period in question some of the painter's naphtha produced at defendant's refinery was shipped from Port Arthur in tank cars to the casinghead gasoline compression plants of the Gypsy Company at Keifer and Drumright, there to be blended,—about one part naphtha to two parts casinghead gasoline. The gravity of the product was about 70 to 75, and its vapor tension less than 10 pounds per square inch. At Jenks, casinghead gasoline was not so blended, but it was subjected to a treatment called "weathering", which lowered specific gravity and reduced vapor tension to substantially the same extent as was effected by the blending with painter's naphtha. The shipment referred to in each count was casinghead gasoline so blended or weathered. Such reduction of specific gravity and vapor tension made permissible its transportation in tank cars, under the regulations of the Interstate Commerce Commission authorized by the Transportation of Explosives Act. Act of March 4, 1909, § 233, 35 Stat. 1088, 1134, amending act of May 30, 1908, § 2, c. 234, 35 Stat. 554. Regulations for the Transportation of Explosives and Other Dangerous Ar-

ticles, effective October 1, 1914, revised July 15, 1918.* There is involved no claim on the part of the United States that there was any violation of the act or regulations.

The tariff on unrefined naphtha, under which the shipments complained of were made, became effective December 2, 1916. Prior to that, the blended product was shipped from Keifer and Drumright to defendant's refinery at the gasoline rate. The compression plant at Jenks was not put in operation until after that date. None of the products so shipped as unrefined naphtha was sent to the market or sold to be used as gasoline. All was used at defendant's refinery and mixed or blended with other products to make gasoline which defendant sold; it constituted from five to twenty-five per cent. of such gasoline. The casinghead gasoline, before or after such blending or weathering, did not correspond with specifications for any gasoline sold in the market for use as fuel for motor engines and the like. The evidence was not sufficient to sustain a finding that the casinghead gasoline in question was suitable for ordinary or general use as fuel for such engines. And, on a consideration of all the evidence, it must be held to have been established conclusively that such substance was not so used and was not reasonably suitable for such use. It follows, therefore, that, whatever it may be called, the product was not the familiar article of commerce sold as gasoline.

A lower rate properly may be applied to a product when in an unfinished condition than that applicable to it when finished. In *National Refining Company* v. *M. K. & T. Ry.*, (1912) 23 I. C. C. 527, it was held that rates applicable to refined oil were excessive when applied to carload shipments of the so-called lighter ends of petroleum

* This act has since been further amended (Act of March 4, 1921, c. 172, 41 Stat. 1444); and the Interstate Commerce Commission prescribed regulations, effective January 1, 1923.

which had been separated from crude oil by a skimming process,—that is, by distillation sufficient to take off the more highly volatile elements,—but which was useless for commercial purposes until a further process of refinement had been undergone; and that a reasonable rate on such product was not more than two cents per hundred pounds in excess of the rates contemporaneously applicable to crude oil. Subsequent to this decision, tariffs covering "unrefined naphtha" were put in effect on the lines from Muskogee, Oklahoma, to Coffeyville, Kansas, and from Oklahoma producing points to Baton Rouge, Louisiana. The product in that case was similar to the casinghead gasoline here in question. Both included the lighter ends or more volatile elements of crude oil; they were unfinished products and differed from ordinary gasoline of commerce in like respects. Presumably, this decision and these tariffs were known to and considered by the shipper and carriers when the tariff on unrefined naphtha was published. And before that tariff was put in, defendant's representative applied by letter to the carriers for a "seventeen cent rate crude unfinished naphtha" from Port Arthur to Keifer and from Keifer to Port Arthur. The carrier's representative testified that they were requested "to put in a rate on crude naphtha or unrefined naphtha or unfinished naphtha", and that he did not recall which. The United States suggests that the shipper did not disclose to the carrier that it intended to ship the product here in question under the proposed tariff. But the evidence negatives any purpose to deceive or defraud the carriers and shows that the purpose of the carrier was to put in a tariff covering the unfinished product referred to in the negotiations as crude unfinished naphtha, crude naphtha, unrefined naphtha and unfinished naphtha.

The United States introduced evidence to show contemporaneous shipments by the Gypsy Oil Company of

such casinghead gasoline to Port Arthur billed as unrefined naphtha and to Pittsburg billed as gasoline, and also shipments by that company and others of the same product to other places, billed as gasoline. But it was not shown that the carriers had published any tariff covering unrefined naphtha to Pittsburg or the other points. In the absence of a rate on unrefined naphtha, such shipments are without significance. There was nothing to show, and no reason to presume, that all classifications had been made that could be made in respect of the numerous products of petroleum, and of those referred to in the industry as gasoline of one kind or another. There being no rate on unrefined naphtha or opportunity to choose between the gasoline rate and some other rate, shipments of the product as gasoline had no probative value or tendency to show that the product was not fairly described by and included within the phrase "unrefined naphtha" in the tariff in question.

The regulations of the Interstate Commerce Commission, revised July 15, 1918, required liquid condensates from natural gas or from casinghead gas of oil wells, alone or blended with other petroleum products, having a vapor pressure of not more than ten pounds per square inch, to be shipped as "gasoline, casinghead gasoline, or casinghead naphtha". Unrefined naphtha was not mentioned. The description of the shipments as gasoline under these regulations had no tendency to show that the tariff rate on unrefined naphtha was not applicable. The purpose of the regulations was to require a disclosure of the character of the shipment, having regard not to rates but to the dangers to be guarded against. It was not an admission on the part of the defendant that the gasoline rate was applicable or that the shipments were not unrefined naphtha within the meaning of the tariff. The language of the regulation illustrates the use of the word "naphtha" to include the casinghead product.

"Naphtha" is a generic term and embraces the lighter or more volatile parts of crude oil down to and sometimes including kerosene. This takes in all the elements of finished gasoline. The words "naphtha" and "gasoline" are often used interchangeably to include the unfinished product of which the gasoline of commerce is made. The thing shipped was an unfinished product. It was taken to Port Arthur to be used to make gasoline. The evidence required a finding that it was naphtha. The insistence of the United States is that it was not "unrefined". The processes for refining crude oil in the production of gasoline include the separation and combining of various elements of the crude product, and are not limited to the elimination of impurities. The evidence is not sufficient to sustain a finding that the making of gasoline of commerce by the use of the blended or weathered casinghead gasoline shipped to Port Arthur did not involve refining, properly so-called. But even if the process was, as contended by the United States, a finishing and not a refining process, it is clear that the phrase "unrefined naphtha" in the tariff in question was not misleading and did not contribute to any deception or fraud. The thing shipped was not ordinary gasoline, and it was lawful to distinguish it by tariff designation and to make the specified rate applicable. The words employed describe the product with sufficient accuracy. The evidence was not sufficient to sustain a finding that the shipments in question were not unrefined naphtha.

Motion to dismiss denied

Judgment affirmed.

SECOND RUSSIAN INSURANCE COMPANY *v.* MILLER, ALIEN PROPERTY CUSTODIAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 362. Argued April 30, May 1, 1925.—Decided June 1, 1925.

After promulgation, in the earlier years of the World War, of a Russian ukase forbidding, under penalties, all Russian subjects to enter into any agreement or commercial relations with citizens of enemy countries and proclaiming all contracts with enemy firms at an end, an arrangement was made between a Russian insurance corporation, a German firm of Hamburg, which was its general agent for reinsurance business including that originating in this country, and a New York corporation, which was the German firm's sub-agent here and shared the commissions on the American business, whereby, in form, the New York corporation was substituted as general agent and entitled to the full commissions on the net premiums it collected. Thereafter, and before the United States entered the war, the American agent collected premiums on old business, but, instead of appropriating the full commissions to which it was thus nominally entitled, retained only the percentage which it would have had under the old arrangement and deposited the rest in a special account in its name. Later, it turned over the fund to the insurance company's trustee under the New York law. The fund was seized by the Alien Property Custodian as belonging to the German firm. Two courts below having found from the evidence that the change of agency was colorable only, made to evade the ukase, and that the deposit was intended by all parties for the German enemies, *Held*, adopting that finding,

(1) That the agreement by which the commissions were set apart for the German firm was valid by the law of the United States, as it was also proven to be by the law of Germany. P. 558.

(2) That the insurance company, having consented that the German firm should have the commissions and they having been actually set apart accordingly, retained no legal interest entitling it to reclaim them from the Alien Property Custodian. P. 559.

(3) *Semble* that comity does not require that extraterritorial effect be given to the Russian ukase so as to make illegal, transactions had in the United States between the insurance company and the

New York corporation respecting their dealings with the German firm. P. 559.

(4) Assuming that the payment was forbidden by the ukase, no principle of comity would entitle the Russian company to recover it back; the rule denying relief when both parties to an illegal executed contract are *in pari delicto,* would apply. P. 561.

(5) A right to a fund in the hands of a depositary is not divested by the act of the latter in merely turning it over without consideration to a trustee holding other funds and securities for an adverse claimant. P. 562.

297 Fed. 404, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed the appellant's bill, brought under the Trading with the Enemy Act to recover money seized by the Alien Property Custodian, and held by the Treasurer of the United States, as the property of a German firm.

Mr. Albert P. Massey, for appellant.

Mr. Hartwell Cabell, with whom the *Solicitor General* was on the briefs, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appeal from a judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York, dismissing a bill in equity brought by the appellant, complainant below, under § 9 of the Trading with the Enemy Act (Act of October 6, 1917, 40 Stat. 419) to recover money seized and held by the Alien Property Custodian. 297 Fed. 404.

The appellant, a Russian corporation, in 1913 established an office in the State of New York for the conduct of an American reinsurance business in that State. In order to comply with the law of the State and to qualify it to do business there, appellant deposited with the New York Life Insurance & Trust Co., as trustee under a trust

deed, money and securities subject to the provisions of the New York Insurance Law and appointed Meinel & Wemple, Inc., a New York corporation (referred to as Meinel in this opinion) its statutory agent and attorney in fact in New York. In January, 1919, the Alien Property Custodian served upon the New York Life Insurance & Trust Co. and Meinel a demand that they pay over to him money in a specified amount held by them for the account and benefit of H. Mutzenbecher, Jr., a co-partnership of Hamburg, Germany, alien enemies not holding a license granted by the President under the Trading with the Enemy Act. The money was paid to the Alien Property Custodian pursuant to the demand and now constitutes the subject matter of this suit. The Mutzenbecher firm filed an answer making claim to the money seized as commissions earned by them under an agency contract with appellant and praying that it be decreed to be their property and be retained by the Alien Property Custodian in accordance with the provisions of the Trading with the Enemy Act.

The firm of Mutzenbecher was engaged in business as managers of a reinsurance "pool" in Hamburg, Germany, and as such managers represented a number of fire insurance companies, including the appellant, as members of the pool which was formed for the purpose of sharing and redistributing reinsurance business contributed to the pool by its various members. They were in complete control of the pool and received as compensation for their services a fixed commission based on the annual net premium upon reinsurance or retrocession contracts (that is, contracts reinsuring reinsurers) plus a stipulated percentage of the annual net profit of the total business conducted by the pool.

For a considerable period before the outbreak of the world war, Meinel acted as sub-agent for the Mutzenbechers in the negotiation of the reinsurance business of

the appellant and of several other insurance companies for whom they acted in effecting the distribution and allotment of reinsurance risks. In the ordinary course of business, Meinel, acting for the appellant, entered into treaties with companies writing direct insurance in the United States, whereby appellant undertook the reinsurance of risks insured by those companies. Premiums for this reinsurance were collected by Meinel from the companies which had thus ceded insurance to appellant and after depositing the required reserve for unearned premiums with the Trustee of appellant, pursuant to the New York statute, the balance, together with documents giving particulars of all reinsurance to be effected by the Mutzenbechers for account of appellant, was transmitted to them in Hamburg. From the premiums thus received, the Mutzenbechers paid the expenses of their business, including their own commissions amounting to 3½%, and remitted to Meinel in New York out of their own commission, certain expenses and ¾ of 1% of the premiums thus transmitted, as commissions to Meinel for doing the business in New York. This continued to be the method of doing business after the outbreak of the world war until January 1, 1915, when the remittances from Meinel to the Mutzenbecher firm ceased because of war conditions. During the calendar year 1916, until November, Meinel paid to the Mutzenbechers from premiums received 2½% commission payable to them and retained its own commissions and expenses.

In October, 1916, the Russian Government promulgated a ukase by the terms of which all Russian subjects were forbidden to enter into any agreement or commercial relations whatever with citizens of enemy countries and which proclaimed that all existing relations, by virtue of contracts, with enemy firms must be considered as at an end from the date of promulgation. Violation of the decree was punishable by imprisonment and fine. The ap-

pellant, which up to that time had continued its ordinary business relations with the Mutzenbechers, then found it necessary to terminate its relations with them, which it did, in form at least, by the appointment of Meinel, as its general agent, to effect reinsurance and to carry on the business which had previously been carried on by the Mutzenbechers at Hamburg. By the terms of this appointment Meinel was appointed general agent for the appellant, authorized to effect reinsurance for appellant's account, and to retain for itself as compensation for handling the business, commissions at the rate of 3½% of the net premiums received.

The principal question of fact presented for consideration by the courts below was whether this transfer of the general reinsurance agency from the Mutzenbechers to Meinel was made in good faith or whether it was formal only, and a mere cover under which the business was intended to be conducted by the Mutzenbechers as it had been previously conducted. On that question of fact, both the District Court and the Circuit Court of Appeals found for the Alien Property Custodian and against the appellant. That finding we adopt. The evidence was sufficient to support it and will not be discussed here, except insofar as it may be necessary to indicate what the legal relationship of Meinel to the Mutzenbechers was, so that the question of law presented here may be adequately dealt with.

No further remittances were made by Meinel to the Mutzenbechers after November 22, 1916, but it deducted from all net premiums received 3½% commission as stipulated by its agency appointment. Of the commission thus deducted it retained for itself a commission of ¾ of 1% plus its expenses and the balance was deposited in a special bank account in its name and carried on its books as a "suspense reserve account." The account remained undisturbed until July 26, 1918, when, the Alien

Property Custodian having begun an investigation of the books and records of Meinel, the fund which is the subject of this suit was then turned over by it to the New York Life Insurance & Trust Co., the trustee for appellant, and was by it later paid over to the Alien Property Custodian.

The inference drawn by the courts below from these facts and from voluminous testimony which need not be here reviewed was that the transfer of the agency from the Mutzenbechers to Meinel was merely colorable; that the commissions segregated in the suspense reserve account which were commissions from old business, that is, premiums earned under reinsurance treaties effected before the transfer of the agency, notwithstanding the formal terms of the written appointment of Meinel, were commissions to which Mutzenbecher was entitled under the contract or arrangement existing between Mutzenbecher, Meinel and appellant before the transfer of the agency and that Meinel had in fact received and set them apart as the property of the Mutzenbechers. These findings, so far as they relate to what the parties did in these somewhat complicated transactions, and the purpose and intent with which they acted, deal with questions of fact and, as they are supported by the evidence, they are controlling here.

The proposition of law which is presented, and on the basis of which we are asked to reverse the judgment below rests upon the asserted illegality of appellant's own conduct. It is argued that the effect of the Russian ukase of October 29, 1916, was to make unlawful the agency of the Mutzenbecher firm for appellant and all further relations between them; that the Mutzenbechers were accordingly not entitled to earn or receive further commissions even from "old business"; that the fund segregated in the suspense reserve account by Meinel was therefore at all times property of appellant and not subject to seizure by the Alien Property Custodian since the illegal conduct of ap-

pellant had prevented the acquisition of any rights in the fund or against the appellant by the German firm.

To sustain this proposition it is necessary for the appellant to maintain, (1) that it has retained some form of legal interest in the 3½% commission deducted by Meinel under the terms of its agency appointment of November 1916; and (2) that the Russian ukase should be given an extra-territorial effect such as to render the acts of the appellant within the United States, which were otherwise lawful and proper according to the laws of the United States, unlawful and void, and thus prevent the Mutzenbecher firm from acquiring any interest in the segregated fund.

We think appellant does not succeed in establishing either proposition. Although Meinel was the statutory agent of appellant in the State of New York and transacted there certain business for the appellant, it was also, and had been for many years before the outbreak of the war, the sub-agent of the Mutzenbechers in handling the business which was transmitted to the German firm to be distributed in the reinsurance pool. The commissions for this service were paid to Meinel by the Mutzenbechers. After the outbreak of the war it became their agent to receive and remit to them commissions for carrying on the reinsurance business for appellant. When the colorable transfer of the Mutzenbechers' agency was made to Meinel, it was accepted by Meinel only after it was authorized to do so by the Mutzenbechers. Appellant having formally authorized Meinel to deduct and retain 3½% commission for conducting the business, and Meinel having actually deducted and retained it, and the court having found that that portion of the commissions placed in the suspense account was placed there by Meinel for the benefit of the Mutzenbechers, with the knowledge and consent of the appellant, and they having formally claimed the segregated fund, we are unable to see that the appel-

lant is in any different situation with respect to this fund than it would have been if it had paid over the commissions directly to the Mutzenbechers or to their authorized agent.

At the time the agency was transferred to Meinel, the United States was at peace with Germany. The action of Meinel, an American corporation controlled by American stockholders, in taking over the German agency, did not violate any law or policy of the United States. It was not unlawful for it to stipulate that it should receive commissions for doing the business or to agree to receive them for the Mutzenbechers, and having received them, it was not unlawful for it to hold the commissions as the agent of the German firm for its account and benefit. Whatever view we take of the arrangement entered into by the appellant with Meinel, appellant can claim under it no ownership in the deducted commissions. By appellant's formal agreement with Meinel, it relinquished all claims to the commissions. By the secret understanding between appellant, Meinel and the Mutzenbechers, the segregated fund was received and held for account of the Mutzenbechers. Until the declaration of war by the United States against Germany, the Mutzenbechers in this state of facts could have maintained a suit against Meinel for an accounting and payment over of the segregated fund. *Hilton* v. *Guyot,* 159 U. S. 113; *Taylor* v. *Benham,* 5 How. 233, 274; *National Bank* v. *Insurance Co.,* 104 U. S. 54; *Kohler* v. *Board of Commissioners,* 89 Fed. 257, 260; *Pennsylvania Steel Co.* v. *N. Y. Central R. R. Co.,* 206 Fed. 663, 665; *In re Interborough Corporation,* 288 Fed. 334, 347.

In view of the legal relationship existing between Meinel and the Mutzenbechers and the legal consequences which flow from it, we find it unnecessary to speculate as to the precise meaning and effect of the Russian ukase. The Circuit Court of Appeals below rejected the conten-

tion that it should be given extra-territorial effect so as to make illegal the transactions had in New York between appellant and Meinel with respect to their dealings with the German firm. Certainly such an application of foreign law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by the expert testimony in the case to be valid according to the German law. The contention runs counter to the reasoning of such cases, as *Bank of Augusta* v. *Earle,* 13 Pet. 519, 598; *Hilton* v. *Guyot,* 159 U. S. 113; *Hervey* v. *R. I. Locomotive Works,* 93 U. S. 664; *Rose* v. *Himely,* 4 Cranch 241; *Polydore* v. *Prince* 19 Fed. Cas. No. 11257; *Dike* v. *Erie R. R.,* 45 N. Y. 113. Nor does *Canada Southern Ry. Co.* v. *Gebhardt,* 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (*Modern Woodmen of America* v. *Mixer,* 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind. It cannot be brought within the purview of the rule established in *Canada Southern Railway Co.* v. *Gebhardt* and *Modern Woodmen of America* v. *Mixer, supra.*

If, however, it be assumed that its true meaning and purpose was to control extra-territorially, Russian sub-

jects, and that it not only imposed penalties on Russian nationals for its violation, but rendered unlawful and void all contracts and commercial intercourse within our own territory, between Russian nationals and Russian enemies, we still do not find in that assumption any basis for the reversal of the judgment below. Had the obligation of appellant to pay the commissions in question remained executory, the assumption that our courts should give an extra-territorial effect to the Russian ukase and disregard the German law affecting the rights of the Mutzenbechers upon their contract with appellant to be performed in German territory, might have been of some avail to it. But as we have seen, the findings of the court below establish that payment of the commissions was made as effectually as if the payment had been by cash in hand. When Meinel set apart the fund for the Mutzenbechers nothing further remained to be done by appellant with respect to the payment. It had relinquished all claim to the fund and Meinel held it for the Mutzenbechers. When the United States declared war, the fund was one held by an American national for the benefit of an alien enemy and on passage of the Trading with the Enemy Act (October 6, 1917), it became its duty to report the fund to the Alien Property Custodian (Trading with the Enemy Act, Section 7-a, 40 Stat. 416) and to surrender it to the Custodian on demand (Section 7-c, 40 Stat. 418).

To hold that money thus situated was not subject to the seizure and retention, under the provisions of the Trading with the Enemy Act, would be going very far; but quite apart from the operation of that Act, we find no basis for the contention that the principle of comity would require us to recognize any right in appellant to recover back the money thus paid because the payment of it was forbidden by the Russian ukase. No foundation

for it in the Russian law is suggested. By our own law payments made under contracts which are illegal where the parties are *in pari delicto* may not ordinarily be recovered. The law leaves the parties where it finds them and gives no relief. *Thomas* v. *City of Richmond,* 12 Wall. 349; *Higgins* v. *McCrea,* 116 U. S. 671, 684; *White* v. *Barber,* 123 U. S. 392, 423; *Dent* v. *Ferguson,* 132 U. S. 50; *St. Louis R. R.* v. *Terre Haute R. R. Co.,* 145 U. S. 393, 407; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 294; *Barrington* v. *Stucky,* 165 Fed. 325, 330; *Levi* v. *Kansas City,* 168 Fed. 524. While there are exceptions to this rule, appellant's case does not fall within any recognized exception and the record suggests no special considerations of equity or of our own public policy which would justify an exception in this case.

We therefore reach the conclusion that the appellant was not entitled to recover the fund as against the Mutzenbechers. Such being the rights of the parties, while the fund remained in the hands of Meinel, their rights could not be altered to the prejudice either of the Mutzenbechers or that of the Government by payment over of the fund by Meinel to the trustee for appellant. The trustee was not a purchaser and could not take the fund free of the legal or equitable rights of the Mutzenbechers, *National Bank* v. *Insurance Co., supra,* although it might and did discharge itself under the provisions of the Trading with the Enemy Act by payment of the money over to the Alien Property Custodian. (Trading with the Enemy Act, § 7-e, 40 Stat. 418.)

The appellant establishes no right in the fund which is the subject of litigation; we find no error in the record.

The judgment of the Circuit Court of Appeals is

Affirmed.

MAPLE FLOORING MANUFACTURERS ASSN. ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 342. Argued December 1, 2, 1924; reargued March 3, 1925.—Decided June 1, 1925.

1. In a suit to enjoin a trade association under the Anti-Trust Act in which the Government adduced, as evidence of guilty purpose, the history of earlier combinations which this one had superseded, *held* that there was no evidence of any present agreement or purpose to produce any effect on commerce other than that which necessarily would flow from the activities of the present association, and that the only question was whether that association, as actually conducted, had a necessary tendency to cause direct and undue restraint of competition condemned by the Act. P. 577.
2. Each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record; and opinions of the Court in those cases must be read and applied in the light of their facts, with clear recognition of essential differences in that regard. P. 579.
3. Trade associations or combinations of individuals or corporations, which, as in this case, openly and fairly gather and disseminate information as to the cost of their product, the actual prices it has brought in past transactions, stocks on hand and approximate cost of transportation from the principal point of shipment to points of consumption, and meet and discuss such statistics without reaching or attempting to reach any agreement or concerted action respecting prices, production or the restraining of competition, do not thereby engage in an unlawful restraint of commerce. P. 582.
4. In a suit under the Anti-Trust Act to dissolve a trade association formed by numerous manufacturers of hard-wood flooring, the following activities were complained of: (1) Computation and distribution among the members of information as to the average cost of their products, based (a) on cost of raw material as ascertained and averaged by the association's secretary from reports of actual sales of rough lumber by members in open market, (b) on manufacturing costs ascertained through questionnaires sent the members, and (c) on percentage of waste in milling, ascertained through test runs made by selected members under direction of

the secretary; (2) compilation and distribution among them of booklets showing freight rates from a basing point to numerous points to which their products were shipped, enabling members to quote delivered prices promptly; (3) gathering by periodical reports from members of information as to the quantity and kind of flooring sold by them, dates of sales and prices received, average freight rates, commissions paid, amount and kinds of stock on hand, and of unfilled orders, monthly production and new orders booked; which information, embracing only past and closed transactions and omitting names of purchasers, current prices and many other details, was transmitted in summarized form to the members by the secretary of the association, without, however, revealing the identity of members in connection with specific information transmitted, and was given wide publicity through publication in trade journals, communication to the Department of Commerce, etc.; (4) monthly meetings at which problems of the industry were discussed, without discussion or agreement upon prices. *Held* that such activities did not constitute an unlawful restraint on commerce. *Am. Column Lumber Co.* v. *United States*, 257 U. S. 377; *United States* v. *Am. Linseed Oil Co.*, 262 U. S. 371, distinguished. P. 568.

Reversed.

APPEAL from a decree of the District Court awarding an injunction, in a suit brought by the Government under the Anti-Trust Act against a combination, in the form of a trade association, of manufacturers of hardwood flooring lumber.

Mr. Edward R. Johnston, with whom *Messrs. Jacob Newman, Conrad H. Poppenhausen, Henry L. Stern,* and *Henry Jackson Darby* were on the brief, for appellants.

Mr. J. A. Fowler, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. C. S. Thompson,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Herbert Pope filed a brief as *amicus curiae* for the National Malleable & Steel Castings Company, by special leave of Court.

MR. JUSTICE STONE delivered the opinion of the Court.

By bill in equity filed March 5, 1923, the United States asked an injunction restraining the defendants, who are appellants here, from violating § 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (c. 647, 26 Stat. 209), commonly known as the Sherman Act.

The defendants are the Maple Flooring Manufacturers Association, an unincorporated "trade association"; twenty-two corporate defendants, members of the Association, engaged in the business of selling and shipping maple, beech and birch flooring in interstate commerce, all but two of them having their principal places of business in Michigan, Minnesota or Wisconsin (one defendant being located in Illinois and one in New York); the several individual representatives of the corporate members of the Association; and George W. Keehn, Secretary of the Association. Of the corporate defendants, approximately one-half own timber lands and saw mills and are producers of the rough lumber from which they manufacture finished flooring, sold and shipped in interstate commerce. The other defendants purchase rough flooring lumber in the open market and manufacture it into finished flooring which is sold and shipped in interstate commerce. In 1922 there were in the States of Illinois, Michigan, Minnesota and Wisconsin seventeen non-member manufacturers of maple, beech and birch flooring and there were fifty-eight non-member manufacturers of maple, beech and birch flooring in the United States who reported to the Government. In that year thirty-eight non-member manufacturers reported a manufacturing capacity of 238,610,000 feet of flooring of the types mentioned and during the same year the manufacturing capacity of the defendants was 158,400,000 feet. Estimates

submitted in behalf of the Government indicate that in the year 1922 the defendants produced 70% of the total production of these types of flooring, the percentage having been gradually diminished during the five years preceding, the average for the five years being 74.2%. It is also in evidence that aside from non-member manufacturers who reported to the Government, there are numerous other non-member manufacturers of such flooring in the United States and Canada. The defendants own only a small proportion of the total stand, in the United States, of maple, beech and birch timber from which the various types of flooring produced and sold by defendants are manufactured.

In March, 1922, the corporate defendants organized the defendant Maple Flooring Manufacturers Association, but for many years prior to that time and certainly since 1913 a substantial number of the corporate defendants have participated actively in maintaining numerous successive trade associations of the same name, which were predecessors of the present association. The oral testimony and documentary evidence have covered a wide range and have reached a great volume which it will be impossible, within the limits of an opinion, to review in detail. The defendants have engaged in many activities to which no exception is taken by the Government and which are admittedly beneficial to the industry and to consumers; such as co-operative advertising and the standardization and improvement of the product. The activities, however, of the present Association of which the Government complains may be summarized as follows:

(1) The computation and distribution among the members of the association of the average cost to association members of all dimensions and grades of flooring.

(2) The compilation and distribution among members of a booklet showing freight rates on flooring from Cadil-

lac, Michigan, to between five and six thousand points of shipment in the United States.

(3) The gathering of statistics which at frequent intervals are supplied by each member of the Association to the Secretary of the Association giving complete information as to the quantity and kind of flooring sold and prices received by the reporting members, and the amount of stock on hand, which information is summarized by the Secretary and transmitted to members without, however, revealing the identity of the members in connection with any specific information thus transmitted.

(4) Meetings at which the representatives of members congregate and discuss the industry and exchange views as to its problems.

Before considering these phases of the activities of the Association, it should be pointed out that it is neither alleged nor proved that there was any agreement among the members of the Association either affecting production, fixing prices or for price maintenance. Both by the articles of association and in actual practice, members have been left free to sell their product at any price they choose and to conduct their business as they please. Although the bill alleges that the activities of the defendants hereinbefore referred to resulted in the maintenance of practical uniformity of net delivered prices as between the several corporate defendants, the evidence fails to establish such uniformity and it was not seriously urged before this Court that any substantial uniformity in price had in fact resulted from the activities of the Association, although it was conceded by defendants that the dissemination of information as to cost of the product and as to production and prices would tend to bring about uniformity in prices through the operation of economic law. Nor was there any direct proof that the activities of the Association had affected prices adversely to consumers. On the contrary, the defendants offered a great volume of evidence tending to show that the trend of

prices of the product of the defendants corresponded to the law of supply and demand and that it evidenced no abnormality when compared with the price of commodities generally. There is undisputed evidence that the prices of members were fair and reasonable and that they were usually lower than the prices of non-members and there is no claim that defendants were guilty of unfair or arbitrary trade practices.

The contention of the Government is that there is a combination among the defendants, which is admitted; that the effect of the activities of the defendants carried on under the plan of the Association must necessarily be to bring about a concerted effort on the part of members of the Association to maintain prices at levels having a close relation to the average cost of flooring reported to members and that consequently there is a necessary and inevitable restraint of interstate commerce and that therefore the plan of the Association itself is a violation of § 1 of the Sherman Act which should be enjoined regardless of its actual operation and effect so far as price maintenance is concerned. The case must turn therefore, on the effect of the activity of the defendants in the gathering and dissemination of information as to the cost of flooring, since, without that, the other activities complained of could have no material bearing on price levels in the industry; and it was to this phase of the case that the oral argument was mainly directed.

Having outlined the substantial issues in the case, it will now be convenient to examine more in detail the several activities of the defendants of which the Government complains.

Computation and distribution, among the members, of information as to the average cost of their product.

There are three principal elements which enter into the computation of the cost of finished flooring. They are

the cost of raw material, manufacturing cost and the percentage of waste in converting rough lumber into flooring. The information as to the cost of rough lumber was procured by the Secretary from reports of actual sales of lumber by members in the open market. From five to ten ascertained sales were taken as standard and the average was taken as the estimated cost of raw material. Manufacturing costs were ascertained by questionaires sent out to members by which members were requested to give information as to labor costs, cost of warehousing, insurance and taxes, interest at 6% on the value of the plant, selling expense, including commissions and cost of advertising, and depreciation of plant. From the total thus ascertained there was deducted the net profit from wood and other by-products. The net total cost thus ascertained of all members reporting was then averaged.

The percentage of waste in converting the rough lumber into flooring was ascertained by test runs made by selected members of the Association under the direction of the Secretary of the Association, in the course of which a given amount of rough lumber was converted into flooring of different sizes and the actual waste in the process ascertained and stated in terms of percentage. By combining the three elements of cost thus arrived at, the total cost per thousand feet of the aggregate of the different types and grades of flooring produced from a given amount of rough lumber was estimated. To this cost there was at one time added an estimated 5% for contingencies, which practice, however, was discontinued by resolution of the Association of July 19, 1923. For the element of manufacturing and marketing cost, the first of these estimates prepared in the manner described was based upon an average of such cost for the first half of 1921. Other successive estimates were prepared on a like basis during the first, third and fourth quarter of the year 1922.

In order to determine the cost of a given type or grade of flooring, it was necessary to distribute the total cost of the aggregate of the different types and grades of finished flooring produced from a given amount of rough lumber among the several types and grades thus produced. This distribution was made by the officials of the Association and the estimated cost thus determined was tabulated and distributed among the members of the Association. There is no substantial claim made on the part of the Government that the preparation of these estimates of cost was not made with all practicable accuracy or that they were in any respect not what they purported to be, an estimate of the actual cost of commercial grades of finished flooring fairly ascertained from the actual experience of members of the Association, except that the point is made by the Government that the distribution of cost among the several types and grades of finished flooring produced from a given amount of rough lumber was necessarily arbitrary and that it might be or become a cover for price fixing. Suffice it to say that neither the Government nor the defendants seem to have found it necessary to prove upon what principle of cost accounting this distribution of cost was made and there are no data from which any inference can be drawn as to whether or not it conformed to accepted practices of cost accounting applied to the manufacture of a diversified product from a single type of raw material.

The compilation and distribution among members of information as to freight rates.

Through the agency of the Secretary of the Association a booklet was compiled and distributed to members of the Association showing freight rates from Cadillac, Michigan, to numerous points throughout the United States to which the finished flooring is shipped by members of the

Association. It appears from the evidence to have been the usual practice in the maple flooring trade, to quote flooring at a delivered price and that purchasers of flooring usually will not buy on any other basis. The evidence, however, is undisputed that the defendants quote and sell on an f. o. b. mill basis whenever a purchaser so requests. It also appears that the mills of most of the members of the Association are located in small towns in Michigan and Wisconsin and that the average freight rates from these principal producing points in Michigan and Wisconsin to the principal centers of consumption in the United States are approximately the same as the freight rate from Cadillac, Michigan, to the same centers of consumption. There is abundant evidence that there were delays in securing quotations of freight rates from the local agents of carriers in towns in which the factories of defendants are located, which seriously interfered with prompt quotations of delivered prices to customers; that the actual aggregate difference between local freight rates for most of defendants' mills and the rate appearing in defendant's freight-rate book based on rates at Cadillac, Michigan, were so small as to be only nominal, and that the freight-rate book served a useful and legitimate purpose in enabling members to quote promptly a delivered price on their product by adding to their mill price a previously calculated freight rate which approximated closely to the actual rate from their own mill towns.

The Government bases its criticism of the use of the freight-rate book upon the fact that antecedent associations, maintained by defendants, incorporated in the freight-rate book a delivered price which was made up by adding the calculated freight rate from Cadillac, Michigan, to a minimum price under the so-called "minimum price plan" of previous associations, whereby the price was fixed at cost plus ten per cent. of profit. It is conceded

that the present Association does not include a delivered price in the freight-rate book, but it is urged by the Government that the circulation of the tables of estimated cost of flooring, together with a freight-rate book, enables members of the Association to fix a delivered price by adding to the estimated cost circulated among members, the calculated freight rate published in the freight-rate book, and that the freight-rate book used in conjunction with the published material as to estimated cost is merely a device whereby the defendants have continued the so-called minimum price plan formerly maintained by predecessor associations, which was a plan whereby the members co-operated in the maintenance of a fixed minimum price. Defendants maintain that the minimum price plan was never actually carried out by any predecessor association and that it was formally abandoned in February or March, 1920, after the failure to secure the approval of the plan by the Federal Trade Commission, and was never revived or continued.

It cannot, we think, be questioned that data as to the average cost of flooring circulated among the members of the Association when combined with a calculated freight rate which is either exactly or approximately the freight rate from the point of shipment, plus an arbitrary percentage of profit, could be made the basis for fixing prices or for an agreement for price maintenance, which, if found to exist, would under the decisions of this Court, constitute a violation of the Sherman Act. But, as we have already said, the record is barren of evidence that the published list of costs and the freight-rate book have been so used by the present Association. Consequently, the question which this Court must decide is whether the use of this material by members of the Association will necessarily have that effect so as to produce that unreasonable restraint of interstate commerce which is condemned by the Sherman Act.

The gathering and distributing among members of trade statistics.

It is contended by the Government that an analysis of the reporting system adopted by the defendants shows that there is no information withheld by one member from another, and that every member is perfectly familiar not only with the summaries which show the exact market condition generally, but also with the exact condition of the business of each of his fellow members. An examination of the record discloses that this is not an accurate statement of the statistical information distributed among members of the Association, certainly not within any recent period of the history of the successive associations. At the time of the filing of the bill, members reported weekly to the Secretary of the Association on forms showing dates of sales made by the reporting member, the quantity, the thickness and face, the grade, the kind of wood, the delivery, the prices at which sold, the average freight rate to destination and the rate of commission paid, if any. Members also reported monthly the amount of flooring on hand of each dimension and grade and the amount of unfilled orders. Monthly reports were also required showing the amount of production for each period and the new orders booked for each variety of flooring. The Association promptly reported back to the members statistics compiled from the reports of members including the identifying numbers of the mills making the reports, and information as to quantities, grades, prices, freight rates, etc., with respect to each sale. The names of purchasers were not reported and from and after July 19, 1923, the identifying number of the mill making the report was omitted. All reports of sales and prices dealt exclusively with past and closed transactions. The statistics gathered by the defendant Association are given wide publicity. They are published in trade journals

which are read by from 90 to 95% of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business. They are forwarded to the Federal Reserve and other banks and are available to anyone at any time desiring to use them. It is to be noted that the statistics gathered and disseminated do not include current price quotations; information as to employment conditions; geographical distribution of shipments; the names of customers or distribution by classes of purchasers; the details with respect to new orders booked, such as names of customers, geographical origin of orders; or details with respect to unfilled orders, such as names of customers, their geographical location; the names of members having surplus stocks on hand; the amount of rough lumber on hand; or information as to cancellation of orders. Nor do they differ in any essential respect from trade or business statistics which are freely gathered and publicly disseminated in numerous branches of industry producing a standardized product such as grain, cotton, coal oil, and involving interstate commerce, whose statistics disclose volume and material elements affecting costs of production, sales price and stock on hand.

Association Meetings.

The Articles of the defendant Association provide for regular meetings for the transaction of business on the third Wednesday of April, July and October of each year, and that special meetings may be called by the President or a majority of the Board of Trustees. During the year in which the bill of complaint was filed meetings appear to have been held monthly. Minutes of meetings were kept, although it is not contended that they constituted a complete record of the proceedings. Trade conditions generally, as reflected by the statistical information dis-

seminated among members, were discussed; the market prices of rough maple flooring were also discussed, as were also manufacturing and market conditions. Those members who did not produce rough flooring lumber improved the occasion of the monthly meetings to secure purchases of this commodity from other members. The testimony is explicit and not denied that, following the decision in *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, (June, 1923) there was no discussion of prices in meetings. There was no occasion to discuss past prices, as those were fully detailed in the statistical reports, and the Association was advised by counsel that future prices were not a proper subject of discussion. It was admitted by several witnesses, however, that upon occasion the trend of prices and future prices became the subject of discussion outside the meeting among individual representatives of the defendants attending the meeting. The Government, however, does not charge, nor is it contended, that there was any understanding or agreement, either express or implied, at the meetings or elsewhere, with respect to prices.

Upon this state of the record, the District Court, from whose decision this appeal was taken, held that the plan or system operated by the defendants had a direct and necessary tendency to destroy competition; that the methods employed by them had at all times a controlling influence to impeding the economic laws of supply and demand, and tending to increase prices, and to stifle competition; that the plan of the Association was therefore inherently illegal; that in consequence the actual results flowing from such a plan and the execution of it are of secondary importance. The court accordingly decreed the dissolution of the defendants' association and enjoined them from engaging in activities complained of by the Government. In arriving at this result it was admitted that it was impossible to measure, either accurately or

even approximately, the effect of the activities of the defendants upon prices, production and competition in the flooring industry, for the reason that there could be, in the nature of things, no satisfactory standards of comparison. The court found no agreement to fix prices and that in fact lower prices have usually been quoted by members than by non-members of the Association. In reaching its conclusion, the court relied principally upon the necessary tendency or effect of the plan actually in operation and upon the past history of the Association and its predecessors as indicating a probable purpose on the part of the members of the Association to use the plan as a medium for effecting actual and undue restraint on interstate commerce, and it is urged here that the history of the successive Associations organized by the members of the defendant Association, or a majority of them, establishes a systematic purpose on the part of the corporate defendants to restrain interstate commerce.

It is pointed out that the Articles of the Association of January 1, 1913, embodied the so-called "allotment plan," which provided for an allotted percentage of the aggregate shipments of all members within a given period, to each member, with a provision for payment of a bonus or allowance to each member which did not make its full allotment or percentage of shipments. This plan was abandoned in March, 1920. On July 1, 1916, the Articles of Association of that date adopted a minimum price plan which it is claimed continued in effect until about January 1, 1921. This plan contemplated the establishment of a minimum price of maple, beech and birch flooring by members of the Association, such prices to consist of the average cost and expense of manufacturing and selling the product, plus an average profit of ten per cent. The plan provided drastic penalties for the sale of flooring at less than the minimum price so established. It is also charged that on January, 1921, the defendants, by agree-

ment, established a minimum price basis for the sale of flooring for the ensuing year. Under this plan the average net profit was reduced from ten to five per cent. and penalties for non-compliance with the minimum price scale were abolished.

It is conceded, however, that each of these several plans was abandoned and that the present Association, both by the terms of its Articles of Association and in actual practice, has confined itself to the activities which have already been described in some detail.

We think it might be urged, on the basis of this record, that the defendants, by their course of conduct, instead of evidencing the purpose of persistent violators of law, had steadily indicated a purpose to keep within the boundaries of legality as rapidly as those boundaries were marked out by the decisions of courts interpreting the Sherman Act. Whether, however, their general purpose was to become law-abiding members of the community or law breakers, it is not, we think, very material unless the court either can infer from this course of conduct a specific and continuing purpose or agreement or understanding on their part to do acts tending to effect an actual restraint of commerce (*United States* v. *United States Steel Corp'n,* 251 U. S. 417), or unless, on the other hand, it is established that the combination entered into by the defendants in the organization of the defendant Association, and its activities as now carried on, must necessarily result in such restraint. As already indicated, the record is barren of evidence tending to establish that there is any agreement or purpose or intention on the part of defendants to produce any effect upon commerce other than which would necessarily flow from the activities of the present Association, and in our view the Government must stand or fall upon its ability to bring the facts of the present case within the rule as laid down in *American Column Co.*

v. *United States,* 257 U. S. 377, where it was said, at p. 400:

"It has been repeatedly held by this Court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the Act and is unlawful";

and within the rule laid down by the Court in *United States* v. *American Linseed Oil Company,* 262 U. S. 371, at p. 390:

"In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection."

It should be noted that the bill of complaint neither charges nor does the Government urge, that there was any purpose on the part of the defendants to monopolize commerce in maple, beech and birch flooring. It is not contended that there was the compulsion of any agreement fixing prices, restraining production or competition or otherwise restraining interstate commerce. In our view, therefore, the sole question presented by this record for our consideration is whether the combination of the defendants in their existing Association, as actually conducted by them, has a *necessary* tendency to cause direct and undue restraint of competition in commerce falling within the condemnation of the Act. In urging that such is the necessary effect, the Government relies mainly upon the decisions of this Court in *Eastern States Retail Lumber Dealers Association* v. *United States,* 234 U. S. 600; *American Column & Lumber Co.* v. *United States, supra,* and *United States* v. *American Linseed Oil Company, supra.*

It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied.

In *Eastern States Retail Lumber Dealers Association* v. *United States, supra,* the defendant members of the Association had entered into a combination and agreement whereby members were required to report to the Association the names of wholesale dealers in lumber who sold their product directly to consumers. The names of the offending wholesalers were placed upon a "black list" which was circulated among the members of the Association. The name of a blacklisted wholesaler could be removed from the list only on application to the secretary of the Association and on assurance that the offending wholesaler would no longer sell in competition with retailers. It was conceded by the defendants, and the court below found, that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns; that it therefore, necessarily, tended to restrain wholesalers from selling to the retail trade, which in itself was an undue and unreasonable restraint of commerce. Moreover, the court said, at p. 612:

"This record abounds in instances where the offending dealer was thus reported, the hoped for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired."

There was thus presented a case in which the court could not only see that the combination would necessarily re-

sult in a restraint on commerce which was unreasonable, but where in fact such restraints had actually been effected by the concerted action of the defendants.

In American Column & Lumber Co. v. *United States, supra,* the defendant association adopted a plan for the gathering from its members daily and disseminating among them weekly, reports of all sales and shipments actually made, giving prices, names and addresses of purchasers, the kind, grade and quantity of commodity sold and shipped. Its plan provided for a monthly production report giving production of members during the previous month; a monthly stock report showing stock on hand on the first day of the month; current price lists, followed by prompt information as to new price quotations as made. Monthly meetings were held at which the extensive interchange of reports was supplemented by further exchange of information as to production, at which active and concerted efforts were made to suppress competition by the restriction of production. The secretary of the Association, in communications to members, actively urged curtailment of production and increase of prices. The record disclosed a systematic effort, participated in by the members of the Association and led and directed by the secretary of the Association, to cut down production and increase prices. The court not only held that this concerted effort was in itself unlawful, but that it resulted in an actual excessive increase of price to which the court found the "united action of this large and influential membership of dealers contributed greatly." The opinion of the court in that case rests squarely on the ground that there was a combination on the part of the members to secure concerted action in curtailment of production and increase of price, which actually resulted in a restraint of commerce, producing increase of price.

In *United States* v. *American Linseed Oil Co., supra,* defendants entered into an agreement, with provisions

for financial forfeitures in event of its violation, for the organization and maintenance of an exchange or bureau whose function it was to gather and distribute information among the members, as to all price lists covering the product of members. Members agreed, under heavy penalties for violation, to furnish to the Bureau a "schedule of prices and terms and adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau to members." Members were required by the agreement to report by telegraph all variations of prices; the names of prospective buyers; the point of shipment; the exact prices, terms and discounts; whether sales were made to jobber, or dealer or consumer; in what quantity; and to report also by telegraph all orders received; to report daily all carload sales of product, giving full details; all such information being treated as confidential and concealed from the buyers. All information received was made available to members through the statistical surveys of the Bureau. It was provided that any subscriber who had offered his product to a prospective buyer who did not purchase, should have the right to advise the Bureau of the unsuccessful offer and to request the Bureau to "bulletin" all its subscribers, asking specific information regarding any quotations for sale to such prospective buyer, and to make to subscribers a compilation report of the information secured by such "bulletin." Members were required to give the desired information. Each subscriber was required to furnish the Bureau, upon request, information pertaining to any buyer of the product and might request the Bureau to secure like information from all other subscribers "whenever it shall have an order or account with or inquiry from the buyer". The plan as organized, was actively carried out by the defendants and the court held that the plan as operated by the defendants was a violation of the Sherman Act in that "its necessary

tendency was to suppress competition in interstate commerce." It was held that the agreement for price maintenance accompanied by free exchange of information between competitors as to current prices of the product offered for sale; full details as to purchasers, actual and prospective; and the exchange of information as to buyers and those to whom offerings were made by sellers and of the terms of such offerings, could necessarily have only one purpose and effect, namely to restrain competition among sellers. The court said, at p. 389:

"If, looking at the entire contract by which they are bound together, in the light of what has been done under it the Court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed."

It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from over-production. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.

It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with

respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.[1] General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however

[1] See a suggestive analysis of the Competitive System by various Economists collected and commented on in Marshall's Readings on Industrial Society, 294, 419, 479, 498, 935. See Hobson The Evolution of Modern Capitalism, 403, 5; Elementary Principles of Economics, Irving Fisher, 427, et seq.

gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce. They would not be any the more so merely because they became stockholders in a corporation or joint owners of a trade journal, engaged in the business of compiling and publishing such reports.

We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses; nor do we think that the proper application of the principles of decision of *Eastern States Retail Lumber Association* v. *United States* or *American Column & Lumber Co.* v. *United States* or *United States* v. *American Linseed Oil Company* leads to any such result. The court held that the defendants in those cases were engaged in conspiracies against interstate trade and commerce because it was found that the character of the information which had been gathered and the use which was made of it led irresistibly to the conclusion that they had resulted, or would necessarily result, in a concerted effort of the defendants to curtail production or raise

prices of commodities shipped in interstate commerce. The unlawfulness of the combination arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices.

Viewed in this light, can it be said in the present case, that the character of the information gathered by the defendants, or the use which is being made of it, leads to any necessary inference that the defendants either have made or will make any different or other use of it than would normally be made if like statistics were published in a trade journal or were published by the Department of Commerce, to which all the gathered statistics are made available? The cost of production, prompt information as to the cost of transportation, are legitimate subjects of enquiry and knowledge in any industry. So likewise is the production of the commodity in that industry, the aggregate surplus stock, and the prices at which the commodity has actually been sold in the usual course of business.

We realize that such information, gathered and disseminated among the members of a trade or business, may be the basis of agreement or concerted action to lessen production arbitrarily or to raise prices beyond the levels of production and price which would prevail if no such agreement or concerted action ensued and those engaged in commerce were left free to base individual initiative on full information of the essential elements of their business. Such concerted action constitutes a restraint of commerce and is illegal and may be enjoined, as may any other combination or activity necessarily resulting in such concerted action as was the subject of consideration in *American Column & Lumber Co.* v. *United States, supra* and *United*

States v. *American Linseed Oil Co., supra.* But in the absence of proof of such agreement or concerted action having been actually reached or actually attempted, under the present plan of operation of defendants we can find no basis in the gathering and dissemination of such information by them or in their activities under their present organization for the inference that such concerted action will necessarily result within the rule laid down in those cases.

We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

The decree of the District Court is reversed.

MR. CHIEF JUSTICE TAFT and MR. JUSTICE SANFORD dissent from the opinions of the majority of the Court in these two cases [1] on the ground that in their judgment the evidence in each case brings it substantially within the rules stated in the *American Column Co.* and *American Linseed Oil Co. Cases,* the authority of which, as they understand, is not questioned in the opinions of the majority of the Court.

[1] The present case and the one next following.

The separate opinion of MR. JUSTICE McREYNOLDS.

These causes[1] disclose carefully developed plans to cut down normal competition in interstate trade and commerce. Long impelled by this purpose, appellants have adopted various expedients through which they evidently hoped to defeat the policy of the law without subjecting themselves to punishment.

They are parties to definite and unusual combinations and agreements, whereby each is obligated to reveal to confederates the intimate details of his business and is restricted in his freedom of action. It seems to me that ordinary knowledge of human nature and of the impelling force of greed ought to permit no serious doubt concerning the ultimate outcome of the arrangements. We may confidently expect the destruction of that kind of competition long relied upon by the public for establishment of fair prices, and to preserve which the Anti-trust Act was passed.

United States v. *American Linseed Oil Co.*, 262 U. S. 371, states the doctrine which I think should be rigorously applied. Pious protestations and smug preambles but intensify distrust when men are found busy with schemes to enrich themselves through circumventions. And the Government ought not to be required supinely to await the final destruction of competitive conditions before demanding relief through the courts. The statute supplies means for prevention. Artful gestures should not hinder their application.

I think the courts below reached right conclusions and their decrees should be affirmed.

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[1] The present case and the one next following.

CEMENT MANUFACTURERS PROTECTIVE ASSOCIATION ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 551. Argued March 3, 5, 1925.—Decided June 1, 1925.

1. Dissemination of information enabling sellers of goods under contracts for future delivery individually to prevent purchasers from fraudulently procuring deliveries on the pretense that the sellers are obligated by their contracts to make them, is not an unlawful restraint of trade, even though the information be gathered by and disseminated among the sellers themselves through coöperation. P. 603.
2. Coöperation of manufacturers in gathering and exchanging (1) information concerning production of cement and the prices for which it was sold by them in actual, closed "specific job" contracts constituting but a part of their business, and (2) information of transportation costs from chief points of production, *held* not an unlawful restraint on commerce, even assuming that the result may tend to bring about uniformity of price, through the operation of economic law. P. 604.
3. In this case the Government did not rely upon any agreement or understanding for price maintenance; and the record fails to establish, either directly of by inference, any concerted action other than that involved in the gathering and dissemination of information, respecting sale and distribution, which in itself the Court finds not unlawful; nor does the evidence show any effect on price and production except such as would naturally flow from the dissemination of such information in the trade and its natural influence on individual action. P. 606.
4. In a suit under the Anti-Trust Act to dissolve a trade association formed by numerous manufacturers of Portland cement, it appeared: (1) That, following trade practice, each manufacturer disposed of part of its product through "specific job contracts", i. e., contracts in effect obligating the manufacturer to deliver in the future to the purchaser at a maximum price named, payable on delivery, the cement required to complete a specified piece of construction work, but allowing the purchaser the advantage of any decline, before delivery, in market price, and not obligating him in any event to take the cement contracted for; (2) that to pre-

vent contractors from obtaining more cement than they were entitled to under such contracts by the practice of entering into several such contracts with several manufacturers for the same specific job, the details of such contracts were reported by the members to the association, agents of the latter visited the jobs, and the fullest information respecting the contracts and the use of cement shipped under them was reported to the members by the secretary; and there were many cancellations of deliveries under such contracts on the ground that purchasers were not entitled to delivery by the terms of their agreements; (3) that the association compiled and distributed to its members books listing freight rates from established basing points to many cities and towns, enabling the manufacturer to calculate a delivery price on the basis of its own mill price (determined by itself) to places nearest in point of freight rate to its own mill, and also to determine at once the freight differential it must offset in its mill price in order to compete with other manufacturers serving any other given territory; (4) that members of the association rendered monthly detailed reports concerning delinquent accounts of their customers; (5) and reports of production, shipments and stock on hand, which, being compiled and distributed, informed each member fully of the available supply of cement and by whom it was held; (6) that, by universal practice of the trade, the price of bags in which cement was shipped was included in the mill base price; and that quarterly reports were made to the association showing the total number of bags returned to each member by customers during the preceding quarter and the percentage found unfit for use; but no information was reported concerning the charge and allowance for bags returned, the number received from any particular customer, or the portion found unfit for use; (7) that periodical meetings were held at which minor subjects, such as return of bags, bag reports, and trade acceptances, were discussed, but not current or future prices, or production or market conditions; which meetings were not proved to have resulted in any agreement or in any uniformity of trade practice. *Held* that a purpose to control production and price of cement could not be inferred from such activities, and they were not in themselves unlawful restraints of commerce prohibited by the Anti-Trust Act. P. 592.

Reversed.

APPEAL from a decree of the District Court in a suit brought by the Government under the Anti-Trust Act,

enjoining the continuance of a combination of various cement manufacturers, in the form of a trade association.

Mr. John W. Davis, with whom *Messrs. George T. Buckingham* and *Archibald Cox* were on the brief, for appellants.

Mr. J. A. Fowler, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. Roger Shale,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal from a final decree of the District Court for the Southern District of New York granting a perpetual injunction in a proceeding brought by the United States under § 4, Chapter 647, of the Act of July 2, 1920, 26 Stat. 209, commonly known as the Sherman Act. Defendants are the Cement Manufacturers Protective Association, an unincorporated association, four individuals, the officers of the Association, and nineteen corporations, members of the Association, engaged in manufacturing and shipping Portland cement in interstate commerce, in Pennsylvania, New Jersey, New York, Maryland and Virginia. The petition, which was filed on the 30th day of June, 1921, alleges restraint of interstate commerce in violation of § 1 of the Act. The complaint prays that the Cement Manufacturers Protective Association be adjudged a violation of § 1 and enjoined accordingly. After final hearing, the District Court entered its decree enjoining the continuance of the Cement Manufacturers Protective Association and enjoined it and the several defendants from engaging in the activities of which the Government complains and of which a summary account will presently be given.

The Association was organized in January, 1916. Its purposes, as described by the constitution, were the "col-

lection and dissemination of such accurate information as may serve to protect each manufacturer against misrepresentation, deception and imposition, and enable him to conduct his business exactly as he pleases in every respect, and particularly free from misdirection by false or insufficient information concerning the following matters, to wit:

(a) Information concerning credits;

(b) Information concerning contracts which have been made for the delivery of cement sufficiently complete to enable the manufacturer to protect himself against spurious contracts and like transactions induced by misrepresentations;

(c) Information concerning freight rates on cement;

(d) Statistical information as to production; stocks of cement and clinker on hand, and shipments."

The constitution also provides that "membership in the Association shall be recognized as implying that the member is absolutely free to conduct his business exactly as he pleases in every respect and particular."

Cement is a thoroughly standardized product. It is manufactured from limestone and shale which are crushed to extreme fineness, then subjected to high temperatures, which process produces a fused mass which when cooled is known as clinker. The clinker is then ground into the finished product which is then ready for transportation and use. Clinker is not subject to deterioration, but the ground clinker or cement deteriorates rapidly on exposure to moisture and cannot be kept in storage except for a limited period of time. The defendant corporations are manufacturers of this product, which is shipped in interstate commerce principally within the areas of the several States in which the several defendants are located, and they are competitors in the business of shipping the product in interstate commerce. From 60% to 65% of the total product of the several corporate defendants is sold

to the general trade for immediate use. Of this 60% to 65% approximately two-thirds is sold to dealers who are allowed a differential from the sales price to the retail trade.

The activities of defendants on which the Government bases its case for an injunction may summarily be stated as follows: The Government charges that the defendants, through the activities of the Association, control prices and production of cement within the territorial area served by the several defendants in the following manner:

(1) By the use of "specific job contracts" for future delivery of cement, accompanied by a system of reports and trade espionage having as its objective the restriction of deliveries of cement under those contracts.

(2) By compiling and distributing, among the members, freight-rate books which give the rate of freight from arbitrary basing points to numerous points of delivery within the territorial area served by the several defendants;

(3) By exchange of information concerning credits;

(4) By activities of the Association at its meetings.

The Government asserts that uniformity of prices and limitation of production are necessary results of these activities of the defendants. It does not, however, charge any agreement or understanding between the defendants placing limitations on either prices or production. The evidence does not establish that prices were excessive or unreasonable, and the District Court found "as compared with the rise of prices of other basic commodities, it is possible to say that the quotations of cement advanced less than others." The court also found that competition had not been destroyed by the Association and that upon many occasions the defendants were active in endeavoring to take business from companies associated with them. The court, however, held that the activities of the defendants in connection with specific job contracts tended to

limit the amount of cement distributed to the trade under those contracts; that the exchange of information complained of generally tended to limit production; that the dissemination of this information, especially that contained in the freight-rate book, tended to produce uniformity in price, and that there was accordingly a restraint of commerce within the principles laid down in *American Column & Lumber Co.* v. *United States,* 257 U. S. 393; *United States* v. *American Linseed Oil Company,* 262 U. S. 371.

It is conceded, and the court below found, that before the organization of the present association there was substantial uniformity of trade practices in the cement trade, so far as is pertinent to the present discussion, in the following respects:

(1) The sale of cement by specific job contracts for future delivery;

(2) The selling of cement, f. o. b. delivery;

(3) Using freight basing points in the quotation of prices;

(4) Including in all quotations for sale of cement, a freight rate from a basing point to the place of delivery;

(5) Charging purchasers of cement for bags in which the product is shipped and allowing credit for bags returned to the manufacturers in good condition.

Since there is no exchange of information among the defendants with respect to contracts for the sale of cement for immediate delivery, which constitutes more than 60% of the business, the Government's contention before this Court centered upon the use of the specific job contract by defendants and their activities in connection with such contracts, since without the use of the specific job contract the other activities complained of could have no substantial bearing on restraint of competition with respect either to prices or production. It will therefore be necessary to

consider more at length the activities of the defendants in connection with specific job contracts and incidentally their other activities as related to sales of cement under specific job contracts and the information exchanged with respect to such contracts.

Specific job contracts.

The specific job contract and the practices of the trade with respect to making deliveries in performance of those contracts were customary in the trade long before any of the collective activities complained of in this case. We do not understand the Government to contend that the use of specific job contracts by defendants, or that their use generally by the trade, is the result of any agreement or understanding, or in itself constitutes any violation of the Sherman Law. It is contended that the violation arises rather from the co-operation among the several defendants in acquiring and distributing information with reference to specific job contracts and the effect of the dissemination of that information on the trade, to which reference will now be made.

The specific job contract is a form of contract in common use by manufacturers of cement whereby cement is sold for future delivery for use in a specific piece of construction which is described in the contract. As was stated in the opinion of the court below, they are contracts "whereby a manufacturer is to deliver in the future, cement to be used in a specific piece of work, such as a particular building or road, and the obligation is that the manufacturer shall furnish and the contractor shall take only such cement as is required for or used for the specific purpose." These contracts have, by universal practice, been treated by cement manufacturers as, in effect, free options customarily made and acted upon on the understanding that the purchaser is to pay nothing until after

the delivery of the cement to him; that he is not obligated in any event to take the cement contracted for unless he chooses to; that he is not held to the price named in the contract in the event of a decline in the market price; whereas the manufacturer may be held to the contract price if the market advances and may be held for the delivery of the full amount of cement required for the completion of the particular piece of construction described in the contract. The practical effect and operation of the specific job contract therefore is to enable contractors who are bidding upon construction work to secure a call or option for the cement required for the completion of that particular job at a price which may not be increased, but may be reduced if the market declines. It enables contractors to bid for future construction work with the assurance that the requisite cement will be available at a definitely ascertained maximum price.

In view of the option features of the contract referred to, the contractor is involved in no business risk if he enter into several specific job contracts with several manufacturers for the delivery of cement for a single specific job. The manufacturer, however, is under no moral or legal obligation to supply cement except such as is required for the specific job. If, therefore, the contractor takes advantage of his position and of the peculiar form of the specific job contract, as modified by the custom of the trade, to secure deliveries from each of several manufacturers of the full amount of cement required for the particular job, he in effect secures the future delivery of cement not required for the particular job, which he is not entitled to receive, which the manufacturer is under no legal or moral obligation to deliver and which presumably he would not deliver if he had information that it was not to be used in accordance with his contract. The activities of the defendants complained of are directed toward securing this information and communicating it

to members and thus placing them in a position to prevent contractors from securing future deliveries of cement which they are not entitled to receive under their specific job contracts, and which experience shows they endeavor to procure especially in a rising market.

Members are required to make to the secretary of the Association prompt reports of all specific job contracts, describing in detail the contract and giving the name and address of the purchaser; the amount of cement required, the price and delivery point; also the date of expiration of the contract. They are also required to make detailed reports of all changes in the contract, including increases in the amount of cement to be delivered and cancellations. The Association also employs "checkers" whose business it is, by actual inspection and inquiry, to ascertain, so far as possible, the amount of cement required for specific jobs referred to in specific job contracts, and whether cement shipped under specific job contracts is actually used or required for use under such contracts. Without entering into any detailed discussion of this phase of the activity of defendants, we accept fully the Government's contention that the defendants regularly take all practicable steps to ascertain whether cement contracted for under the specific job type of contract was actually being used for the job described in the contract, and that the fullest information with respect to such contracts and the use of cement shipped under said contracts is reported to the members of the Association through the mediation of the secretary.

The Government does not contend that the activities of the Association with respect to specific job contracts diminished the number of such contracts, or that they diminished in any way the obligations of members of the Association upon such contracts. There is, however, abundant evidence to show that there were actual cancellations of deliveries on the ground that contractors were

not entitled, under the terms of their contracts, to receive such deliveries. In 1920, of 1,392 contracts investigated and found to be "padded" to the extent of more than 3,500,000 barrels of cement, 978 were partially cancelled to the extent of 2,014,653 barrels.

The Association freight-rate book.

The custom in the cement trade of selling cement at a delivered price which includes the mill price, the price of bags and freight charges, was an established trade practice before the organization of the defendant association. As required by the by-laws of the defendant association, it has distributed to its members freight-rate books, listing freight rates from established basing points to practically every city and town in the northeast section of the United States. The freight rates contained in the freight-rate book are compiled from the official tariffs and translated from the rate per ton of the official tariffs into the rate per barrel of 380 pounds, the unit for the sale of cement. Similar lists of freight rates embracing substantially the same subject matter were prepared and used by individual manufacturers before the organization of the defendant association. The association freight-rate book took the place of previous separate publications by individual manufacturers, with a consequent saving of money and increase of accuracy and a more thorough and continuous checking of rates. The basing points from which freight rates were calculated were not selected by the Association, but were the same as those appearing in prior books published by individuals before the publication of the Association freight-rate book. The basing points are points of actual shipment from which the larger proportion of the cement in a given locality in which cement is manufactured is actually shipped. The rates published are the actual rates omitting fractions of cents between the basing points and actual points of delivery.

Manufacturers customarily, and for the purpose of the convenient conduct of their business, maintain a uniform base or factory price, so far as the customers of the individual manufacturer are concerned. That is to say, the business is conducted on a "one-price" basis. In order, however, to determine the delivered price, there must be added to the factory price of a given manufacturer, the cost of transportation to the point of delivery. Prompt quotation of a delivered price therefore involves the ability to carry out promptly the mechanical process of adding to the mill price, the cost of transportation to the point of delivery. Lists of freight rates, in convenient and readily available form, are therefore necessary adjuncts to the quotation of delivery prices for cement.

The use of basing points for the purpose of computing freight rates appears not to have been the result of any collective activity on the part of defendants or cement manufacturers generally, nor were they arbitrarily selected. Their use is rather the natural result of the development of the business within certain defined geographical areas. When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, in order to compete in that territory, must either secure a like freight rate or they must sell at a mill price which will permit them to deliver cement at a price which will enable them to compete with the mill or mills located at the basing point which is the principal point of production in the territory which is contiguous in point of freight rate to the basing point. If such competing mills secure the same freight rate through the adoption of a blanket freight rate by the Interstate Commerce Commission, as was done in the Lehigh Valley, the rate from the basing point would in every case be identical with the freight rate for the competing mills. If there were no

blanket freight rate the competing mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of that chief point of production. In either case the freight rate from the basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement. The freight-rate book, therefore, not only enables the manufacturer to calculate a delivered price on the basis of his own mill price, which he determines, to points in the territory nearest in point of freight rate to his own mill, but it enables him also to determine at once the freight differential which he must offset in his mill price in order to compete with other manufacturers serving any other given territory.

Exchange of information concerning credits.

Members of the Association render monthly reports of all accounts of customers two months or more over due, giving the name and address of the delinquent debtor, the amount of the overdue account in ledger balance, accounts in hands of attorneys for collection, and any explanation, as for example when the account was treated by the debtors as offset of a balance due for bags, or was otherwise disputed. There are also reports showing the general total of delinquent accounts in comparison with those for the last twelve months, and reports of payments of accounts placed in the hands of attorneys. There was a form, seldom used, for answering inquiries as to whether a particular name had appeared in the monthly report, and if so, where. There were never any comments concerning names appearing on the list of delinquent debtors. The Government neither charged nor proved that there was any agreement with respect to the use of this informa-

tion, or with respect to the persons to whom or conditions under which credit should be extended. The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer.

Statistical information.

The statistical activities of the Association, other than those relating to specific job contracts which have already been referred to, dealt with information as to existing supplies of cement and the so-called bag report, which gave information concerning returned bags which are the usual containers in which cement is shipped and delivered.

Each member of the Association, in addition to the reports on specific job contracts already referred to, sends to the Association a monthly statement of its production of clinker and ground cement, shipments and stock on hand for the past month and for the corresponding periods of the previous year. These were compiled and distributed to members without any change or comment. In addition, semi-monthly statements of shipments were also received and likewise distributed. Each member of the Association was thus given full information as to the available supply of cement and by whom it was held.

By universal practice, the price of bags in which cement is shipped is included and becomes a part of the mill base price. This is usually at the rate of ten cents per bag. The bag reports were made quarterly and contained two items; the total number of bags returned by each member

during the preceding quarter and the percentage thereof found unfit for use. The reports show that the loss varied from about ¾ of 1% by one manufacturer to about 4½% by another, and the diversity continued throughout the period covered by the reports. In 1918 a questionnaire was sent out enquiring as to the practice of each company, to determine whether better results were obtained by cleaning before or after counting, showing that some counted before cleaning and some after cleaning, and some both before and after. No information was reported concerning the charge and allowance or deposit for bags returned, or concerning the number received from any particular customer, or the portion found unfit for use.

Meetings.

The constitution and by-laws of the Association provided for monthly meetings. A full and accurate stenographic report of all discussions at meetings was kept and made available to the Government and, as is stated in the Government's brief, "the Association's counsel was present at every meeting to steer the discussions away from illegal subjects and to have them confine the matters strictly within the purview of the by-laws and the constitution of the Association." During the only period of rising markets since the relinquishment of war control, the spring and summer of 1920, no meetings were held during July and August. The later minutes contained complaints at smallness of attendance, and the number of companies represented at meetings varied from eleven to seventeen, with an average attendance of about two-thirds of the total membership of nineteen corporations. There was no discussion at these meetings of current prices; no comment on conditions or as to prospect of market, production or prices. Excerpts from the minutes are set out by the Government's brief at great length in-

dicating that from time to time individual representatives of the companies expressed themselves on subjects of minor importance; such as return of bags and bag reports, discounts, the use of trade acceptances where customers desired more than the customary thirty days' discount. But with reference to these suggestions and discussions, either no action was taken, or action was taken adverse to the suggestions made. There is no evidence that any agreement was reached affecting any of the matters discussed; nor does the Government point specifically to any uniformity of trade practice or custom followed, which is urged as even inferentially the result of activities at meetings.

Legal consequence of defendants' activities.

From these various activities of the defendants, the Government deduces a purpose to control the price of cement, which it is charged was to be accomplished by the control of the supply of cement on the market and by intimate association of the defendants in the exchange of information and a ready means of quoting a delivered price at any point. Cement was to be kept from the market by the use of the specific job contract accompanied by the systematic gathering and reporting of information with reference to the specific jobs and the amount of cement required for their completion. The two essential elements in the conspiracy to restrain commerce charged therefore are (a) the gathering and reporting of information which would enable individual members of the Association to avoid making deliveries of cement on specific job contracts which by the terms of the contracts they are not bound to deliver, and (b) the gathering of information as to production, price of cement sold on specific job contracts and transportation costs, not differing essentially from similar information disseminated by the Maple Flooring Association which is the subject of

the opinion in *Maple Flooring Association* v. *United States,* decided today, *ante* p. 563.

That a combination existed for the purpose of gathering and distributing these two classes of information is not denied. That a consequence of the gathering and dissemination of information with respect to the specific job contracts was to afford to manufacturers of cement, opportunity and grounds for refusing deliveries of cement which the contractors were not entitled to call for,—an opportunity of which manufacturers were prompt to avail themselves—is also not open to dispute. We do not see, however, in the activity of the defendants with respect to specific job contracts any basis for the contention that they constitute an unlawful restraint of commerce. The Government does not rely on any agreement or understanding among members of the Association that members would either make use of the specific job contract, or that they would refuse to deliver "excess" cement under specific job contracts. Members were left free to use this type of contract and to make such deliveries or not as they chose, and the evidence already referred to shows that in 1920 padded specific job contracts were cut down something less than two-thirds of the total amount of the padding, as a result of the system of gathering and reporting this information. It may be assumed, however, if manufacturers take the precaution to draw their sales contracts in such form that they are not to be required to deliver cement not needed for the specific jobs described in these contracts, that they would, to a considerable extent, decline to make deliveries, upon receiving information showing that the deliveries claimed were not called for by the contracts. Unless the provisions in the contract are waived by the manufacturer, demand for and receipt of such deliveries by the contractor would be a fraud on the manufacturer; and, in our view, the gathering and dissemination of information which will enable

sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound.

In *Swift & Co.* v. *United States,* 196 U. S. 375, 395, this Court approved a decree which provided that defendants should not be restrained "from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers." Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud. But for reasons stated more at length in our opinion in *Maple Flooring Association* v. *United States, supra,* we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.

Nor, for the reasons stated, can we regard the gathering and reporting of information, through the co-operation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price.

Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful

and may be enjoined, but the Government does not rely on any agreement or understanding for price maintenance. It relies rather upon the necessary leveling effect upon prices of knowledge disseminated among sellers as to some of the important factors which enter into price. It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade. As already indicated, the larger proportion of the product of the defendants is distributed through dealers, and prices to dealers are not reported to or through the Association. It is contended by the Government that the report of prices on specific job contracts in effect informs the members of the Association of prices to dealers, since the differential allowed to dealers is well known in the trade. However this may be, the fact is that any change in quotation of price to dealers, promptly becomes well-known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers.

It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that " undoubtedly

the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers."

We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.

For reasons stated in *Maple Flooring Association* v. *United States, supra,* such activities are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act.

The judgment of the District Court is reversed.

The CHIEF JUSTICE and MR. JUSTICE SANFORD, and MR. JUSTICE MCREYNOLDS in a separate opinion, dissented from the opinions of the majority in this case and the case next preceding. See *ante,* pp. 586, 587.

UNITED STATES *v.* FISH.

CERTORARI TO THE COURT OF CUSTOMS APPEALS.

No. 653. Argued April 23, 1925.—Decided June 1, 1925.

1. Under Jud. Code §§ 195, 198, the Court of Customs Appeals has jurisdiction to review a decision of a board of general appraisers denying a petition, filed under § 489 of the Tariff Act of Sept. 21, 1922, praying remission of additional duties assessed under that section based on excess of final appraised value over entered value of articles imported. P. 610.
2. Such a decision of the board of general appraisers is a final decision within Jud. Code § 195, since it follows final appraisement, and its finality is not dependent on subsequent liquidation by the Collector. P. 611.
3. Upon petition for remission of additional duties under § 489 of the Tariff Act, *supra,* the issue to be decided by the board of general appraisers is whether the importer has shown by his evidence that the entry at less value than finally appraised was without intent to defraud the revenue, conceal or misrepresent the facts or deceive the appraiser; and a finding merely that the importer was careless will not justify the board in deciding whether there should be a remission. P. 612.

12 Cust. App. 307, affirmed.

CERTIORARI to a decision of the Court of Customs Appeals reversing a decision of the Board of General Appraisers (T. D. 40,315) and remanding the case for a new trial.

Mr. Assistant Attorney General Hoppin, with whom the *Solicitor General* and *Mr. Samuel M. Richardson,* Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Allan R. Brown for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case is brought here by certiorari after a certificate of importance by the Attorney General, in accord with

§ 195 of the Judicial Code, as amended by the Act of Congress approved August 22, 1914, c. 267, 38 Stat. 703. The case in the Court of Customs Appeals was an appeal from a decision of the Board of General Appraisers denying two petitions filed under § 489 of the Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, 962. The parts of § 489 which are relevant here are inserted in the margin.*

The importer purchased at Hong Kong plaited peacock flues:

50 pounds at $26.00 per pound, July 9, 1922.
48 pounds at $28.00 per pound, July 27, 1922.

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* Sec. 489. Additional Duties. If the final appraised value of any article of imported merchandise which is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the entered value, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total final appraised value thereof for each 1 per centum that such final appraised value exceeds the value declared in the entry. Such additional duty shall apply only to the particular article or articles in each invoice that are so advanced in value upon final appraisement and shall not be imposed on any article upon which the amount of duty imposed by law on account of the final appraised value does not exceed the amount of duty that would be imposed if the final appraised value did not exceed the entered value, and shall be limited to 75 per centum of the final appraised value of such article or articles. Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. . . . Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. . . .

50 pounds at $28.00 per pound, Aug. 20, 1922.
36 pounds at $28.00 per pound, Aug. 30, 1922.
27 pounds at $32.00 per pound, Aug. 30, 1922.

The importations were entered at the custom house by the importer's broker and the entered value stated in the entries was the invoice price paid for each lot of flues. All the goods were appraised at $32.00 per pound. Under paragraph 1419 of the Tariff Act of 1922 (42 Stat. 915) the duty on the peacock flues was 60 per cent. ad valorem. The appraised value of $32.00 a pound exceeded the entered value of $28 a pound by 14 per cent. It exceeded the entered value of $26 a pound by 23 per cent. This increased the duty on the first 50 pounds from $960 to $1,328, and on the remaining undervalued 134 pounds $2,572 to $3,173, or a total on all entries of additional duties of $968. This illustrates the importance of the conclusion of the Board as to the intent of the importer in undervaluation under § 489. In due time after the appraisement the importer filed petitions to avoid the imposition of the additional duties. At the hearing before the Board the only witness was the importer, who testified that when he bought he got quotations by cable, that the market changed rapidly, sometimes as much as 50 per cent., that he had been importing for two years and that this was the first instance in which there had been an advance in value by the appraiser; that he gave the broker the invoice and told him to make the entry, and that in so doing he did not intend to deceive the appraiser. This was all the evidence. The Board of General Appraisers denied the petition, on the ground that the broker who made the entry should have testified, and suggested that the most favorable view as to the importer's conduct was that he was very careless. The importer appealed. The Government moved to dismiss the appeal, on the ground that there was no right to appeal. The court denied the

motion to dismiss, holding that it had jurisdiction. On the merits, the court found that the Board of General Appraisers erred in not finding whether there was or was not fraud or intent to deceive by the importer or his broker, and remanded the case for a new trial on that issue.

The relevant parts of § 195, as amended, 38 Stat. 703, and of § 198, of the Judicial Code, adopted March 3, 1911, are as follows:

"Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues. . . .

"Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. . . ."

The Government insists that the action of the Board of General Appraisers under § 489 of the Tariff Act of 1922, does not involve such an exercise of judicial judgment as to be regarded as appealable under the general jurisdiction of the Court of Customs Appeals. The sug-

gestion is that as the evidence to be submitted on the point at issue is to be under rules to be approved by the Board, it is a matter confined to their action; that their discretionary power is to be exercised very much as the discretion is to be exercised by the Secretary of the Treasury on clerical errors under § 489, or as exercised by him on a question of intent of the importer in the Act of October 3, 1913, c. 16, § III, I, 38 Stat. 114, 184.

The Court of Customs Appeals reached the conclusion that the decision of the Board on the law and facts might affect the duty imposed on the imported articles so materially that Congress must have intended to give the importer the right to avail himself of the provision for appeal to the Court of Customs Appeals. We agree with that conclusion. We think that this is a decision of the law and the facts respecting the rate of duty imposed on classified merchandise imported, or at least that it concerns the fees and charges connected therewith. We think that it is a question relating to the laws and regulations governing the collection of customs revenues of importance, and is appealable. It comes, therefore, under the several heads of the jurisdiction of the Court of Customs Appeals, as defined in §§ 195 and 198. We think that the interpretation of the expression "appealable questions" as only including questions which are elsewhere referred to as appealable, is too narrow a view of the purpose of the statute. It would be unreasonable to suppose that a Court of Appeals, given the power to reexamine both the law and the facts on all the important issues raised in respect to duties, was excluded from reviewing the issue of retaining or remitting a considerable percentage of those duties. This view is sustained by *Brown & Co.* v. *United States,* 12 Ct. Cust. Appls. 93, although the point there involved was only one of jurisdiction of the Board.

But it is said that this decision of the Board of Appeals is not a final decision, and that only final decisions are

subject to review by the Court of Customs Appeals. Section 195 refers to final decisions, § 198 to decisions. But even if the language of § 195 is to prevail, we think that under § 489 the decision of the Board of General Appraisers as to increase or decrease of duties is final, so far as the Board is concerned. Such a decision under § 489 can not take place until there is a final appraisement, because until that time there is no opportunity to determine whether the 1 per centum clause applies. But it is said that the decision is not really final until after the liquidation by the Collector, and that liquidation in this case has not taken place. We do not think that the liquidation by the Collector of the duties in such cases constitutes the final decision subject to appeal. Section 489 itself shows that the final decision of the Board on this point may be before or after liquidation. This is not a case analogous to the final judgments in the ordinary practice of appellate courts in respect to which it is held that cases appealed may not be taken up piecemeal. As the Board may make a final decision on the point, we do not see why the Court of Customs Appeals has not jurisdiction at once to consider the ruling of the Board and thus facilitate the ultimate liquidation of the duties if it has not already been completed.

Upon the merits of the case, we think the Court of Customs Appeals was right and that the finding of the Board of General Appraisers did not respond to the requirement of the statute. The issue to be found by the Board was whether the importer showed by his evidence that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The issue presented to the Board was, " Has the importer sustained the negative in this regard?" Merely to find that

the importer was careless is not a finding sufficient to justify the Board in deciding whether there should be a remission. Both the importer and the Government are entitled to a finding either that there was no intent to defraud or that the importer did not sustain his burden that there was no such intent.

The judgment of the Court of Customs Appeals is

Affirmed.

UNITED STATES *v.* NOCE.

APPEAL FROM THE COURT OF CLAIMS.

No. 360. Argued April 30, 1925.—Decided June 8, 1925.

1. An army officer *held* not entitled to count for longevity pay his service as a cadet in the Military Academy. P. 616.
2. The proviso in § 11 of the Act of May 18, 1920, 41 Stat. 601, "that hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services," does not deal with rules of longevity in any one service but intends to produce equality as between all the services named and did not repeal the provisions in the Army and Naval Appropriation Acts, of October 24, 1912, and March 4, 1913, respectively, directing that service in the Military and Naval Academies shall not be counted in computing for any purpose the length of service of any officer of the Army, Navy or Marine Corps.

58 Ct. Cls. 688, reversed.

APPEAL from a judgment of the Court of Claims allowing recovery of longevity pay by an army officer.

Mr. Assistant Attorney General Letts, with whom the *Solicitor General* and *Mr. Merrill E. Otis,* Special Assistant to the Attorney General, were on the brief, for appellant.

Mr. Samuel T. Ansell, with whom *Mr. Edward S. Bailey* was on the brief, for appellee.

Mr. Chief Justice Taft delivered the opinion of the Court.

Daniel Noce was Major of Engineers in the United States Army in the emergency establishment from May 18, 1920, until June 30, 1920, when he returned to a captaincy in the regular establishment. He sued the United States in the Court of Claims for $467.66 as longevity pay, alleged to be due him under the law over and above the pay he received. He was appointed cadet at the West Point Military Academy August 1, 1913. He was graduated April 20, 1917. If he can count for longevity pay his cadet service from August 1, 1913, to April 20, 1917, he will be entitled to the amount he claims from the date of approval of the Act of Congress of May 18, 1920, (§ 11, c. 190, 41 Stat. 601, 603) to April 19, 1922, the period covered by this suit. The accounting officers denied the claim.

The Court of Claims found that under the Act, claimant's cadet service must be counted and gave judgment for him. The United States has appealed and urges a reversal, on the ground that such a conclusion is forbidden by the Army Appropriation Act of October 24, 1912, c. 391, § 6, 37 Stat. 569, 594, which provides:

"That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army."

A similar provision was made in the Naval Appropriation Act of March 4, 1913, c. 148, 37 Stat. 891, as follows:

"Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be ap-

pointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

The Court of Claims held that these two provisions had been repealed by the Act of May 18, 1920, already referred to. The Act is entitled "To increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey and Public Health Service". It increased the pay of certain commissioned officers of the Army, Navy, Marine Corps and Public Health Service, mentioning in detail the ranks affected and the increases provided. It provided for a temporary commutation of quarters, heat, and light theretofore granted to Army officers on duty in the field to those of the Navy, Marine Corps, Coast Guard and Public Health Service. It gave warrant officers of the Navy an increase, in addition to all pay allowances, of $240 per annum. It increased the pay of all enlisted men of the Army and Marine Corps and of female nurses 20 per centum with certain exceptions. It increased the commutation rations of non-commissioned officers of the Army, of the Marine Corps and of field clerks of the Army and the Quartermaster Corps. It gave a new base pay for enlisted ratings of petty officers and non-commissioned officers and of enlisted men in the Navy, of the Naval Academy band and of the Fleet Naval Reserve. It authorized the Secretary of the Navy in his discretion to readjust the prevailing rates of pay of civilian professors and instructors of the Naval Academy. In § 8 it provided that the Coast Guard should have the same pay ratings to correspond with the Navy and mentioned the officers. Then by § 11 it provided as follows:

"Sec. 11. That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now

are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917, entitled 'An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes,' including longevity; and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.*"

It is this proviso which it is said repealed the laws of 1912 and 1913 above quoted. It is urged that the words "longevity pay shall be based on the total of all service in any or all of said services" are inconsistent with the exclusion of service in the Military Academy or in the Naval Academy from the calculation of longevity pay.

We are unable to put such a construction on this proviso. The whole Act was intended to promote equality between the six services. After equalizing their pay, it was intended to give any officer or any man in either of the services the benefit of longevity increases for any service which he might have had in any other of the services. The Report of the Managers of the House of Representatives as to § 11 and its proviso (H. R. 948, 66th Congress, 2nd Sess.) said:

"It provides that commissioned officers of the Coast and Geodetic Survey, a highly technical and specialized service, shall receive the same pay and allowances as are prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917. *It also contains a proviso placing all services on an equality in the matter of computation of longevity or service pay.*"

In other words, the longevity pay of a member of any service was to be determined by his total service in any or all of the services. It was not dealing with the rules as to the longevity in any one service. It was to make the calculation of longevity as if the six services were but one service. It was not aiming at any inequality within a service but at an inequality between services. No reference is made to cadet service and nothing to indicate that Congress had it in mind.

The question whether service in either of the Academies was Army or Navy service which should count for longevity pay and retirement was a long standing issue between the officers of the Army and Navy who were graduates of the two academies on the one hand and the officers who were not graduates and the accounting officers of the Treasury on the other. This is evident from the decision of this Court in *United States* v. *Morton,* 112 U. S. 1; and *United States* v. *Watson,* 130 U. S. 80. The legislative history of the Act of 1912 and that of 1913 shows that the question was much contested between the two Houses. The Report of the House Committee on Military Affairs (H. R. 270, 62nd Congress, 2nd Sess.) gives an extended argument against the practice of computing cadet service for pay and retirement purposes. It said:

"The result of this practice is that a graduate of the Military Academy who was appointed a second lieutenant, after having been educated for that appointment for four or more years wholly at the expense of the Government, receives his first 10 per cent increase of pay after not more than one year of service as a commissioned officer, whereas the second lieutenant who is appointed from civil life, after having been fitted for the appointment wholly at his own expense, must serve for five full years as a commissioned officer before he can receive his first 10 per cent increase of pay. And the same disparity between the two cases continues to the end."

After pointing out other discriminations arising from this practice, the report continues:

"It is but just to say that this preposterous practice did not originate with the War Department. It was the result of a decision rendered by the Supreme Court October 27, 1884 (Morton *v.* United States, 112 U. S. 1), to the effect that the time during which a person has served as a cadet is to be regarded as 'actual time of service in the army.'" . . .

After referring specifically to retirement, the report says:

"These are additional discriminations against the civilian appointee who pays for his own preliminary education and in favor of the graduate of the Military Academy who is educated for his commission at the expense of the Government."

In view of this long continued controversy which before 1912 had finally been settled only by two decisions of this Court, it is inconceivable that the two Acts of 1912 and 1913, nullifying the effect of those decisions, and passed after a heated struggle, should have been repealed without mention of the cadet service in the proviso now said to have worked this result. As already pointed out, the Act of which this was a part was detailed in its reference to the commissioned officers, the non-commissioned officers and to the enlisted men of the various six services affected, and to the pay and increases which they were to receive. Had it been intended to increase the "fogey" pay, as the longevity pay is called, for only a part of the commissioned officers of the Army and only a part of the commissioned officers of the Navy, and only a part of the commissioned officers of the Marine Corps in such a specific Act, the favor thus to be conferred upon them would certainly have been set forth in language whose meaning could not be mistaken.

It is, indeed, very difficult to say that there is any real inconsistency between the proviso of 1920 and the Acts of

1912 and 1913. It is supposed to be shown in the use of the words " any or all the services " and it is said that as " any " may mean one or more, it may apply to the Army alone, and can only be satisfied by making it apply to the total service in the Army alone and must therefore mean service in the Army as construed by this Court in the *Morton Case* and the *Watson Case,* in which it was held that, under then existing legislation, service in the Military Academy was service in the Army. This, it seems to us, is a strained method of first finding an inconsistency, by no means clear, if it exists at all, and then erecting it into an implied repeal. Implied repeals are not favored. *United States* v. *Greathouse,* 166 U. S. 601, 605; *Frost* v. *Wenie,* 157 U. S. 46, 58; *United States* v. *Yuginovich,* 256 U. S. 450, 463.

Judgment reversed.

ROBERTSON *v.* RAILROAD LABOR BOARD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 739. Argued March 17, 18, 1925.—Decided June 8, 1925.

1. Section 310, par. b, of the Transportation Act, 1920, which provides that the Railroad Labor Board, in case of failure to comply with its subpoena to testify, may invoke the aid of " any United States District Court," and that such court may thereupon order the witness to comply with the subpoena, etc., is to be construed consistently with the general rule limiting jurisdiction of a district court *in personam* (as distinguished from venue) to the district of which the defendant is an inhabitant or in which he can be found. P. 622.
2. Hence a district court, in a suit brought by the Board to compel attendance of a witness, does not acquire jurisdiction over his person by service of its process in another district even though that of the witness' residence. *Id.*

3 Fed. (2d) 488, reversed.

JURISDICTIONAL APPEAL from a decree of the District Court overruling a motion to quash service of original process in a suit brought by the Railroad Labor Board to require the defendant to appear before it as a witness, and ordering him so to appear and to testify.

Mr. Donald R. Richberg, with whom *Mr. David E. Lilienthal* was on the brief, for the appellant.

Mr. Robert N. Golding, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. Weymouth Kirkland,* Special Assistant to the Attorney General, were on the brief, for the appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Transportation Act, 1920, February 28, 1920, c. 91, § 310, par. a, 41 Stat. 456, 472, authorizes the Railroad Labor Board, "for the efficient administration of the functions vested in" it, to require by subpoena "the attendance of any witness . . from any place in the United States at any designated place of hearing, and the taking of a deposition before any person having power to administer oaths." Paragraph 'b' provides: "In case of failure to comply with any subpoena [to testify] or in case of the contumacy of any witness appearing before the Labor Board, the Board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be."

Pursuant to paragraph 'a', the Board issued a subpoena to Robertson, a citizen and inhabitant of Cleveland, Ohio, commanding him to appear at its offices in Chicago, Illinois, on a day named, to testify concerning a dispute then being enquired into. The subpoena was served upon

Robertson at Cleveland by the United States marshal for the Northern District of Ohio. Robertson did not personally attend as commanded. But on the day named he appeared specially by his attorney, and challenging the jurisdiction of the Board over him, declined to appear and testify. Thereupon this suit was begun by the Board in the federal court for northern Illinois, Eastern Division, pursuant to paragraph 'b'.

The bill prayed that Robertson, the sole defendant, be ordered to appear before the Labor Board "at a time and place to be fixed by" it and make "full answer to any and all pertinent questions relating" to the matter under investigation, and for any other proper relief. The court issued, in the form customary in equity, a summons, directing the defendant to appear and answer. This summons was likewise served upon Robertson personally at Cleveland by the United States marshal for the Northern District of Ohio. By his attorney he again appeared specially and moved to quash the service on the ground that, being an inhabitant of Ohio and served there, he was not subject to the jurisdiction of the federal court for Illinois. The motion was overruled; Robertson then moved to dismiss the petition for lack of jurisdiction over the subject-matter of the suit; this motion was also overruled; Robertson declined to plead further; and a final decree was entered directing him "to appear before the Railroad Labor Board, upon due notice by said board, at a time and place to be designated therein, there to testify, to give evidence, and to give full, true and complete answer and response to any and all pertinent and relevant questions then and there propounded to him" concerning the subject matter of the enquiry. 3 Fed. (2d) 488. The case is here on appeal under § 238 of the Judicial Code, the questions of jurisdiction having been duly certified. Whether the court acquired jurisdiction over Robertson is the only question requiring decision.

Robertson contends that by the term "any United States district court" Congress meant any such court "of competent jurisdiction"; and that, under the applicable law, no district court is of competent jurisdiction to compel a defendant to obey its decree except that of the district of which he is an inhabitant or of one in which he is found. The Board contends that Congress intended by the phrase to confer not only liberty to invoke the aid of the court for any district, but power to compel the person named as defendant to litigate in the district selected by the Board, although he is not a citizen or inhabitant of it and is not found therein. The question presented is one of statutory construction. Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States. *Toland* v. *Sprague,* 12 Pet. 300, 328; *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569, 604. But it has not done so either by any general law or in terms by § 310 of Transportation Act, 1920. The precise question is whether it has impliedly done so by that provision.

In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 79, in accordance with the practice at the common law. *Piquet* v. *Swan,*

5 Mason 35, 39 *et seq.* And such has been the general rule ever since. *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 279. No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen.[1]

Section 51 of the Judicial Code is a general provision regulating venue. The part pertinent here is that, with certain inapplicable exceptions, "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." [2] It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant. The general provision as to venue contained in Judicial Code, § 51, has been departed from in various specific provisions which allow the plaintiff, in actions not local in their nature, some liberty in the selection of venue.[3] Unrestricted choice was conferred upon the Labor Board by the section of Trans-

[1] *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, 601; *United States* v. *Crawford*, 47 Fed. 561.

[2] See *Galveston, etc. Ry. Co.* v. *Gonzales*, 151 U. S. 496; *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Male* v. *Atchison, etc. Ry. Co.*, 240 U. S. 97. Compare *In re Hohorst*, 150 U. S. 653; *Stone* v. *United States*, 167 U. S. 178, 182; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100. The rule applies even where it may result in barring the jurisdiction of every federal court because all the defendants are indispensable parties. *Shields* v. *Barrow*, 17 How. 130, 140-142; *Barney* v. *Baltimore City*, 6 Wall. 280; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603. Compare *Clearwater* v. *Meredith*, 21 How. 489; *Camp* v. *Gress*, 250 U. S. 308, 311, 314. Judicial Code, §§ 50, 52.

[3] See, for example, Judicial Code, §§ 43, 44, 45, 48; Acts of March 4, 1909, c. 320, § 35, 35 Stat. 1075, 1084; October 15, 1914, c. 323, § 12, 38 Stat. 730, 736; June 5, 1920, c. 250, § 33, 41 Stat. 988, 1007; September 7, 1916, c. 451, § 31, 39 Stat. 728, 738.

portation Act, 1920, here involved (§ 310). So far as venue is concerned, there is no ambiguity in the words "any United States district court."

Congress has also made a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam* stated above. In one instance, the Credit Mobilier Act, March 3, 1873, c. 226, § 4, 17 Stat. 485, 509, it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney General in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States* v. *Union Pacific Railroad,* 98 U. S. 569. Under similar circumstances, but only for the period of three years, authority was granted generally by Act of September 19, 1922, c. 345, 42 Stat. 849, to institute a civil suit by, or on behalf of, the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act, July 2, 1890, c. 647, § 5, 26 Stat. 209, 210, provides that when "it shall appear to the court" in which a proceeding to restrain violations of the Act is pending "that the ends of justice require that other parties should be brought before the court" it may cause them to be summoned although they reside in some other district. The Clayton Act, October 15, 1914, c. 323, § 15, 38 Stat. 730, 737, contains a like provision. But no act has come to our attention in which such power has been conferred in a proceeding in a circuit or district court [4] where a private citizen is

[4] Even the jurisdiction of the bankruptcy court is subject to the territorial limitation. *Lathrop* v. *Drake,* 91 U. S. 516, 517. Although the adjudication in one district brings the property of the bankrupt wherever situated into *custodia legis* (*Lazarus* v. *Prentice,* 234 U. S. 263), that court cannot issue an order upon a person in another

the sole defendant and where the plaintiff is at liberty to commence the suit in the district of which the defendant is an inhabitant or in which he can be found.[5]

As the Railroad Labor Board is charged generally with the adjustment of disputes between carriers and their employees, it may prove desirable to hold hearings at any place within the United States; and power to do so was expressly conferred. The Board may demand answers or the production of documentary evidence from one who attends such a hearing. The contumacy of a witness

district, not a party to the proceeding, to deliver it up. See *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 311-312; *In re Geller*, 216 Fed. 558; *Progressive Building & Loan Co.* v. *Hall*, 220 Fed. 45; *In re United States Chrysotile Asbestos Co.*, 253 Fed. 294. Ancillary proceedings are brought in the other district. *Babbit* v. *Dutcher*, 216 U. S. 102. Resort is likewise had to ancillary proceedings to secure the evidence of a person living in another district. *Elkus, Petitioner*, 216 U. S. 115.

The Commerce Court created by Act of June 18, 1910, c. 309, 36 Stat. 539, could issue process through the United States. P. 541. Upon its repeal by Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220, it was provided that the process of the applicable district court might "run, be served, and be returnable anywhere in the United States"; but the venue of suits in the district courts was narrowly limited. See *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 563; *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 535. Compare *Vicksburg, etc. Ry. Co.* v. *Anderson-Tully Co.*, 236 U. S. 408; *Graustein* v. *Rutland R. Co.*, 256 Fed. 409.

[5] Under the Materialmen's Act, August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, the action on the bond in the name of the United States must be brought in the district in which the contract was to be performed. This Court has held that jurisdiction of the persons of the defendants may be secured by service of process upon them in whatever district they may be found. *United States* v. *Congress Construction Co.*, 222 U. S. 199, 203. Compare suits by a national bank against the Comptroller of the Currency. Judicial Code, § 49; *First National Bank* v. *Williams*, 252 U. S. 504, 509.

appearing before the Board in any designated place of hearing was thus one contingency for which it was necessary to make provision. Congress also granted to the Labor Board in explicit language the broad power of compelling a person to come from any place in the United States to any designated place of hearing to furnish evidence.[6] The refusal of such person, who might be in any district in the United States, to comply with such a subpoena was obviously a second contingency to be provided for. Unrestricted liberty of venue in invoking the aid of a district court, referred to before, was clearly essential to the complete exercise of the Board's powers and the effective performance of its functions. Moreover, this unrestricted choice cannot subject to undue hardship any defendant actually found within the district in which the suit is brought. But no reason is suggested why Congress should have wished to compel every person summoned either to obey the Board's administrative order without question, or to litigate his right to refuse to do so in such district, however remote from his home or temporary residence, as the Board might select. The Interstate Commerce Commission which, throughout thirty-eight years, has dealt in many different ways with most of the railroads of the United States has never exercised, or asserted, or sought to secure for itself, such broad powers.

[6] Compare Act of March 2, 1793, c. 22, § 6, 1 Stat. 333, 335; Rev. Stat. § 876, as amended by Act of September 19, 1922, c. 344, 42 Stat. 848: also Acts of February 10, 1891, c. 128, 26 Stat. 743; July 15, 1913, c. 6, § 5, 38 Stat. 103, 106; September 26, 1914, c. 311, § 9, 38 Stat. 717, 722; October 15, 1914, c. 323, § 13, 38 Stat. 730, 736; September 8, 1916, c. 463, § 706, 39 Stat. 756, 797; February 5, 1917, c. 29, § 16, 39 Stat. 874, 886; October 6, 1917, c. 105, 40 Stat. 398, 399; October 22, 1919, c. 80, § 105, 41 Stat. 297, 300; June 10, 1920, c. 285, § 4(g), 41 Stat. 1063, 1067; November 23, 1921, c. 136, § 1308, 42 Stat. 227, 310; September 21, 1922, c. 369, § 6 (b), 42 Stat. 998, 1002; June 2, 1924, c. 234, § 1004, 43 Stat. 253, 340; June 7, 1924, c. 320, § 8, 43 Stat. 607, 609.

We are of opinion that by the phrase "any District Court of the United States" Congress meant any such court "of competent jurisdiction." The phrase "any court" is frequently used in the federal statutes and has been interpreted under similar circumstances as meaning "any court of competent jurisdiction."[7] By the general rule the jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant or in which he can be found. It would be an extraordinary thing if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory (*Pennsylvania R. R. Co.* v. *Labor Board,* 261 U. S. 72; *Pennsylvania R. R. System Federation No. 90* v. *Pennsylvania R. R. Co.,* 267 U. S. 203) and which enters the district court, not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the Board is dealing. We think it has made no such extension by § 310 of Transportation Act, 1920. It is not lightly to be assumed that Congress intended to depart from a long established policy. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 384; *In re East River Towing Co.,* 266 U. S. 355, 367.

Reversed.

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[7] Rev. Stat. § 4284; *Ex parte Slayton,* 105 U. S. 451; *In re Louisville & Cincinnati Packet Co.,* 223 Fed. 185; Rev. Stat. § 2103; *United States* v. *Crawford,* 47 Fed. 561. Compare Rev. Stat. § 1042; *United States* v. *Mills,* 11 App. D. C. 500, 504–507. The phrase has been used in other statutes in conferring the right to invoke judicial aid in compelling attendance as a witness. See statutes in note 6, *supra.*

EDWARDS, FORMER COLLECTOR, *v.* CUBA RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 324. Argued April 15, 1925.—Decided June 8, 1925.

1. The meaning of "income," as used in § 38 of the Corporation Excise Tax Law of 1909, *held*, in its application to the case, not distinguishable from the meaning of the same word in the Income Tax Law of 1913 and the Revenue Act of 1916. P. 631.
2. The Sixteenth Amendment, like other laws authorizing or imposing taxes, is not to be extended beyond the meaning clearly indicated by its words. P. 631.
3. Money subsidies granted by the Cuban government to a railroad company of this country, to promote the construction of railroads in Cuba and in consideration also of reduced rates to the public as well as reduced rates and other privileges for the government, and which were fixed and paid proportionately to mileage actually constructed, and were used for capital expenditures by the company, though not entered on its books as in reduction of cost of construction,—*held* not income within the Sixteenth Amendment. P. 632.

Affirmed.

ERROR to a judgment for plaintiff railroad in the District Court in an action to recover money paid as income and corporation excise taxes.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. Nelson T. Hartson* were on the brief, for plaintiff in error.

Mr. Howard Mansfield, with whom *Mr. Allen Evarts Foster* was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff, a New Jersey corporation, owns and operates a railroad in Cuba. In March, 1917, it made return of its income for 1916; and, in due time, paid the tax assessed

on the basis of its return. Plaintiff had received in 1911 to 1916, inclusive, subsidy payments from the Republic of Cuba, amounting in all to $1,696,216.20, but did not report any part of them as taxable income. January 1, 1918, the Commissioner of Internal Revenue assessed against plaintiff for 1916 an additional tax of $33,924.32, being two per cent.—the rate prescribed in the Revenue Act of 1916, (Act of September 8, 1916, c. 463, 39 Stat. 456)—on the total of such payments. Notwithstanding its objection that the assessment was without authority of law, plaintiff was required to pay the tax. It applied for refund. The commissioner adhered to the view that the amounts so received constituted income, but held that the payments were taxable in the years when received. Prior to the act of 1916, the tax rate was one per cent. There was repaid to plaintiff one per cent. on the payments made before that year, but its application was denied as to the balance, $20,239.18. This action was brought to recover that amount with interest. The complaint alleged that the subsidy payments were not income within the meaning of the Sixteenth Amendment. Defendant moved to dismiss the case on the ground that the complaint failed to state a cause of action. The court denied the motion and gave judgment for plaintiff. Defendant brought the case here on writ of error. § 238, Judicial Code.

An act of the Congress of the Republic of Cuba of July 5, 1906, authorized the President to contract with one or more companies for the construction and operation of certain lines of railroad on designated routes between places specified. The Republic granted a subsidy up to $6,000 per kilometer, payable in six annual instalments, to the companies constructing and maintaining in use the specified lines. Any company having such a contract was entitled to receive subsidies for that part of the railroad constructed after the passage of the act, as well as for the

part constructed after the making of the contract. March 25, 1909, the President of the Republic and the plaintiff made a contract, by which the latter agreed, in consideration of $6,000 per kilometer to be paid by the Republic as specified in the law of 1906, to construct and operate a railroad on the routes and between the places specified. And the plaintiff agreed to reduce by one-third the tariffs then in force for the transportation of permanent employees and troops of the government, and, in case of war or any disturbance of the public order, to transport troops in special trains at the rate of one cent per man per kilometer; and also agreed to reduce the fares for all first-class passengers. The entire line covered by this contract was completed in 1911. The subsidy payments amounted in all to $1,642,216.20, about one-third of the cost of the railroad.

An act of June 1, 1914, added to the law of 1906 an article which provided that the subsidy per kilometer for the construction of a railroad from Casilda to Placetas del Sur should be 6,000 pesos for a part and 12,000 pesos for the rest of the distance. June 30, 1915, in accordance with that act, the President of the Republic and plaintiff made a contract for the construction of the railroad. It bound the company to carry public correspondence free of charge on the lines of this railroad, to carry small produce for 50 per cent. of the tariff, and to allow telegraph and telephone stations to be established by the government alongside the railroad. And there was handed over to the plaintiff certain land, buildings, construction and equipment then in the possession of the State, which theretofore had been acquired and built in an earlier effort to complete that line. The subsidy payment in 1916 was $54,000.

All the subsidy payments under both contracts were credited to a suspense account and, June 30, 1916, were transferred to the surplus account, and were used for

capital expenditures. The cost of construction as carried on the books was not reduced by such payments.

The power given Congress by the Sixteenth Amendment is to "lay and collect taxes on incomes from whatever source derived." Defendant insists that the subsidy payment made in 1916 was taxable under the Revenue Act of 1916, which imposes an annual tax of two per centum "upon the total net income received . . . from all sources by every corporation" (c. 463, 39 Stat. 765); that the payments made in 1913, 1914 and 1915 were taxable under the Income Tax Law of October 3, 1913, c. 16, 38 Stat. 114, 172, which imposes an annual tax of one per centum "upon the entire net income arising or accruing from all sources . . . to every corporation", and that the payments made in 1911 and 1912 were taxable under the Corporation Excise Tax Law of August 5, 1909, § 38, c. 6, 36 Stat. 11, 112, which provides that "every corporation . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income . . . from all sources." Defendant insists that the subsidies were merely payments in advance on account of transportation service, later to be performed by the plaintiff for the government, and therefore are to be deemed income and taxable as such.

In respect of these subsidy payments, the meaning of "income" as used in the Corporation Excise Tax Law of 1909 is not to be distinguished from the meaning of the same word as used in the Income Tax Law of 1913 and the Revenue Act of 1916. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 518–519.

The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used. The Cuban laws and contracts are similar

to legislation and arrangements for the promotion of railroad construction which have been well known in the United States for more than half a century. Such aids, gifts and grants from the government, subordinate political subdivisions or private sources,—whether of land, other property, credit or money,—in order to induce construction and operation of railroads for the service of the public are not given as mere gratuities. *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 679; *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395. Usually they are given to promote settlement and to provide for the development of the resources in the territory to be served. The things so sought to be attained in the public interest are numerous and varied. There is no support for the view that the Cuban Government gave the subsidy payments, lands, buildings, railroad construction and equipment merely to obtain the specified concessions in respect of rates for government transportation. Other rates were considered. By the first contract, plaintiff agreed to reduce fares for first class passengers and by the second, it agreed to reduce the rates on small produce. Clearly, the value of the lands and other physical property handed over to aid plaintiff in the completion of the railroad from Casilda to Placetas del Sur was not taxable income. These were to be used directly to complete the undertaking. The Commissioner of Internal Revenue in levying the tax did not include their value as income, and defendant does not claim that it was income. Relying on the contract for partial reimbursement, plaintiff found the money necessary to construct the railroad. The subsidy payments were proportionate to mileage completed; and this indicates a purpose to reimburse plaintiff for capital expenditures. All—the physical properties and the money subsidies—were given for the same purposes. It cannot reasonably be held that one was contribution to capital assets, and that the other was profit, gain or

income. Neither the laws nor the contracts indicate that the money subsidies were to be used for the payment of dividends, interest or anything else properly chargeable to or payable out of earnings or income. The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment. See *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415; *Eisner* v. *Macomber,* 252 U. S. 189, 207; *Merchants' Loan & Trust Co.* v. *Smietanka, supra.*

Judgment affirmed.

WILLIAM DANZER & COMPANY, INC. *v.* GULF & SHIP ISLAND RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 346. Argued April 28, 1925.—Decided June 8, 1925.

1. The right of a shipper to an award by the Interstate Commerce Commission of the damages resulting from misrouting of his goods by a carrier, is both created and limited by the Interstate Commerce Act. P. 635.
2. The limitation of the Act, (§ 16 (3)) that such complaints shall be filed within two years from the time the cause of action accrues, and not after, enters into the cause of action, so that lapse of that time not only bars the remedy afforded but destroys the liability of the defendant to the plaintiff. P. 636.
3. Section 206 (f) of the Transportation Act, 1920, providing: "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control", is not to be construed retroactively to recreate a liability destroyed by lapse of the two year period, *supra,* before the Transportation Act was passed; this would deprive the carrier of property without due process, in violation of the Fifth Amendment. P. 637.

Affirmed.

ERROR to a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action against a carrier to recover damages awarded by the Interstate Commerce Commission.

Mr. Brenton K. Fisk for plaintiff in error.

Mr. B. E. Eaton for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error brought this action to recover the amount of damages awarded against defendant in error by the Interstate Commerce Commission. August 30, 1917, at Lyman, Mississippi, the Ingram-Day Lumber Company delivered to defendant in error a carload of lath consigned to the V. W. Long Lumber Company at Wilkes-Barre, Pennsylvania. The shipment was directed to be moved via a line of the Norfolk & Western Railway Company through Hagerstown, Maryland. On the day the shipment was made, plaintiff bought the lath, and in due time received the bill of lading. Defendant misrouted the car; and in consequence plaintiff suffered damages. February 14, 1921,—after the expiration of the two-year period prescribed for filing claims for damages,—plaintiff made complaint for reparation to the Interstate Commerce Commission against defendant and three connecting carriers. May 18, 1922, the commission made its report and order. The contention on the part of the carriers, that plaintiff's right expired before the passage of the Transportation Act, 1920, c. 91, 41 Stat. 456, and was not revived by § 206 (f), was overruled. The commission's order authorized and directed the defendant, on or before August 2, 1922, to pay $307.15 with interest to plaintiff as reparation for damages sustained in consequence of the misrouting. Defendant failed to pay the award, and this suit was brought, May 7, 1923. The complaint set forth the facts above

stated. Defendant demurred on the ground, among others, that § 206 (f), as construed and applied by the commission, was unconstitutional; and that so to renew or revive the cause of action, which had expired before the passage of the Transportation Act, was to take defendant's property without due process of law in contravention of the Fifth Amendment. The district court sustained the demurrer and gave judgment for defendant. The case is here on writ of error. § 238, Judicial Code.

Plaintiff's cause of action was created and limited by the Interstate Commerce Act. That act imposes upon the initial and other carriers the duty to route and transport freight in accordance with the shipper's instructions. § 15 (8). And the carrier is liable to any person injured for the full amount of damages sustained in consequence of a breach of that duty. § 8. Any person claiming to be damaged by any carrier may make complaint to the commission. §§ 9, 13. "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . ." § 16 (3). "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control." § 206 (f). If, after hearing, the commission shall determine that complainant is entitled to damages under the act, it is required to make an order directing the carrier to pay the amount so awarded on or before a day named. And, if the carrier fails to comply, the person for whose benefit the order was made, within one year from the date of the order, may file petition in the United States district court, setting forth briefly the causes for which he claims damages and the order of the commission in the premises; and, subject to some provisions which are not important here, the suit proceeds like other suits for damages. § 16 (2), (3).

Plaintiff's right to file his claim with the commission had expired several months before the passage of the Transportation Act. But, if the period of federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the commission and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 666; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642; *Kansas City Southern Ry.* v. *Wolf,* 261 U. S. 133, 139. On the expiration of the two-year period, it was as if liability had never existed. And this court applying the rule of construction that all statutes are to be considered prospective unless the language is express to the contrary or there is a necessary implication to that effect, recently has held that § 206 (f) does not apply to causes of action which were barred by a state statute of limitations before the passage of the Transportation Act. *Fullerton Company* v. *Northern Pacific,* 266 U. S. 435, 437.

Plaintiff suggests that the only period of limitations applicable to claims for reparation is that prescribed by § 16 (3), and argues that, as the period of federal control exceeded two years, § 206 (f) must be construed retrospectively or given no effect.

We need not re-examine the doctrine of *Campbell* v. *Holt,* 115 U. S. 620, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision

rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act; *The Harrisburg,* 119 U. S. 199, 214; and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry.* v. *White,* 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 201; *Kannellos* v. *Great Northern Ry. Co.,* 151 Minn. 157, 160; *Jones* v. *D. L. & W. R. R. Co.,* 96 N. J. L. 197. See also *Davis* v. *Mills,* 194 U. S. 451, 454. This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment. Cf. *Levy* v. *Wardell,* 258 U. S. 542, 544; *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 340; *Union Pacific R. R.* v. *Laramie Stock Yards,* 231 U. S. 190, 200; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U. S. 296, 301.

Judgment affirmed.

DAVIS, AGENT, *v.* L. L. COHEN & COMPANY, INC.

ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY, STATE OF MASSACHUSETTS.

No. 331. Argued April 21, 1925.—Decided June 8, 1925.

1. A judgment entered in the Superior Court in Massachusetts in accordance with a rescript from the Supreme Judicial Court on exceptions reserved, *held* reviewable on writ of error directed to the Superior Court. P. 639.
2. The cause of action for damage to goods in transport over a railroad under federal control was against the Director General of Railroads exclusively. P. 640.
3. When such an action was erroneously brought against the railroad company, it could not be treated as an action against the Director General; and service of process did not bring him into court though made on an agent of the company who might have been properly served in an action against the Director General. *Id.*
4. Where such an action against a railroad company was pending at the termination of federal control, *held*, (a), that substitution, as defendant, of the Agent appointed by the President under the Transportation Act, 1920, is not permissible under § 206(d) thereof, which relates only to suits previously brought against the Director General; (b), that such substitution is in effect the commencement of a new action, and a state statute construed as allowing this by amendment later than two years from the date of the Transportation Act is repugnant to the time limitation in § 206(a) of that Act and void. P. 642.

247 Mass, 259, reversed.

ERROR to a judgment entered in a Superior Court of Massachusetts upon a rescript from the Supreme Judicial Court, in an action for damages, begun against a railroad company, in which the Agent appointed by the President under the Transportation Act was substituted as party defendant.

Mr. Arthur W. Blackman for plaintiff in error.

Mr. Louis Swig for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This writ of error is brought to review a judgment in favor of Cohen & Co., entered in the Superior Court of Bristol County, Massachusetts, against James C. Davis, as Agent designated by the President under the Transportation Act, 1920.[1] After a verdict had been rendered, but before entry of judgment, the case was reported by the Superior Court to the Supreme Judicial Court for instructions upon exceptions that had been reserved by both parties; and thereafter, in accordance with a rescript from the Supreme Judicial Court (247 Mass. 259), the judgment in question was entered in the Superior Court. Under the Massachusetts practice that was followed, the judgment is to be regarded as the final decision of the highest court of the State in which a decision could be had; and the writ of error was therefore properly directed to the Superior Court. *McGuire* v. *Commonwealth,* 3 Wall. 382, 386. And see *Joslin Co.* v. *Providence,* 262 U. S. 668, 673.

A petition for certiorari has also been filed, but as the case is properly here on writ of error, that petition is denied.

The sole question here presented is whether the provisions of the Massachusetts General Laws, c. 231, §§ 51, 138, authorizing amendments in any process, pleading, or proceeding at any time before final judgment, as construed and applied in this case, are invalid because of repugnancy to § 206 of the Transportation Act.

The suit was brought by Cohen & Co., in January, 1920, against the New York, New Haven & Hartford Railroad Co., to recover for damages to a carload of scrap iron shipped over the railroad in 1918, when it was under Federal Control. While the Railroad Company was described

[1] Act of Feb. 28, 1920, c. 91, 41 Stat. 456.

in the writ as a corporation "operated and controlled by the United States Railroad Administration," the writ was directed to, and served upon, the Railroad Company alone, and the declaration was filed against it alone; no effort being then made to sue the Director General. The Railroad Company appeared and filed an answer denying the allegations of the declaration.

No further proceedings were had until September, 1922, when on the *ex parte* motion of the plaintiff, the writ and declaration were amended by striking out the name of the Railroad Company, and substituting the name of James C. Davis, Agent, and the Director General of Railroads, as the party defendant. An order of notice was then served upon Davis, who appeared specially, and moved that such service be set aside and the action against him dismissed, on the grounds that the service was void and the court was without jurisdiction to entertain the action against him, because the proceeding against him had not been instituted within the time prescribed by § 206 of the Transportation Act; and that any provisions of the Massachusetts laws purporting to authorize such proceeding were repugnant to the Transportation Act and void. This motion was denied, and Davis was required to answer. The case, in which, at every stage, he preserved his original objections, finally resulted in the judgment against him which it is now sought to review.

Our conclusions may be briefly stated. The Railroad Company was not liable for the cause of action that had arisen during Federal Control; the sole liability being that of the Director General as the representative of the Government. *Missouri Pacific Railroad* v. *Ault,* 256 U. S. 554, 557. The original suit against the Railroad Company was not a suit against the Director General, and the service of the original writ upon the Railroad Company did not bring him before the court. While originally, after the passage of the Federal Control Act, it was sometimes

thought that the Government might be held liable in a suit brought against the carrier, describing it as in the hands or possession of the Director General, all doubts as to how the suit should be brought was cleared away by the General Order of the Director General requiring that it should be brought against the Director General of Railroads, and not otherwise. *Ault Case, supra,* p. 561 (1921).[2] And it is immaterial that, as admitted at bar, the service of the writ against the Railroad Company was made upon a clerk upon whom process against the Director General might have been served if the suit had been brought against him. " The Federal agent was not bound to take cognizance of an action against the railroad corporation, even though the service was on the same local station agent, and even though the complaint stated a cause of action for personal injuries sustained during government control." *Davis* v. *Chrisp,* 159 Ark. 335, 343.

The Transportation Act, which passed in February, 1920, provided that the Federal Control should terminate on March 1, 1920. It further provided, in § 206(a), that suits and proceedings based on causes of action arising out of the possession, use and operation of a railroad under Federal Control, of such character as prior thereto could have been brought against the railroad company, might, after the termination of Federal Control, be brought against an agent designated by the President for such purpose, " but not later than two years from the date of the passage of this Act." It also provided, in § 206(d), that actions of the character above described, pending at the termination of Federal Control, should not abate by reason of such termination, but might be prosecuted to

[2] See General Order No. 50 of the Director General, Oct. 28, 1918; amended by General Order No. 50-A, Jan. 11, 1919. U. S. Railroad Administration Bulletin No. 4 (Revised), p. 334; and Supplement, p. 58.

final judgment, substituting the agent designated by the President.

At the termination of Federal Control there was no suit pending against the Director General to enforce the liability of the Government. The amendment of the writ and declaration in the suit against the Railroad Company, in October, 1922, by substituting the designated Agent as the defendant, was, in effect, the commencement of a new and independent proceeding to enforce this liability. Being commenced more than two years after the passage of the Transportation Act, it was repugnant to the provision of § 206(a) requiring such an action to be instituted not later than two years after the passage of the Act. This was the only consent the Government had given to being sued in such an action after the termination of Federal Control. Nor was this amendment authorized under § 206(d), which related solely to the substitution of the designated Agent as the defendant in a suit which had been previously brought against the Director General to enforce the liability of the Government, that is, merely authorized the substitution, in such a suit, of another Federal agent for the one already before the court. It had no application to suits pending against a railroad company alone in which there was no Federal agent for whom the designated Agent could be substituted, where the substitution of the designated Agent for the railroad company would work an entire change in the cause of action.

These conclusions, we may add, are substantially the same as those of the State courts in *Fahey* v. *Davis,* 224 Mich. 371; *Fischer* v. *Wabash Railway,* 235 N. Y. 568; *Currie* v. *Louisville & Nash. Railroad,* 206 Ala. 402; *Davis* v. *Chrisp,* 159 Ark., *supra;* and *Davis* v. *Industrial Commission* (Ill.), 146 N. E. 569.

It results that the provisions of the Massachusetts General Laws under which the plaintiff was allowed to amend

the writ and declaration so as to substitute the designated Agent as the defendant instead of the Railroad Company, as construed and applied in the present case, are void because of repugnancy to § 206 of the Transportation Act.

The judgment of the Superior Court is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

LEE ET AL. *v.* OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1 OF MISSISSIPPI COUNTY, ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 336. Argued April 21, 27, 1925.—Decided June 8, 1925.

1. A decree of a state supreme court enforcing special assessments despite objection that the underlying statute, as construed and applied, deprived the land owners of property without due process of law, in violation of the Fourteenth Amendment, is reviewable by writ of error. P. 644.
2. A State cannot impose special taxes on lands acquired by private owners from the United States on account of benefits resulting from a road improvement made before the United States parted with its title. P. 645.
3. When a tax is beyond the constitutional powers of a State, its exaction is a taking of property without due process of law, in violation of the Fourteenth Amendment. P. 646.

162 Ark. 4, reversed.

ERROR to a decree of the Supreme Court of Arkansas which affirmed a decree foreclosing a statutory lien to pay special re-assessments on lands in a road improvement district.

Mr. Prewitt Semmes, with whom *Messrs. D. F. Taylor* and *Charles M. Bryan* were on the brief, for plaintiffs in error.

Mr. J. T. Coston for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Osceola & Little River Road Improvement District brought this suit in a Chancery Court of Arkansas against Lee and the other plaintiffs in error to collect an assessment of taxes that had been made against them for the benefit accruing to their lands by the improvements. The Chancellor found the issues in favor of the District, and decreed that the statutory lien for the assessments be foreclosed and the lands sold to pay the same. This decree was affirmed by the Supreme Court. 162 Ark. 4. The case is properly here on writ of error; and a pending petition for certiorari is accordingly denied.

The sole question presented is whether the Arkansas statute under which the taxes in question were assessed, as construed and applied in this case, deprives the land owners of their property without due process of law in violation of the provisions of the Fourteenth Amendment.

When the District was originally organized, the lands involved in this suit, which are known as "lake lands, or sunk lands", were included in it. The benefits accruing from the improvements were then assessed against all the land owners, including various persons who were supposed to be the riparian owners of the lake lands. It was subsequently ascertained, before the completion of the improvements, that the United States was the owner of these lake lands. It was recognized, however, that it was not liable to assessment, and no attempt was made to collect from it any part of the assessed benefits. After the improvements had been completed, the United States conveyed these lake lands, under the Homestead Act, to the present owners. Thereafter, the Board of Commissioners of the District caused a reassessment to be made of the benefits accruing to all the lands within the District, including the lake lands which had formerly belonged to the

United States. This reassessment was made under a section of the Arkansas statute which provided that: "The board of commissioners may not oftener than once a year order a reassessment of the benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment with like effect." Crawford & Moses' Digest of Arkansas Statutes, § 5399. It is the reassessment of benefits thus made which the District by this suit has sought to collect.

It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 180. This is conceded. It is urged, however, that this rule has no application after the title has passed from the United States, and that it may then be taxed for any legitimate purposes. While this is true in reference to general taxes assessed after the United States has parted with its title, we think it clear that it is not the case where the tax is sought to be imposed for benefits accruing to the property from improvements made while it was still owned by the United States. In the *Van Brocklin Case, supra,* p. 168, it was said that the United States has the exclusive right to control and dispose of its public lands, and that "no State can interfere with this right, or embarrass its exercise." Obviously, however, the United States will be hindered in the disposal of lands upon which local improvements have been made, if taxes may thereafter be assessed against the purchasers for the benefits resulting from such improvements. Such a liability for the future assessments of taxes would create a serious incumbrance upon the lands, and its subsequent enforcement would accomplish indirectly the collection of a tax against the United States which could not be directly imposed. In *Nevada National Bank* v. *Poso Irr. Dist.,* 140 Cal. 344, 347, in which it was held that the State could not

include lands of the United States in an irrigation district so as to impose an assessment for benefits which would become a liability upon a subsequent purchaser, it was said that "if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the government or the purchaser, it attaches a condition to the disposal of the property of the government without its sanction or consent, . . . which must, in such cases, interfere with its disposal."

There is nothing leading to a contrary conclusion in *Seattle* v. *Kelleher,* 195 U. S. 351, and *Wagner* v. *Baltimore,* 239 U. S. 207, which involved merely questions as to the assessment of benefits for local improvements after they had been completed, upon lands which at no time had been the property of the United States.

We find that the provision of the Arkansas statute under which the reassessment of benefits was made, as construed and applied in the present case, was beyond the constitutional authority of the State; and there being no power to impose such a tax, its exaction is a taking of property without due process of law in violation of the Fourteenth Amendment. *Frick* v. *Pennsylvania, ante,* p. 473.

The decree of the Supreme Court of Arkansas is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

PEOPLE OF THE STATE OF NEW YORK EX REL. ROSEVALE REALTY COMPANY *v.* KLEINERT, SUPERINTENDENT, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 350. Argued April 29, 1925.—Decided June 8, 1925.

Under a law authorizing an administrative board to regulate the height, spacing, etc., of buildings thereafter erected in a city, and

for such purposes to divide the city into districts, and to change the districts from time to time after notice and hearing, a lot on which plaintiff had planned to build was transferred to a district of greater restrictions incompatible with the plan, and permission was denied for that reason. *Held,*

(1) That a judgment refusing relief by mandamus was not reviewable by this Court upon the question whether the substantial provisions of the regulations deprived the plaintiff of his property in violation of the Fourteenth Amendment, the federal question raised in the state court having been limited to the constitutionality of the transfer from the district of lesser to that of greater restrictions. P. 650.

(2) That the latter question was not open here, not having been raised by assignments of error, nor specified in the brief as required by Rule 21, par. 2, cl. (2). P. 651.

Writ of Error to 237 N. Y. 580; 206 App. Div. 712, 207 *Id.* 828, dismissed.

ERROR to a judgment of the Supreme Court of New York entered on affirmance and remittitur by the Court of Appeals, denying a petition for a writ of mandamus.

Mr. Benjamin Reass, with whom *Messrs. Emanuel Newman* and *Hugo Hirsh* were on the brief, for plaintiff in error.

Mr. Joseph P. Reilly, with whom *Messrs. Charles J. Druhan* and *George P. Nicholson* were on the brief, for defendant in error Kleinert.

Mr. James Marshall, with whom *Mr. J. George Silberstein* was on the brief, for defendants in error, Midwood Manor Association and Kalvin.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Rosevale Realty Co., the relator herein, filed its petition in the Supreme Court of New York for a peremptory mandamus directing Kleinert, as Superintendent of the Bureau of Buildings, to approve its plans

for an apartment house and grant it a permit to erect the same. On final hearing the Supreme Court entered an order denying this petition. This was affirmed by the Appellate Division and by the Court of Appeals, 206 App. Div. 712 and 207 App. Div. 828; 237 N. Y. 580. The record was remitted to the Supreme Court, to which this writ of error was directed. *Hodges* v. *Snyder,* 261 U. S. 600, 601.

By an Act amending the charter of Greater New York the Board of Estimate and Apportionment was given power to regulate the height and bulk of buildings thereafter erected, the area of courts and other open spaces, and the location of buildings designed for specific uses; to divide the city into districts for such purposes; and to change such districts from time to time, after public notice and hearing. New York Laws, 1916, c. 497, p. 1320. In July, 1916, the Board adopted a "Building Zone Resolution", or ordinance, dividing the city into various classes of Use, Height, and Area districts.[1] In the several classes of area districts, which were designated A, B, C, etc., the required open spaces on each lot were progressively increased and the available building space correspondingly decreased. This Resolution also provided that the Board might from time to time change the districts, either on its own motion or on petition.

In the Spring of 1922 the relator acquired a plot of ground in the Borough of Brooklyn, then in a C area district. It was also in a residential section known as Midwood Manor, in which, under private restrictive covenants contained in the deeds, no buildings except detached dwelling houses could be erected before January 1, 1923. Disregarding these restrictive covenants, the relator procured plans for a 40-family apartment house, conforming as to open spaces, etc., to the requirements of a C area

[1] Each parcel of ground was placed within one of each of these three classes of districts.

district. It filed these plans with the Superintendent of the Bureau of Buildings on September 1, 1922, for the purpose of having them approved and obtaining a building permit.[2] The Superintendent on the same day issued a temporary permit for the necessary installation of footings and foundations; but on the next day revoked this temporary permit, because of a petition that had been forwarded by other owners of property in Midwood Manor to the Board of Estimate and Apportionment, to place this locality within an E area district. On October 20, 1922, the Board, after a public hearing, amended the Zoning Resolution of 1916 by changing this locality, including the relator's plot, from a C to an E area district. On the following day the Superintendent refused approval of the relator's plans because the proposed building was contrary to the regulations of the Zoning Resolution applicable to an E area district.

On January 25, 1923, the relator filed the present petition for peremptory mandamus against the Superintendent.[3] In this petition the relator did not challenge in any way the constitutionality of the substantive provisions of the Zoning Resolution, either in reference to E area districts or otherwise, but did allege, in general terms, that the amendment of October 20, 1922, deprived it of its property in violation of the due process and equal protection clauses of the Fourteenth Amendment. In other

[2] By the Building Code of the city the Superintendent was required to approve or reject any application or plan "within a reasonable time"; and, if approved, to promptly issue a permit therefor.

[3] Meanwhile, in a suit by an owner of other property in Midwood Manor, the relator had been enjoined from constructing the apartment house, in violation of the restrictive covenants, prior to Jan. 1, 1923. And an earlier petition filed by the relator for a peremptory mandamus against the Superintendent had been denied because of the pendency of this injunction, but without prejudice to an application to be made after its vacation or termination. 204 App. Div. 883; 236 N. Y. 605.

words, it merely challenged the constitutionality of the transfer of its property from a C to an E area district, but did not challenge the constitutionality of the provisions in reference to E area districts in and of themselves.

The petition was denied by the Supreme Court on the ground that the building for which the relator desired a permit would, if constructed, be in violation of the Zoning Resolution as amended, and would be unlawful. There was no reference in the opinion to any constitutional question; and the order of the Supreme Court was affirmed by the Appellate Division and the Court of Appeals, without opinions.

1. The relator by its assignments of error challenges the constitutionality of the substantive provisions of the Zoning Resolution, especially as to the restrictions in an E area district made applicable to its plot by the amendment of October, 1922, and earnestly contends, in an elaborate argument, that such restrictions are not regulatory, but confiscatory, and have no such relation to the public welfare, as justifies the exercise of the police power of the State. This broadly outlined, is the contention made both in the oral argument and the relator's brief.

It is clear, however, that no question as to alleged unconstitutionality of the substantive provisions of the Zoning Resolution or of the particular provisions relating to E area districts, was presented by the petition for mandamus; and no such question appears to have been presented to any of the State courts, or to have been considered or determined by them. It is well settled that this Court is without jurisdiction to review the judgment of a State court on a writ of error, by reason of a federal question which was not raised below or called to the attention of or decided by the State court. *Cincinnati, etc., Ry.* v. *Slade,* 216 U. S. 78, 83; *El Paso and Southwestern R. R.* v. *Eichil,* 226 U. S. 590, 597. The writ of error in the present case, therefore, does not bring up for our de-

termination the question as to the constitutionality of the substantive provisions of the Zoning Resolution as to which it is now sought to invoke our decision.

2. While there is an incidental statement in the relator's brief that the amendment of the Zoning Resolution has resulted in restricting the principal use to which relator's property may be put, and also in the illegal confiscation of the plans prepared to conform to a C area district, no argument is made as to this question. And we find that the assignments of error do not, in any tangible or specific way, present any question as to the constitutionality of such amendment, but, that, reasonably construed, they relate merely to the constitutionality of the substantive provisions of the Zoning Resolution made applicable to the relator's property by the amendment. In short, the assignments challenge the constitutionality of the restrictive provisions themselves, and not the transfer from one area district to another. Nor is there in the relator's brief any specification of the errors relied upon, as required by Rule 21 of this Court, par. 2, cl. (2), setting up separately and particularly any error asserted in reference to the constitutionality of the amendment itself. This question is therefore not properly before us, even if its presentation was in fact intended.

As the only federal question properly presented by the assignments of error, namely, the constitutionality of the substantive provisions of the Zoning Resolution, is one which, for the reasons already stated, is not brought within our jurisdiction by the writ of error, we conclude that, without consideration of the merits, the writ must be dismissed, and it is so ordered.

Writ of error dismissed.

GITLOW *v.* PEOPLE OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 19. Argued April 12, 1923; reargued November 23, 1923.—Decided June 8, 1925.

1. *Assumed,* for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States. P. 666.
2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language. P. 666.
3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welware, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question. P. 667.
4. For yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. P. 667.
5. A statute punishing utterances advocating the overthrow of organized government by force, violence and unlawful means, imports a legislative determination that such utterances are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized under the police power; and this determination must be given great weight, and every presumption be indulged in favor of the validity of the statute. P. 668.
6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative discretion, even if the effect of a given utterance can not accurately be foreseen. P. 669.
7. A State can not reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction. P. 669.
8. The New York statute punishing those who advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force, violence, or any unlawful means, or who print, publish, or knowingly circulate any book,

paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown, does not penalize the utterance or publication of abstract doctrine or academic discussion having no quality of incitement to any concrete action, but denounces the advocacy of action for accomplishing the overthrow of organized government by unlawful means, and is constitutional as applied to a printed "Manifesto" advocating and urging mass action which shall progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government; even though the advocacy was in general terms and not addressed to particular immediate acts or to particular persons. Pp. 654, 672.

9. The statute being constitutional, it may constitutionally be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute; and the question whether the specific utterance in question was likely to bring about the substantive evil aimed at by the statute, is not open to consideration. *Schenck* v. *United States*, 249 U. S. 47, explained. P. 670.

195 App. Div. 773; 234 N. Y., 132, 539, affirmed.

ERROR to a judgment of the Supreme Court of New York, affirmed by the Appellate Division thereof and by the Court of Appeals, sentencing the plaintiff in error for the crime of criminal anarchy, (New York Laws, 1909, c. 88), of which he had been convicted by a jury.

Messrs. Walter Nelles and *Walter H. Pollak*, with whom *Messrs. Albert De Silver* and *Charles S. Ascher* were on the brief, for plaintiff in error.

Messrs W. J. Weatherbee, Deputy Attorney General of New York, and *John Caldwell Myers*, Assistant District Attorney of New York County, with whom *Messrs. Carl Sherman*, Attorney General of New York, *Claude T. Dawes*, Deputy Attorney General of New York, *Joab H. Banton*, District Attorney of New York County, and *John F. O'Neil*, Assistant District Attorney of New York County, were on the briefs, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161.[1] He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 160. *Criminal anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. *Advocacy of criminal anarchy.* Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any

[1] Laws of 1909, ch. 88; Consol. Laws, 1909, ch. 40. This statute was originally enacted in 1902. Laws of 1902, ch. 371.

form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . ,

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand

copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin.[2] Coupled with a review of the rise of Socialism, it

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[2] Italics are given as in the original, but the paragraphing is omitted.

"The Left Wing Manifesto"

"Issued on Authority of the Conference by the National Council of the Left Wing.

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. . . . Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. . . . The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. . . . The dominant Socialism united with the capitalist

condemned the dominant " moderate Socialism " for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the " Communist Revolution " by a militant and " revolutionary Socialism ", based on " the class struggle " and mo-

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governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. . . . [The] proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of ' all power to the Soviets,'—organizing the new transitional state of proletarian dictatorship. . . . Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism. . . . Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. . . . Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship. . . . Imperialism is dominant in the United States, which is now a world power. . . . The war has aggrandized American Capitalism, instead of weakening it as in Europe. . . . These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. . . . Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. . . . These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles

bilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg [3] were cited as instances of a development already verging on revolutionary action and suggestive of prole-

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of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. . . . Our task . . . is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. . . . Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle . . . in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. . . . It proposes to conquer by means of political action . . . in the revolutionary

(*Footnote 2 continued on following pages.*)

[3] There was testimony at the trial that "there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed."

tarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the

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Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat *in any form* having as its objective the conquest of the power of the state. . . . Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. . . . But parliamentarism cannot conquer the power of the state for the proletariat. . . . It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action.* The supreme power of the proletariat inheres in the *political mass strike,* in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is *the political mass strike.* . . . The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. . . . The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. . . . The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.* . . . Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the

indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on the grounds stated in the first objection to evidence",

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bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. . . . The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism. . . . While the dictatorship of the proletariat performs its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. . . . It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!"

and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness,

with the object of overthrowing organized government. These were also denied.

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the Revolutionary Age, said: [4] "It is perfectly plain that the plan and purpose advocated . . . contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, . . . but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. . . . The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown . . ."

The Court of Appeals held that the Manifesto "advocated the overthrow of this government by violence, or by unlawful means." [5] In one of the opinions represent-

[4] 195 App. Div. 773, 782, 790.

[5] Five judges, constituting the majority of the court, agreed in this view. 234 N. Y. 132, 138. And the two judges, constituting the minority—who dissented solely on a question as to the construction of the statute which is not here involved—said in reference to the

ing the views of a majority of the court,[6] it was said: "It will be seen . . . that this defendant through the manifesto . . . advocated the destruction of the state and the establishment of the dictatorship of the proletariat. . . . To advocate . . . the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means." In the other[7] it was said: "As we read this manifesto . . . we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism" and "in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described."

And both the Appellate Division and the Court of Appeals held the statute constitutional.

The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out.[8] The correctness of the verdict is not

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Manifesto: "Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means rather than by constitutional means is therein clearly advocated and defended . . ." p. 154.

[6] Pages 141, 142.

[7] Pages 149, 150.

[8] Exceptions to all of these rulings had been duly taken.

questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching

the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . ."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass in-

dustrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.[9]

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Fox* v. *Washington,* 236

[9] Compare *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Twining* v. *New Jersey,* 211 U. S. 78, 108; *Coppage* v. *Kansas,* 236 U. S. 1, 17; *Fox* v. *Washington,* 236 U. S. 273, 276; *Schaefer* v. *United States,* 251 U. S. 466, 474; *Gilbert* v. *Minnesota,* 254 U. S. 325, 338; *Meyer* v. *Nebraska,* 262 U. S. 390, 399; 2 Story On the Constitution, 5th Ed., § 1950, p. 698.

U. S. 273, 276; *Schenck* v. *United States,* 249 U. S. 47, 52; *Frohwerk* v. *United States,* 249 U. S. 204, 206; *Debs* v. *United States,* 249 U. S. 211, 213; *Schaefer* v. *United States,* 251 U. S. 466, 474; *Gilbert* v. *Minnesota,* 254 U. S. 325, 332; *Warren* v. *United States,* (C. C. A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson* v. *Baldwin, supra,* p. 281; *Patterson* v. *Colorado, supra,* p. 462; *Fox* v. *Washington, supra,* p. 277; *Gilbert* v. *Minnesota, supra,* p. 339; *People* v. *Most,* 171 N. Y. 423, 431; *State* v. *Holm,* 139 Minn. 267, 275; *State* v. *Hennessy,* 114 Wash. 351, 359; *State* v. *Boyd,* 86 N. J. L. 75, 79; *State* v. *McKee,* 73 Conn. 18, 27. Thus it was held by this Court in the *Fox Case,* that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case,* that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State* v.

Holm, supra, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. *People* v. *Most, supra,* pp. 431, 432. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People* v. *Lloyd,* 304 Ill. 23, 34. See also, *State* v. *Tachin,* 92 N. J. L. 269, 274; and *People* v. *Steelik,* 187 Cal. 361, 375. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. *Turner* v. *Williams,* 194 U. S. 279, 294. In *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 419, it was said: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas,* 123 U. S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreason-

able attempts to exercise authority vested in the State in the public interest." *Great Northern Ry.* v. *Clara City,* 246 U. S. 434, 439. That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In *People* v. *Lloyd, supra,* p. 35, it was aptly said: "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there

would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox* v. *Washington, supra,* p. 277; *Abrams* v. *United States,* 250 U. S. 616, 624; *Schaefer* v. *United States, supra,* pp. 479, 480; *Pierce* v. *United States,* 252 U. S. 239, 250, 251; [10] and *Gilbert* v. *Minnesota, supra,* p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language

[10] This reference is to so much of the decision as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language.

used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck* v. *United States, supra,* p. 51; *Debs* v. *United States, supra,* pp. 215, 216. And the general statement in the *Schenck Case* (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should

have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen* v. *Most*, L. R., 7 Q. B. D. 244.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck* v. *United States*, 249 U. S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substan-

tive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in *Abrams* v. *United States,* 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer* v. *United States,* 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

DECISIONS PER CURIAM, FROM APRIL 14, 1925, TO AND INCLUDING JUNE 8, 1925, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 328. PETER SAIN ET AL. *v.* CYPRESS CREEK DRAINAGE DISTRICT. Error to the Supreme Court of the State of Arkansas. Submitted April 13, 1925. Decided April 20, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Morrison* v. *Watson,* 154 U. S. 111, 115; *Harding* v. *Illinois,* 196 U. S. 78, 86; *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U. S. 191, 192; *Cleveland & Pittsburgh R. R. Co.* v. *Cleveland,* 235 U. S. 50, 53. *Mr. Lamar Williamson* for plaintiffs in error. *Mr. Charles T. Coleman* for defendant in error.

No. 13, ORIGINAL. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In Equity. Orders entered April 27, 1925.

The motion of the State of Texas for leave to file a reply to the replications of the State of Oklahoma and the United States to the amended counter-claim of the State of Texas relating to the interstate boundary along the 100th meridian is granted, and the reply tendered with such motion is ordered filed.

The joint motion of the State of Oklahoma, the State of Texas and the United States respecting the making up and printing of the record on such counter-claim and the submission and hearing of the issues pertaining thereto is granted; the Clerk is directed to make up and print the record as requested in the motion; and the hearing on the counter-claim is fixed for Monday, November 2, next, after the cases heretofore assigned for that day.

No. 154. CREW LEVICK COMPANY *v.* THE CITY OF PHILADELPHIA, to the use of J. Joseph McHugh. Error to the Supreme Court of the State of Pennsylvania. Argued April 20, 1925. Decided April 27, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of § 257 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. David Wallerstein* with whom *Mr. W. B. Saul* was on the brief, for plaintiff in error. *Mr. Glenn C. Mead* for defendant in error.

No. 220. FORT SMITH LIGHT & TRACTION CO. *v.* FAGAN BOURLAND ET AL. It is ordered by this court that the opinion heretofore filed be amended by inserting after the words " franchise " in the last sentence of the opinion the words " or indeterminate permit." Petition for rehearing denied. [See 267 U. S. 330.]

No. 404. LOUISIANA RAILWAY & NAVIGATION COMPANY *v.* MRS. ALICE S. DUPUIS. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted April 27, 1925. Decided May 4, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. W. M. Barrow* for defendant in error in support of the motion. *Mr. E. H. Randolph* for plaintiff in error in opposition to the motion.

No. 13, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In Equity. Orders entered May 11, 1925. Announced by MR. JUSTICE VAN DEVANTER. See *ante* p. 252.

On consideration of the report made by Joseph M. Hill, Esquire, as special master, under paragraph 8 of the order of January 19, last, and of the exceptions of the Durfee Mineral Company to such report, it is ordered:

1. The exceptions are overruled and the report is confirmed;

2. The claim of T. P. Roberts and A. H. Britain to the royalty interest in the impounded proceeds of the oil and gas taken from receiver's wells 152, 153 and 154 is sustained and the claim of the Durfee Mineral Company to such royalty interest is denied;

3. The receiver is directed to pay out of such royalty interest the following costs incurred in the determination of those claims: To Joseph M. Hill, $2,250.00 for services as special master and $223.36 for expenses; and to the clerk of this court the clerk's costs and printing charges in so far as they may exceed the advance payments made by Roberts and Britain and the Durfee Mineral Company under paragraph 8 of the order of January 19, last;

4. The net balance of such royalty interest remaining after making the required deduction for receivership expenses and paying the costs named in paragraph 3 of this order shall be paid by the receiver to Roberts and Britain as the rightful claimants;

5. No allowance shall be made to either Roberts and Britain or the Durfee Mineral Company by way of reimbursement for expenses incurred and paid in producing witnesses before the special master and having the evidence reported;

6. All moneys advanced for costs under paragraph 8 of the order of January 19, last, by claimants other than Roberts and Britain and the Durfee Mineral Company shall be refunded to such claimants by the clerk. If the advance payments which were made by Roberts and Britain and the Durfee Mineral Company exceed the clerk's costs and printing charges, the excess shall be returned to them in equal proportions.

No. 13, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In Equity. Orders entered May 11, 1925. Announced by MR. JUSTICE VAN DEVANTER.

On consideration of the fourteenth report of the receiver it is ordered:

1. The accounts, disbursements and transactions of the receiver shown in the report are approved;

2. The receiver is directed to apply to receivership expenses the balance of approximately $6,800.00 remaining in his hands to the credit of the river-bed wells;

3. The receiver is directed to pay to the several claimants interested in the Texas or flood-plain wells the balance remaining in his hands to the credit of such wells and heretofore reserved to meet possible receivership expenses;

4. The receiver is instructed, as soon as may be convenient, to make any needful preparation for promptly closing the receivership; to store the books of account, records and files of the receivership with the Security Storage Company of Washington, D. C., in such manner as will make them readily accessible to the clerk of this Court; to pay the storage charges thereon in advance for a period of three years; to deliver such books, records and files as so stored to the clerk of this court; and to make and submit a final report covering his disbursements and transactions since the fourteenth report.

No. —, Original. THE STATE OF LOUISIANA *v.* THE STATE OF MISSISSIPPI. May 11, 1925. Motion for leave to file a bill of complaint herein granted; and process ordered to issue returnable on Monday, October 5 next. *Messrs. Robert Ash* and *John Dale* for Louisiana. No appearance for Mississippi.

No. 783. JAMES C. DAVIS, AGENT, ETC., *v.* DEXTER & CARPENTER, INC., ETC. Error to the Circuit Court of Appeals for the Fourth Circuit. Argued May 4, 1925. Decided May 11, 1925. *Per Curiam.* Affirmed upon the authority of *Davis, Agent,* v. *Newton Coal Co.,* 267 U. S. 292; and *United States* v. *Archibald McNeil & Sons,* 267 U. S. 302. *Mr. Duncan K. Brent,* with whom *Messrs. Francis R. Cross* and *A. A. McLaughlin* were on the brief, for plaintiff in error. *Messrs. Otto A. Schlobohm* and *William B. Symmes, Jr.,* for the defendant in error, submitted.

No. 968. THE UNITED STATES OF AMERICA EX REL. OMAR LENOX MACKLEM *v.* COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. Appeal from the District Court of the United States for the Southern District of New York. Motion, May 4, 1925. Decided May 25, 1925. *Per Curiam.* Motion to admit to bail denied, and cause transferred to the Circuit Court of Appeals for the Second Circuit, upon the authority of (1) the act of September 14, 1922, c. 305, 42 Stat. 827; *Heitler* v. *United States,* 260 U. S. 438, 439; (2) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Isaac Shorr,* with whom *Messrs. Walter H. Pollak* and *Carol Weiss King* were on the brief, for appellant. *The Solicitor General, Mr. Assistant Attorney General Donovan* and *Mr. Harry S. Ridgely* for the appellee.

No. 830. BANCO DI ROMA *v.* PHILIPPINE NATIONAL BANK. Error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted March 2, 1925. Decided May 25, 1925. *Per Curiam.* Dismissed for want of jurisdiction on authorities cited. *Mr. John T.*

Loughran for defendant in error in support of the motion. *Mr. Carroll G. Walter* for plaintiff in error in opposition to the motion.

No. 593. G. W. Coffee et al. *v.* Joseph F. Gray, Receiver of the Tallulah Falls Railway Co. et al. Error to the Supreme Court of the State of Georgia. Motion to dismiss or affirm submitted April 20, 1925. Decided May 25, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *South Carolina* v. *Seymour,* 153 U. S. 353; *United States ex rel. Taylor* v. *Taft,* 203 U. S. 461, 464, 465; *United States ex rel. Champion Lumber Co.* v. *Fisher,* 227 U. S. 445; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert,* 245 U. S. 162. *Messrs. S. R. Prince, L. E. Jeffries* and *Sanders McDaniel* for defendants in error in support of the motion. *Mr. Hooper Alexander* for plaintiffs in error in opposition to the motion.

No. 1155. George Cox *v.* The State of Florida; and

No. 1156. Walker Bryant *v.* The State of Florida. Error to the Supreme Court of the State of Florida. Decided May 25, 1925. *Per Curiam.* Dismissed for want of jurisdiction *ex mero motu,* upon the authority of § 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. Motion to proceed as poor persons denied. *Mr. W. D. Bell* for plaintiffs in error. No appearance for defendant in error.

No. 13, Original. The State of Oklahoma *v.* The State of Texas, The United States, Intervener. Filed May 25, 1925. Final report of receiver received and filed, on motion of *Mr. John Spalding Flannery,* in that behalf.

No. 1089. R. O. Bass *v.* The City of Clifton. Error to the Court of Civil Appeals for the Tenth Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted May 11, 1925. Decided June 1, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. W. A. Keeling* for the defendant in error in support of the motion. *Mr. J. Walter Cocke* for plaintiff in error in opposition to the motion.

No. 909. First National Bank of Longview *v.* Henry Jackson. Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted May 25, 1925. Decided June 1, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of § 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. R. E. Taylor* for defendant in error in support of the motion. *Mr. F. H. Prendergast* for plaintiff in error in opposition to the motion. See *post,* p. 699.

No. 1004. The National Shawmut Bank of Boston *v.* The City of Boston. Error to the District Court of the United States for the District of Massachusetts. Motion to dismiss or affirm submitted May 25, 1925. Decided June 1, 1925. *Per Curiam.* Transferred to the Circuit Court of Appeals for the First Circuit upon the authority of (1) act of September 14, 1922, c. 305, 42 Stat. 827; (2) *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 37; *Brown* v. *Alton Water Co.,* 222 U. S.

325, 332–333; *Metropolitan Water Co.* v. *Kaw Valley Drainage District,* 223 U. S. 519, 522; *Union Trust Co.* v. *Westhus,* 228 U. S. 519, 522–523; *Shapiro* v. *United States,* 235 U. S. 412, 416. *Messrs. William Harold Hitchcock* and *John A. Sullivan* for defendant in error in support of the motion. *Mr. Robert H. Holt* for plaintiff in error in opposition to the motion.

No. 1201. George Chaprales *v.* W. I. Biddle, Warden, Etc. Appeal from the District Court of the United States for the District of Kansas. June 8, 1925. *Per Curiam.* Decree affirmed *ex mero motu,* upon the authority of *Ex parte Parks,* 93 U. S. 18; *Ex parte Yarborough,* 110 U. S. 651; *Henry* v. *Henkel,* 235 U. S. 219; *McMicking* v. *Shields,* 238 U. S. 99. *Mr. Albert S. Marley* for appellant. *The Solicitor General* and *Mr. Harry S. Ridgely* for appellee.

No. 430. Merriam & Millard Company *v.* Chicago, Burlington & Quincy Railroad Company. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted June 1, 1925. Decided June 8, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Baker* v. *White,* 92 U. S. 176, 179; *United States* v. *Beatty,* 232 U. S. 463, 466; *Collins* v. *Miller,* 252 U. S. 364, 370. *Messrs. T. Byron Clark, Bruce Scott* and *Kenneth F. Burgess* for the defendant in error in support of the motion. *Messrs. Edward P. Smith* and *Francis S. Howell* for plaintiff in error in opposition to the motion.

No. 538. St. Louis and Hannibal Railroad Company, *v.* Mary Jackman. Error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm sub-

mitted June 1, 1925. Decided June 8, 1925. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of § 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Messrs. Daniel Bartlett, Thomas L. Philips* and *Matthew E. O'Brien* for defendant in error in support of the motion. *Messrs. J. D. Hostetler, George A. Mahan, Dulaney Mahan, J. H. Haley* and *Richard F. Ralph* for plaintiff in error in opposition to the motion.

PETITIONS FOR CERTIORARI GRANTED, FROM APRIL 14, 1925, TO AND INCLUDING JUNE 8, 1925.

No. 1007. Morse Dry Dock & Repair Company *v.* Steamship Northern Star and Harry Luber. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William E. Leahy* for petitioner. *Mr. Gerson C. Young* for respondent.

No. 1011. Sacramento Navigation Company *v.* Milton H. Salz, doing business as E. Salz & Son. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. H. H. Sanborn* for petitioner. *Mr. S. Hasket Derby* for respondent.

No. 1085. Middleton S. Borland, Trustee, *v.* The United States. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals granted. *Mr. Godfrey Goldmark* for petitioner. *The Solicitor General, Assistant Attorney General Letts* and *Mr. Harvey B. Cox,* Attorney in the Department of Justice, for the United States.

No. 1086. A. J. Byars *v.* The United States. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Claude R. Porter* for petitioner. *The Attorney General* for the United States.

No. 1075. Dr. A. W. Boyd *v.* The United States. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Sam E. Whitaker* for petitioner. *The Attorney General* for the United States.

No. 1143. The Mosler Safe Company *v.* Ely-Norris Safe Company. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Samuel Owen Edmonds* for petitioner. *Messrs. Julius M. Mayer* and *F. P. Warfield* for respondent.

No. 866. Chicago and North Western Railway Company *v.* Alvin R. Durham Company et al. May 25, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Michigan granted. *Mr. R. N. Van Doren* for petitioner. *Mr. Julius J. Patek* for respondents.

No. 1084. Federal Trade Commission *v.* Pacific States Paper Trade Association, etc., et al. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *The Attorney General* for the petitioner. No appearance for respondent.

No. 1098. WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, *v.* CHILE COPPER COMPANY. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *The Solicitor General* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the petitioner. *Messrs. Arthur A. Ballantine* and *George E. Cleary* for respondent.

No. 1145. FEDERAL TRADE COMMISSION *v.* WESTERN MEAT COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *The Solicitor General* and *Mr. Olin M. Fuller,* Attorney in the Department of Justice, for petitioner. *Mr. J. F. Sullivan* for respondent.

No. 1192. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY ET AL *v.* F. A. COCKE. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Charles N. Burch, Harry McCall, H. D. Minor* and *Victor Leovy* for petitioners. *Messrs. Frederic H. Lotterhos* and *George Butler* for respondent.

No. 1193. LAZARUS G. JOSEPH ET AL. *v.* JOHN BORDMAN ET AL. June 1, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Henry D. Green, John W. Clifton* and *Marion Butler* for petitioners. No appearance for respondents.

No. 1199. LEO A. PRICE, AS RECEIVER IN EQUITY OF J. M. GIDDING & COMPANY, INC., *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Second Circuit granted. *Mr. Godfrey Goldmark* for petitioner. *The Attorney General* for the United States.

No. 1203. CHARLES V. DUFFY, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *The Solicitor General* for petitioner. *Mr. John O. H. Pitney* for respondent.

No. 1208. HARMAN W. MCMAHON *v.* MONTOUR RAILROAD COMPANY. June 1, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. C. D. Scully* for petitioner. *Mr. Don Rose* for respondent.

No. 1252. FRANK E. STRIPE ET AL., AS RECEIVERS IN EQUITY OF JOHNSON SHIPYARDS CORPORATION, *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Ben A. Matthews* and *Harold Harper* for petitioners. *The Attorney General* for the United States.

No. 1256. SAMUEL A. MYERS ET AL., COPARTNERS AS S. A. AND H. MYERS, *v.* INTERNATIONAL TRUST COMPANY. June 1, 1925. Petition for a writ of certiorari to the Superior Court for the County of Suffolk, State of Massachusetts, granted. *Mr. Edward F. McClennan* for petitioners. *Mr. John R. Lazenby* for respondent.

No. 1261. THE UNITED STATES *v.* BUTTERWORTH-JUDSON CORPORATION. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *The Solicitor General* for the United States. *Messrs. Eldon Bisbee* and *Bertram F. Shipman* for respondent.

No. 1224. THE UNITED STATES *v.* ONE FORD COUPE AUTOMOBILE, GARTH MOTOR COMPANY, CLAIMANT. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *The Solicitor General* and *Assistant Attorney General Willebrandt* for the United States. *Mr. William S. Pritchard* for claimant.

No. 1024. CONTINENTAL CASUALTY COMPANY ET AL. *v.* ALFRED W. AGEE, ADMINISTRATOR. June 8, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. James C. Jones, Lon O. Hocker* and *Frank H. Sullivan* for petitioners. *Messrs. James H. De Vine* and *Charles R. Hollingsworth* for respondent.

No. 1190. JOHN CARLTON DYSART *v.* THE UNITED STATES. June 8, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. W. Morrow* and *J. H. Hutchins* for petitioner. *The Attorney General* for the United States.

No. 1230. AMERICAN RAILWAY EXPRESS COMPANY *v.* F. S. ROYSTER GUANO COMPANY. June 8, 1925. Petition for a writ of certiorari to the Special Court of Appeals of the State of Virginia granted. *Messrs. Charles W. Stockton* and *Kenneth E. Stockton* for petitioner. No appearance for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM APRIL 14, 1925, TO AND INCLUDING JUNE 8, 1925.

No. 946. A. Guckenheimer & Brothers Company et al. *v.* The United States. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. B. McGinnis* for petitioners. *The Attorney General* for the United States.

No. 952. Adolph Paleais *v.* Lewis H. Saper. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph G. M. Browne* for petitioner. *Mr. Robert P. Levis* for respondent.

No. 954. Citrus Soap Company of California *v.* Royal Lemon Products Company et al. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Barry Mohun* for petitioner. No appearance for respondents.

No. 961. Louis Abramson *v.* The United States. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Martin* for petitioner. *The Attorney General* for the United States.

No. 969. Charles Dick et al. *v.* Marx & Rawolle, Inc. April 20, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frederick C. Bryan* for petitioners. *Mr. H. Winship Wheatley* for respondent.

No. 974. ROSWELL O. JOHNSON ET AL. *v.* THE UNITED STATES. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. C. B. Tinkham* and *Thomas P. Littlepage* for petitioners. No appearance for respondent.

No. 977. EUGENE L. NORTON ET AL. *v.* FREDERICK R. BABCOCK. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William L. Ransom* for petitioners. *Messrs. Hartwell Cabell* and *B. F. Sturgis* for respondent.

No. 979. MAHLON D. THATCHER, TRUSTEE UNDER THE LAST WILL OF FRANKLIN A. LUCE, DECEASED, ET AL., ETC. *v.* THE CHICAGO RAILWAYS COMPANY ET AL. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry S. Robbins* for petitioners. *Messrs. Horace K. Tenney, Roger Sherman, James M. Sheean,* and *Charles S. Babcock* for respondents.

No. 983. KEYSTONE BREWING COMPANY ET AL. *v.* THE UNITED STATES. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry A. Knapp* for petitioners. *The Attorney General* for the United States.

No. 1000. JOHN F. DOWNS ET AL. *v.* THE UNITED STATES. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Merritt Lane* for petitioners. *The Attorney General* for the United States.

Nos. 1012 and 1013. J. H. Mosely *v.* The United States. April 20, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John E. Garner* for petitioner. *The Attorney General* for the United States.

No. 1014. Schweyer Electric & Manufacturing Company et al. *v.* Regan Safety Devices Company et al. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Irving M. Obreight* and *George Wharton Pepper* for petitioners. *Messrs. John J. Kirby* and *A. V. Cushman* for respondents.

No. 1020. Alice Cheney Baltzell *v.* John J. Mitchell, Formerly Collector of Internal Revenue. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert H. Holt* for petitioner. *The Solicitor General* for the respondent.

No. 1021. Hannah P. Weld *v.* John J. Mitchell, Formerly Collector of Internal Revenue. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert H. Holt* for petitioner. *The Solicitor General* for respondent.

No. 1034. M. M. Elkan et al. *v.* Sebastian Bridge District. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas B. Pryor* and *Vincent M. Miles* for petitioners. *Mr. James B. McDonough* for respondent.

No. 1057. LEON ISRAEL ET AL., COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF LEON ISRAEL & BROS., *v.* LUCKENBACH STEAMSHIP COMPANY, INC. April 20, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles C. Burlingham* and *Roscoe H. Hupper* for petitioners. *Mr. Peter S. Carter* for respondent.

No. 918. PORTO RICO RAILWAY, LIGHT & POWER COMPANY *v.* EUGENIE COGNET ET AL. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Carroll G. Walter* for petitioner. *Mr. Charles V. Imlay* for respondents.

No. 990. HARRY C. GROVE, OTHERWISE KNOWN AS HOPPY GROVE, *v.* THE UNITED STATES. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert F. Leach*, Jr. for petitioner. *The Attorney General* for the United States.

No. 999. PETE LUCIS *v.* THE UNITED STATES. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioner. *The Attorney General* for the United States.

No. 1035. HENRY V. CUNNINGHAM, TRUSTEE, *v.* MERCHANTS NATIONAL BANK. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William R. Sears* and *Clarence M. Gordon* for petitioner. *Messrs Edward E. Blodgett* and *George S. Fuller* for respondent.

No. 1038. D. J. AHEARN ET AL. *v.* THE UNITED STATES. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Eric Lyders* for petitioners. *The Attorney General* for the United States.

No. 1043. FRANK MILLER *v.* THE UNITED STATES. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert M. Golding* and *Joseph B. Fleming* for petitioner. *The Attorney General* for the United States.

No. 1061. J. S. HUGHES *v.* THE UNITED STATES. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. M. Beets* for petitioner. *The Attorney General* for the United States.

No. 1062. HERCULES POWDER COMPANY *v.* J. F. RICH. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Gould G. Rheuby* and *William R. Robertson* for petitioner. *Messrs. Heartsell H. Ragon* and *J. H. Thompson* for respondent.

No. 1077. BOATMEN'S BANK *v.* THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Lambert E. Walther, Sears Lehman, Walter H. Saunders, John S. Leahy* and *J. L. London* for petitioner. No appearance for respondent.

No. 1082. C. C. CONNALLY ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Mize* for petitioner. No appearance for respondent.

No. 1087. THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, *v.* JAMES A. BEAR, TRUSTEE. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James D. Johnston* for petitioner. *Mr. Harvey B. Apperson* for respondent.

No. 1042. TOYO KISEN KABUSHIKI KAISHA *v.* WILLIAM D. OELBERMANN ET AL., COPARTNERS, ETC. April 27, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied for failure to file within the time prescribed by the statute. *Messrs. Samuel Knight* and *Joseph K. Hutchinson* for petitioner. *Mr. S. Hasket Derby* for respondents.

No. —. HOWARD *v.* BAILEY, JUDGE. May 4, 1925. Petition for a writ of certiorari herein denied. *Howard,* pro se. No appearance for respondent.

No. 800. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* A. N. MURPHY ET AL., PARTNERS, ETC. May 4, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. M. L. Bell, W. T. Dickinson, W. R. Bleakmore, A. T. Boys, Thomas P. Littlepage* for petitioner. No appearance for respondents.

No. 1015. Morris Orsatti *v.* The United States. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *The Attorney General* for the United States.

No. 1023. Clarence T. Parker *v.* The United States. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl W. Woods* for petitioner. *The Attorney General* for the United States.

No. 1032. Ellis C. Talmadge et al. *v.* The United States. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. H. Prescott Gatley* and *Edward M. Seymour* for petitioners. *The Attorney General* for the United States.

No. 1040. Lynn Storage Warehouse Company *v.* Mordka Senator. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Benjamin N. Johnson, Hugh W. Ogden,* and *Edwin H. Abbot, Jr.,* for petitioner. *Mr. Lee M. Friedman* for respondent.

No. 1047. Kelly-Springfield Tire Company *v.* L. A. Bobo et al. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Preston* for petitioner. *Mr. Olen L. Everts* for respondents.

No. 1048. Blanchard Lumber Company *v.* Jesse H. Metcalf. May 4, 1925. Petition for a writ of certiorari

to the Circuit Court of Appeals for the First Circuit denied. *Mr. Fred F. Field* for petitioner. *Mr. Foye M. Murphy* for respondent.

No. 1058. NEW YORK DOCK COMPANY *v.* STEAMSHIP CAPITAINE FAURE, ETC., ET AL. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph S. Auerbach* and *Charles H. Tuttle* for petitioner. *Mr. Roscoe H. Hupper* for respondents.

No. 1074. CHARLESTON, SOUTH CAROLINA, MINING AND MANUFACTURING COMPANY *v.* THE UNITED STATES. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. E. C. Brandenburg* and *William Wade Hampton* for petitioner. *The Attorney General* for the United States.

No. 1080. JOHN L. NOUNES ET AL. *v.* THE UNITED STATES. May 4, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James W. Wayman* for petitioners. *The Attorney General* for the United States.

No. 1100. E. F. SWINNEY *v.* GARY REALTY COMPANY. May 4, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Frank M. Lowe* for petitioner. *Mr. Armwell L. Cooper* for respondent.

No. 1110. LEHIGH VALLEY RAILROAD COMPANY *v.* JOHN J. HOWELL. May 4, 1925. Petition for a writ of certio-

rari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Allan McCulloh* and *Clifton P. Williamson* for petitioner. *Mr. John C. Robinson* for respondent.

No. 449. WALTER RAY SIMMONS *v.* WILLIAM R. FENTON, WARDEN, ETC.; and

No. 450. WALTER RAY SIMMONS *v.* THE STATE OF NEBRASKA. May 11, 1925. Petitions for writs of certiorari to the Supreme Court of the State of Nebraska denied. *Messrs. E. P. Holmes* and *Thomas P. Littlepage* for petitioner. No appearance for respondents.

No. 829. MANUEL J. JACOBS *v.* MYRA F. JACOBS. May 11, 1925. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Messrs. Carlos P. Griffin* and *Eugene C. Brown* for petitioner. No appearance for respondent.

No. 885. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* FRANK GRIFFITH AND L. D. ALEXANDER. May 11, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. M. L. Bell, Thomas P. Littlepage, W. F. Dickinson, W. R. Bleakmore,* and *A. T. Boys* for petitioner. *Mr. Fred E. Suits* for respondents.

No. 980. UNITED STATES CAST IRON PIPE & FOUNDRY COMPANY *v.* M. W. SULLIVAN, AS ADMINISTRATOR. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Brenton K. Fisk* for petitioner. *Mr. Hugo L. Black* for respondent.

No. 986. WILLIAM PARMENTER *v.* THE UNITED STATES;

No. 987. DAVID BAKER *v.* THE UNITED STATES;

No. 988. MAX CORRIGAN *v.* THE UNITED STATES; and

No. 989. JAMES QUICK *v.* THE UNITED STATES. May 11, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. F. Connally,* with whom *Mr. William Henry Gallagher* was on the brief in No. 989, for petitioners. *The Solicitor General* and *Assistant Attorney General Willebrandt* for the United States.

No. 1027. WILLIAM A. PRICE ET AL. *v.* THE UNITED STATES. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph Kreamer* and *Joseph Siegler* for petitioners. *The Attorney General* for the United States.

No. 1033. LEON FOX *v.* THE UNITED STATES. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Martin* for petitioner. *The Attorney General* for the United States.

No. 1049. JACOB MARCUS ET AL., INDIVIDUALLY AND AS COPARTNERS, ETC. *v.* PILLSBURY FLOUR MILLS COMPANY ET AL. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for petitioners. *Mr. George B. Gordon* for respondents.

No. 1071. JOHN T. PORTER COMPANY ET AL. *v.* JAVA COCOANUT OIL COMPANY, LIMITED. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Ninth Circuit denied. *Messrs. Warren Olney, Jr., J. M. Mannon, Jr.* and *A. Crawford Green* for petitioners. *Messrs. Alfred Sutro, F. D. Madison, H. D. Pillsbury* and *Oscar Sutro* for respondent.

No. 1072. Byron A. Corey *v.* Sunburst Oil & Gas Company. May 11, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied. *Messrs. Louis P. Donovan, P. J. McCumber* and *Homer Sullivan* for petitioner. *Mr. George E. Hurd* for respondent.

No. 1076. The Western Automobile Insurance Company *v.* George S. Robbins et al. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Mitchell D. Follansbee* and *Fred Barth* for petitioner. *Messrs. James W. Good* and *Dwight S. Bobb* for respondents.

No. 1088. Minnie L. Bellamy *v.* Willie G. Pitts et al. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Gunter* for petitioner. *Mr. C. P. McIntyre* for respondents.

No. 1131. Henry Mandel et al. *v.* The United States to the use of Wharton & Northern Railroad Company. May 11, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James D. Carpenter, Jr.* for petitioners. *Messrs. Charles Campbell, Jr.* and *Frederic B. Scott* for respondent.

No. 369. MUNICIPAL ASSEMBLY OF ARROYO, PORTO RICO *v.* SUCCESSORS OF C. & J. FANTAUZZI. Motion submitted April 30, 1925. Decided May 25, 1925. Motion to quash writ of certiorari in this cause granted. *Mr. E. B. Wilcox,* with whom *Mr. C. Dominquez Rubio* was on the brief, for petitioner. *Mr. Francis E. Neagle,* with whom *Mr. Eugene Congleton* was on the brief, for respondent.

No. 859. JAMES C. DAVIS, DIRECTOR GENERAL, ETC. *v.* CATHERINE LIND, ADMINISTRATRIX. May 25, 1925. Petition for a writ of certiorari to the Court of Appeals of Hamilton County, State of Ohio, denied. *Messrs. George Hoadly, Judson Harmon* and *Edward Colston* for petitioner. *Mr. Edward M. Ballard* for respondent.

No. 887. EMELIE W. PEACOCK *v.* MABEL G. REINECKE, COLLECTOR, ETC. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope, James J. Forstall* and *E. Barrett Prettyman* for appellant. *The Solicitor General* and *Assistant Attorney General Willebrandt* for appellee.

No. 909. FIRST NATIONAL BANK OF LONGVIEW *v.* HENRY JACKSON. May 25, 1925. Petition for a writ of certiorari herein denied. *Mr. F. H. Prendergast* for plaintiff in error. *Mr. R. E. Taylor* for defendant in error. See *ante* p. 681.

No. 975. TAMPICO BANKING COMPANY, S. A. *v.* R. S. BARBER. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Hampton Gary* and *Challon B. Ellis* for petitioner. No appearance for respondent.

No. 978. LITTLE SIX OIL COMPANY *v.* MARIE T. EMERSON ET AL. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. D. Lipscomb* for petitioner. No appearance for respondents.

No. 1016. THE COMMERCE-GUARDIAN TRUST & SAVINGS BANK *v.* THE STATE OF MICHIGAN ET AL. May 25, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Messrs. Lee H. Schminck* and *George W. Ritter* for petitioner. No appearance for respondents.

No. 1051. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* HARRY F. STITT. May 25, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. John F. Sharp, W. F. Evans, E. T. Miller, C. B. Stuart, M. K. Cruce* and *Ben Franklin* for petitioner. *Mr. Washington E. Hudson* for respondent.

No. 1056. CHICKASHA COTTON OIL COMPANY *v.* HOMER N. CHAPMAN ET AL. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. C. Coke* and *M. M. Crane* for petitioner. *Mr. Joe A. Worsham* for respondents.

No. 1094. THE DISTRICT OF COLUMBIA *v.* CATHERINE H. BAUER. May 25, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. F. H. Stephens* and *Robert L. Williams* for petitioner. No appearance for respondent.

No. 1095. J. L. WALKER *v.* W. W. WILKINSON, TRUSTEE. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. C. Brandenburg* for petitioner. *Mr. Mark McMahon* for respondent.

No. 1096. J. L. WALKER *v.* W. W. WILKINSON, TRUSTEE. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. C. Brandenburg* for petitioner. *Mr. Mark McMahon* for respondent.

No. 1099. ALEXANDER CUMMINGS *v.* WILSON & WILLARD MANUFACTURING COMPANY ET AL. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leonard S. Lyon* for petitioner. *Messrs. Ford W. Harris* and *G. Benton Wilson* for respondents.

No. 1108. J. L. WALKER *v.* W. W. WILKINSON, TRUSTEE. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. C. Brandenburg* for petitioner. *Mr. Mark McMahon* for respondent.

No. 1109. MASSACHUSETTS BONDING & INSURANCE COMPANY ET AL. *v.* W. W. WILKINSON, TRUSTEE. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. C. Brandenburg* for petitioners. *Mr. Mark McMahon* for respondent.

No. 1120. W. GARLAND GRACE ET AL. *v.* THE UNITED STATES. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank J. Looney* for petitioners. No appearance for respondent.

No. 1154. GUARANTY BANK & TRUST COMPANY *v.* TEXAS SULPHUR COMPANY. May 25, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. D. Lipscomb* for petitioner. No appearance for respondent.

No. 614. WILLIAM LOCKE PADDON *v.* UNA MARGARET LOCKE PADDON. June 1, 1925. On petition for a writ of certiorari to the Supreme Court of the State of California. Dismissed for want of prosecution. *Messrs. Walter C. Clephane, J. Wilmer Latimer* and *Morris Bien* for petitioner. No appearance for respondent.

No. 1079. ROBERT T. BROWN, JR., *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Erle Pettus* and *James A. Cobb* for petitioner. *The Solicitor General* and *Mr. Harry S. Ridgely* for the United States.

No. 1111. AMERICAN SHIPBUILDING & DOCK CORPORATION, CLAIMANT OF THE BARGE AMSADOC, ETC., AND AMERICAN SURETY COMPANY, *v.* JOHN ROURKE & SONS. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George T. Cann* for petitioners. *Mr. A. A. Lawrence* for respondent.

No. 1115. W. H. L. NEWINGHAM ET AL. *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Bernard B. McGinnis* for petitioners. *The Attorney General* for the United States.

No. 1118. CHARLES SCHOPP *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Alexander S. Drescher* for petitioner. *The Attorney General* for the United States.

No. 1119. SOUTHERN PACIFIC COMPANY *v.* VIOLA MASSEY, AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR RALPH MASSEY, DECEASED. June 1, 1925. Petition for a writ of certiorari to the District Court of Appeals, Third Appellate District of the State of California, denied. *Messrs. William H. Devlin* and *Robert T. Devlin* for petitioner. *Mr. Francis Carr* for respondent.

No. 1128. WILLIAM VAN ENGELEN *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James G. Moore* for the petitioner. *The Attorney General* for the United States.

No. 1147. THE PEOPLE OF THE STATE OF NEW YORK EX REL. INTERNATIONAL BRIDGE COMPANY *v.* STATE TAX COMMISSION. June 1, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Adelbert Moot* and *Miss Helen Z. M. Rodgers* for petitioner. *Messrs. Albert Ottinger* and *Frederic C. Rupp* for respondent.

No. 1152. S. C. GRIGSBY ET AL., ADMINISTRATORS OF R. L. GRIGSBY, DECEASED, *v.* THE SOUTHERN RAILWAY COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. T. Kennerly* for petitioners. *Mr. Charles H. Smith* for respondent.

No. 1158. S. J. CRAIG *v.* W. S. LANGMADE, AS EXECUTOR, ETC., ET AL. June 1, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Joseph M. Stark* for petitioner. *Mr. H. O. Caster* for respondents.

No. 1188. EDGAR F. HIATT *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James W. Noel* for petitioner. *The Attorney General* for the United States.

No. 1189. MARION E. MARKS *v.* CARL BAUERS ET AL., ETC. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. I. Moulton* for petitioner. *Mr. Elton Watkins* for respondents.

No. 1194. ACME FOUNDRY & MACHINE COMPANY *v.* THE OIL WELL IMPROVEMENTS COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles Ray Dean* and *Luther Ely Smith* for petitioner. No appearance for respondent.

No. 1211. HARTFORD FIRE INSURANCE COMPANY *v.* WILSON & TOOMER FERTILIZER COMPANY. June 1, 1925.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Daniel MacDougald* and *E. M. Underwood* for petitioner. *Mr. George C. Bedell* for respondent.

No. 1212. GENERAL BAKING COMPANY *v.* JAMES H. GORMAN. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Julius M. Mayer, F. P. Warfield* and *Ellis W. Leavenworth* for petitioner. *Mr. Daniel W. O'Donoghue* for respondent.

No. 1218. STATES OIL CORPORATION *v.* T. J. GILBREATH. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Barry Mohun* for petitioner. *Messrs. R. N. Grisham* and *J. S. Grisham* for respondent.

No. 1222. MRS. VANNYE GILMER, ADMINISTRATRIX, ETC. *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lomax M. Smith* for petitioner. *Messrs. Charles W. Burch, H. D. Minor* and *Marion G. Evans* for respondent.

No. 1223. VAPOR CAR HEATING COMPANY, INC., ET AL. *v.* GOLD CAR HEATING & LIGHTING COMPANY ET AL. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Otto Raymond Barnett* for petitioners. *Messrs. William A. Redding* and *Arthur C. Fraser* for respondents.

No. 1226. JOSEPH DICARLO *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas L. Newton* for petitioner. *The Solicitor General* and *Assistant Attorney General Donovan* for the United States.

No. 1227. JOSEPH RUFFINO *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ernest W. McIntyre* and *Thomas L. Newton* for petitioner. *The Solicitor General* and *Assistant Attorney General Donovan* for the United States.

No. 1231. UNION PETROLEUM STEAMSHIP COMPANY *v.* WILLIAM H. EDWARDS, FORMERLY COLLECTOR. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Delbert M. Tibbetts* for petitioner. *The Solicitor General* for respondent.

No. 1237. I. A. SILVERBERG ET AL. *v.* THE UNITED STATES. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. F. Weeks* for petitioners. *The Attorney General* for the United States.

No. 1245. WASHBURN CROSBY COMPANY *v.* FRANCE MILLING COMPANY. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William J. Hughes, Edward S. Rogers, Harry D. Nims* and *Minturn DeS. Verdi* for petitioner. *Mr. Samuel E. Darby* for respondent.

No. 1253. PHILIP LESCHNIK *v.* CATHERINE C. FRIER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF SOL J. LESCHNIK. June 1, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ben A. Matthews* for petitioner. *Catherine C. Frier,* pro se.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 14, 1925, TO AND INCLUDING JUNE 8, 1925.

No. 358. WILLIAM, INMAN & STRIBLING *v.* SEABOARD AIR LINE RAILWAY COMPANY. April 20, 1925. Appeal from the District Court of the United States for the Northern District of Georgia. Dismissed with costs on motion of *Mr. C. E. Cotterill,* with whom *Mr. Harry W. VanDyke* was on the brief, for appellants. *Messrs. Hollis N. Randolph* and *Robert S. Parker* for appellee.

No. 189. BUFFALO UNION FURNACE COMPANY *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. April 27, 1925. Error to the Circuit Court of Appeals for the Second Circuit. Dismissed with costs, on motion of *Mr. John Lord O'Brien* for plaintiff in error. *Mr. Assistant Attorney General Donovan* for defendant in error.

No. 507. AMERICAN EXPRESS COMPANY *v.* FARMINGTON SHOE MANUFACTURING COMPANY. May 4, 1925. Error to the Circuit Court of Appeals for the First Circuit. Dismissed with costs, on motion of *Mr. Austin N. Pinkham* for plaintiff in error. *Messrs. William C. Resen* and *Lee M. Friedman* for defendant in error.

No. 888. PATRICK J. O'SHAUGHNESSY ET AL. *v.* THE UNITED STATES. May 4, 1925. Error to the District Court of the United States for the Southern District of Alabama. Writ of error dismissed as to plaintiff in error John McEvoy, on motion of *Mr. Solicitor General Beck* in behalf of counsel for the plaintiffs in error. *Mr. Harry H. Smith* was on the brief, for plaintiff in error McEvoy.

No. 1164. THE UNITED STATES *v.* HERBERT H. MCGOVERN, JR. May 11, 1925. Error to the Circuit Court of Appeals for the Ninth Circuit. Dismissed, on motion of *Mr. Solicitor General Beck,* for the plaintiff in error. *Mr. Herbert H. McGovern, Jr.* pro se.

No. 927. ANDRES FUENTES *v.* THE DIRECTOR OF PRISONS. May 11, 1925. On petition for a writ of certiorari to the Supreme Court of the Philippine Islands. Dismissed, pursuant to section 4, rule 37. *Mr. Adam C. Carson* for petitioner. No appearance for respondent.

No. 970. HUMBLE OIL & REFINING COMPANY ET AL. *v.* K. KISHI ET AL. May 11, 1925. On petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Dismissed, pursuant to section 4, rule 37. *Mr. R. L. Batts* for petitioners. No appearance for respondents.

No. 1254. ALBERT OTTINGER, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK *v.* NEW YORK AND QUEENS GAS COMPANY. Motion filed May 23, 1925. Decided May 25, 1925. Appeal from the District Court of the United States for the Southern District of New York. Docketed and dismissed with costs, on motion of *Mr. Robert E. Coulson* for the appellee. No appearance for appellant.

APPENDIX.

ORDER AMENDING EQUITY RULES. MAY 4, 1925.

Equity Rules 10 and 30 (226 U. S. Appendix) are amended hereby to read as follows:

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DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it pro rata among them according to their respective interests.

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ANSWER—CONTENTS—COUNTERCLAIM

The defendant by his answer shall set out in short and simple terms his defense to each claim asserted in the bill, omitting mere statements of evidence and avoiding general denials, but specifically admitting, denying, or explaining

the facts upon which the plaintiff relies, unless he is without knowledge, in which event he shall so state, and this shall be treated as a denial. Averments other than those of value or amount of damage, when not denied, shall be deemed confessed, except as against an infant, lunatic, or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross claims.

When in the determination of a counterclaim complete relief can not be granted without the presence of parties other than those to the bill, the court shall order them to be brought in as defendants if they are subject to its jurisdiction.

ORDER AMENDING RULE OF THE COURT.
MAY 4, 1925.

It is now here ordered by this court that section 7 of Rule 24 of this court be amended so that the entire section will read: [1]

In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to

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[1] The revision of all the rules of the court, adopted June 8, 1925, and effective July 1, 1925, was printed in Vol. 266 U. S., pp. 643, et seq. The rule amended by the above became rule 29 of the revision.

be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, ten dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the Court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of Court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, ten cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

For making a manuscript copy of the record, when required under rule 10, twenty cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

This order shall apply to causes filed here on or after June 9, 1925, but not to causes filed prior to that date.

BANKRUPTCY ORDER. MAY 25, 1925.

It is ordered by the court that General Order in Bankruptcy No. 8, entitled "Proceedings in partnership cases," and Bankruptcy Form No. 2, entitled "Partnership petition," be, and are, abrogated and annulled. Order announced by Mr. JUSTICE SANFORD.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1924.

Original Docket.

Cases pending at beginning of term	24
New cases docketed during term	1
Cases finally disposed of	3
Cases not finally disposed of	22

Appellate Docket.

Cases pending at beginning of term	438
New cases docketed during term	853
Cases finally disposed of	758
Cases not finally disposed of	533

The number of pending cases, original and appellate, was thus increased by 93.

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

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