UNITED STATES REPORTS

VOLUME 269

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1925

FROM OCTOBER 5, 1925
TO AND INCLUDING JANUARY 11, 1926

ERNEST KNAEBEL
REPORTER

GOVERNMENT PRINTING OFFICE
WASHINGTON
1926

ERRATA:

252 U. S. Add " year " after " tax," at end of 9th line from bottom of p. 530.

266 U. S. 687. In last line of enacting clause, change " as " to " and " before " reenacted."

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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.
WILLIAM D. MITCHELL, Solicitor General.
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*.

SUPREME COURT OF THE UNITED STATES

October Term, 1925 [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 268 U. S., p. IV.

TABLE OF CASES REPORTED.

TABLE OF CASES.

Cited in Opinions.

TABLE OF STATUTES.

Cited in Opinions.

(A) Statutes of the United States.

(B) Statutes of the States and Territories.

(C) Treaties.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1925.

PATTERSON ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 221. Argued April 23, 24, 1925.—Decided October 12, 1925.

1. The power given the Interstate Commerce Commission by § 4 of the Act to Regulate Commerce, upon special application to prescribe the extent to which a carrier might be relieved from the operation of that section, containing the long-and-short-haul clause, extended also to the aggregate-of-intermediates clause, when that was added to the section by amendment of June 18, 1910. P. 9.
2. Under the second proviso of § 4, a through rate, exceeding the aggregate of intermediates, if in effect on June 18, 1910, and then lawful, remained so, provided an application to suspend the operation of the section was duly made and was either allowed by the Commission or remained undetermined. P. 11.
3. A through rate higher than the aggregate of intermediates is *prima facie* unreasonable; and, if unreasonably high, violates § 1 of the act despite the pendency of an application suspending the aggregate-of-intermediates clause. P. 12.
4. But when the sole cause of action advanced by the shipper is violation of the aggregate-of-intermediates clause, pendency of the carrier's due and timely application for relief from that clause is a defense, and there is no occasion to consider either the presumption of unreasonableness or the justification for making the through rate higher. P. 12.

2 Fed. (2d) 592, affirmed.

80048°—26——1

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court which sustained demurrers to the amended declaration in an action brought by numerous shippers of horses and mules against Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, and James C. Davis, Director General of Railroads, as Federal Agent, to enforce an order of reparation, made by the Interstate Commerce Commission, and to recover interest, costs and attorney's fee.

Mr. Edgar Watkins, with whom *Mr. Mac Asbill* was on the brief, for plaintiffs in error.

Suit having been brought on an order of the Interstate Commerce Commission, made after complaint and full hearing, such order is *prima facie* evidence of the facts therein stated, including the damages; and a petition setting forth briefly the causes for which damages are claimed and the order of the Commission, is not open to demurrer.

In *Pennsylvania R. R.* v. *International Coal Co.,* 230 U. S. 184, *Mitchell Coal Co.* v. *Pennsylvania R. R.,* 230 U. S. 247, and *Davis* v. *Portland Seed Co.,* 264 U. S. 403, no order of the Commission was involved. The case is ruled by *Meeker* v. *Lehigh Valley R. R.,* 236 U. S. 412; *Pennsylvania R. R.* v. *Clark Bros. Co.,* 238 U. S. 458; *Mills* v. *Lehigh Valley R. R.,* 238 U. S. 473; *Pennsylvania R. R.* v. *Jacoby,* 242 U. S. 89; *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531; *Spiller* v. *Atchison, etc. Ry.,* 253 U. S. 117; *Interstate Commerce Comm.* v. *Louisville & Nashville R. R.,* 227 U. S. 88.

It has been the general practice of the Commission to allow reparation for the unlawful exaction of through rates in excess of the aggregate of the intermediates. *Alabama Packing Co.* v. *Louisville & Nashville R. R.,* 47 I. C. C. 524; *Kyle* v. *M. K. & T. R. Co.,* 42 I. C. C. 335; *Traffic Bureau of Aberdeen Commercial Club* v. *Director Gen-*

eral, 56 I. C. C. 147; *Standard Rail & Steel Co.* v. *M. P. R. R.,* 73 I. C. C. 219; *United Iron Works* v. *Director General,* 74 I. C. C. 277. The Commission has never, after hearing an application for relief from the clause, approved such application. See *Morgan's L. & T. R. & S. S. Co.* v. *Joseph Iron Co.,* 243 Fed. 149. In the case at bar the undisputed evidence was that the through rates assailed exceeded the aggregate of the intermediate rates contemporaneously in effect, and therefore were in violation of § 4 of the Act. 63 I. C. C. 6; 74 I. C. C. 419. Reasonableness or unreasonableness is a question of fact. *Ill. Central R. R.* v. *I. C. C.,* 206 U. S. 441; *Seaboard Air Line Ry.* v. *United States,* 254 U. S. 57.

The Director General was not exempt from the fourth section. In *Davis* v. *Portland Seed Co., supra,* he contended that the long-and-short-haul provision did not apply to him. See 264 U. S. 407. By necessary implication, his contention must have been overruled. There is even greater reason why the aggregate-of-intermediates clause binds him. *Johnston* v. *Atchison etc. Ry.,* 51 I. C. C. 356; *United States* v. *Metropolitan Lumber Co.,* 254 Fed. 335.

Interest is allowable against the Director General. *Mo. Pacific Co.* v. *Ault,* 256 U. S. 554; *Davis* v. *Stamford Co.,* 260 S. W. 1081; § 10, Fed. Control Act.

The petition with exhibits attached does not show that a timely or adequate application to suspend the operation of the aggregate-of-the-intermediates clause was made by the defendants. Bearing on this point, the Court may consider the rules of the Commission and the official communications of its Secretary. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504; *Heath* v. *Wallace,* 138 U. S. 573; *Caha* v. *United States,* 152 U. S. 211; *The Paquete Habana,* 175 U. S. 677; *Robinson* v. *Baltimore & O. R. R.,* 222 U. S. 506. No suspension can be granted, unless a "special case" is shown. The clause is not a statute which the

Commission has jurisdiction to suspend. A greater charge for the through rate than the aggregate of the intermediates is always *prima facie* unlawful; and, in the absence of justification, an order condemning the higher charge, will always be entered; and generally reparation in such cases has been awarded and paid. A through tariff on a joint line is not the standard by which the reasonableness of the local tariff of either carrier should be measured or condemned. *C. & N. W. Ry.* v. *Osborne,* 52 Fed. 912; *Parsons* v. *C. & N. W. Ry.,* 63 Fed. 903; *Augusta S. R. Co.* v. *Wrightsville & T. R. Co.,* 74 Fed. 522. See *New Orleans Board of Trade* v. *Louisville & Nashville R. R.,* 17 I. C. C. 231; *Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88. The 1910 amendment to § 4 merely made statutory the rule that had been enforced by the Commission and the courts. The cost of two intermediate hauls being greater than that of the one through haul, there should not be a greater charge for the latter. *Chicago, M. & St. P. Ry.* v. *Tompkins,* 176 U. S. 167. See *Minneapolis & St. L. R.* v. *Minnesota,* 186 U. S. 257.

The amendment containing the aggregate-of-the-intermediates clause, was not to lessen, but to increase, the rights of shippers; and in construing it that purpose should be kept in mind. It should also be remembered that the power to grant relief from the long-and-short-haul clause was already in the Act. The aggregate-of-the-intermediates provision was inserted after the section had otherwise been completed, and this insertion might properly have been placed elsewhere in the Act. The history of the long-and-short-haul clause shows that there were reasons why the Commission should have authority to suspend, even permanently to modify, that clause. See Hadley, Railroad Transportation, pp. 65, 155; *Interstate Commerce Comm.* v. *L. & N. R. R.,* 190 U. S. 273. No such reasons apply to the aggregate-of-the-intermediates clause.

The history of the provision furnishes conclusive reasons why there should be no suspension by the Commission. Looking to the language and punctuation, it is clear that the provision for granting relief cannot be made to apply to the aggregate-of-the-intermediates clause. Had there been no amendment of 1910, plaintiffs in error, there having been no justification by the carriers for their unlawful charge, would have received the award of reparation which they did receive and would have been able to collect it. Can it be contended that the amendment lessened their rights? See *Hudson Mule Co.* v. *Director General,* 91 I. C. C. 459. The Commission's power was not intended to be enlarged by the amendment of 1910 but the purpose was rather to restrict it. *United States* v. *Atchison etc. Ry.,* 234 U. S. 476; Cong. Rec. April 12, 1910, pp. 4579, 4580.

It is contended that the fact that the Interstate Commerce Commission permits the filing of applications to suspend the clause in question furnishes argument in support of the right of the Commission so to do. But if we apply the principle that the practice of the Commission should be given force in construing a statute we have a practice of the Commission continued through some thirty years holding that reparation is properly awarded in a case like this. Besides, while the Commission did state in its report to Congress in 1911, pp. 19 and 20, that it had authority to suspend, the Commission based its opinion rather on an argument of convenience and a question of practicality. After the Act of 1910, the greater charge for the through rate became unlawful, unjust and unreasonable. Even if, to protect the carriers against the criminal provisions of the Act, and as a practical reason, the Commission may be justified in granting relief, there is no reason for the Commission to hold, (and it did not,) that the suspension of the amendment of 1910 deprives a shipper of civil rights. The carrier as a " practical mat-

ter" might be protected against criminal prosecution by an application, but no application could make reasonable, just and lawful that which the courts, the Commission and the Congress had said was unjust, unreasonable and unlawful. To give the Commission power, unlimited as to time and as to the principles to be applied, to suspend a statute would be a delegation of legislative power and unconstitutional. Courts will, if possible, so construe a statute as to make it constitutional.

If the Commission had power to suspend the aggregate-of-the-intermediates clause, and had it done so, the Commission nevertheless had jurisdiction to determine whether or not, under §8 of the Interstate Commerce Act, plaintiffs in error suffered damages, and the amounts thereof; and such determination is *prima facie* correct.

Mr. Nelson W. Proctor, with whom *Mr. William A. Northcutt* was on the brief, for defendants in error, Louisville & Nashville R. R. and Nashville, Chattanooga & St. Louis Ry.

Mr. John F. Finerty, for Davis, Director General.

Mr. Justice Brandeis delivered the opinion of the Court.

Section 4 of the Act to Regulate Commerce as amended June 18, 1910, c. 309, 36 Stat. 539, 547, provides, among other things: "That it shall be unlawful for any common carrier subject to the provisions of this Act . . . to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act."

This suit was brought in the federal court for northern Georgia, under § 16, paragraph 2, of the Act, to enforce an order of reparation for $30,000 which had been entered by the Interstate Commerce Commission on April 9, 1923, pursuant to §§ 8 and 9. The shipments having been made from time to time between January 1, 1916 and December

1, 1918, both the railroad companies and James C. Davis, as agent designated by the President under § 206 of Transportation Act, 1920, c. 91, 41 Stat. 456, 461, were joined as defendants before the Commission and in the courts. The rates under which these shipments were made were first established in 1892, and were proportionately increased under the terms of general order No. 28 of the Director General of Railroads on June 25, 1918. The case was heard upon demurrer to the declaration, to which were annexed as exhibits the several complaints before the Commission and the order of the Commission with incorporated reports. The demurrers were sustained by the District Court; judgment was entered for the defendants; and this judgment was affirmed by the Circuit Court of Appeals, 2 Fed. (2d) 592. The case is here on writ of error under § 241 of the Judicial Code.

The complaint before the Commission as amended charged that the through rates were "unreasonable, excessive and unjustly discriminatory contrary to the First, Third and Fourth Sections," and also charged specifically that they violated the aggregate-of-intermediates clause above quoted. The report shows that relief was not granted on the ground of unjust discrimination under § 3, nor on the ground of departure from the long-and-short-haul clause of § 4. As to the remaining grounds of relief asserted in the complaint, the report states: ". . . we find that, while the rates assailed appear not unduly high, they were unreasonable in and to the extent that they respectively exceeded the aggregate of the intermediate rates subject to the act; that complainants made shipments and paid and bore the charges thereon upon the basis of the through rates and were damaged thereby; and that they are entitled to reparation on the basis of the difference between the respective through rates and the sums of the lowest intermediate rates subject to the act applicable on all shipments which moved since the dates above stated for the several complainants."

Whether the Commission intended to base its order of reparation upon § 1, or upon the aggregate-of-intermediates clause of § 4, or upon both, is left uncertain by the language used. The District Court apparently assumed that the report awarded, and the declaration sought, such relief on both grounds. It held that there was no liability under § 4, because the Commission had found that the through rates which exceeded the local had been protected by proper application for relief from the operation of that clause of the section. It held that there was no liability under § 1, because the Commission found that the through rates, although higher than the aggregate of the intermediates, were "not unduly high." The Circuit Court of Appeals construed the declaration as seeking recovery only on the ground that the quoted clause of § 4 had been violated; and it affirmed the judgment because the shippers had failed to show that this violation had caused them special pecuniary damage. The declaration, and the brief and argument submitted for the shippers in this Court, make it clear that the only cause of action sued on is the violation of the aggregate-of-intermediates clause of § 4. We have, therefore, no occasion to pass upon the effect of the finding that the through rates were "not unduly high" or on other questions discussed by counsel bearing upon liability under § 1.

The shippers insist that, since the declaration set forth an order of reparation for violation of the aggregate-of-intermediates clause duly made upon complaint and hearing, the demurrer should have been overruled. The argument is that the Commission is without power to suspend the aggregate-of-intermediates clause; that if it has any such power, it is only to the extent of relieving the carrier from criminal liability under § 10 of the Act, so that in no event can a suspension relieve the carrier from civil liability to shippers; that the Commission thus retains the power under §§ 8 and 9 to award reparation for damage

suffered; that, whatever the power of the Commission to suspend the clause in question, that power does not appear to have been invoked in this case by an adequate and timely application to the Commission; that since, on any one of the above grounds, the Commission was free to award reparation upon finding damage suffered as a result of the higher through rate, and found such damage, its report stated a *prima facie* liability; and that, as the declaration embodied the report, it was good on demurrer. The argument is, in our opinion, unsound.

The aggregate-of-intermediates clause was inserted in § 4 by the Act of June 18, 1910. Since that amendment, as before, the section empowers the Commission, upon special application, to "prescribe the extent to which such designated common carrier may be relieved from the operation of this section." The question whether, after the amendment, the power so conferred was still limited to the long-and-short-haul clause or extended also to the aggregate-of-intermediates clause, received careful consideration immediately after the passage of the 1910 Act. The Commission concluded that its power to grant the relief applied to both of these clauses. In its annual report for 1911 the reasons for this conclusion were set forth. Pp. 19–20. The construction then adopted has been acted upon consistently ever since.[1] So far as appears, no court, federal or state, has taken a different view. And Congress has acquiesced.

In support of the contention that the power to relieve from the operation of the section does not cover this case, the shippers point to the fact that, while the charge of the

[1] *Humphreys Godwin* v. *Yazoo & M. V. R. R. Co.*, 31 I. C. C. 25, 29; *Through Rates from Buffalo-Pittsburg Territory*, 36 I. C. C. 325; *Through Rates to Points in Louisiana and Texas*, 38 I. C. C. 153; *Du Pont de Nemours & Co.* v. *Director General*, 62 I. C. C. 109; *Fares between New York and Points West of Newark*, 74 I. C. C. 516; *Fidelity Lumber Co.* v. *Louisiana & P. Ry. Co.*, 83 I. C. C. 499, 500.

higher through rate did not become unlawful *per se* until the provision to that effect was inserted in § 4 by the 1910 Act, the Commission had repeatedly held that a through rate higher than the aggregate of the intermediates was *prima facie* unreasonable.[2] From this they argue that the construction given to the amended Act by the defendant carriers would result in abridging, instead of enlarging, the rights of shippers in this respect, and therefore should not be adopted. We think such a conclusion erroneous. The construction given the section by the carriers does not result in abridging the rights of shippers. As a result of the amendment such through rates, unless protected by proper application, are not merely *prima facie* unreasonable, but unlawful by express statutory provision. The Commission, while claiming the power to suspend the operation of the clause in question, has continued to hold that, as before the amendment, such through rates are *prima facie* unreasonable when attacked under § 1 of the Act.[3]

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[2] *Hope Cotton Oil Co.* v. *Texas & P. Ry. Co.,* 12 I. C. C. 265; *Coomes* v. *Chicago, M. & St. P. Ry. Co.,* 13 I. C. C. 192; *Oshkosh, Logging Tool Co.* v. *Chicago & N. W. Ry. Co.,* 14 I. C. C. 109; *Hardenberg, Dolson & Gray* v. *Northern Pacific Ry. Co.,* 14 I. C. C. 579; *Momsen & Co.* v. *Gila Valley, G. & N. Ry. Co.,* 14 I. C. C. 614, 615; *Lindsay Bros.* v. *Michigan Central R. R. Co.,* 15 I. C C. 40; *Michigan Buggy Co.* v. *Grand Rapids & I. Ry. Co.,* 15 I. C. C. 297; *Lindsay Bros.* v. *Baltimore & O. S. W. R. R. Co.,* 16 I. C. C. 6; *Wells-Higman Co.* v. *Grand Rapids & I. Ry. Co.,* 16 I. C. C. 339; *Blodgett Milling Co.* v. *Chicago, M. & St. P. Ry. Co.,* 16 I. C C. 384; *Smith Mfg. Co.* v. *Chicago, M. & G. Ry. Co.,* 16 I. C. C. 447; *Milburn Wagon Co.* v. *Lake Shore & M. S. Ry. Co.,* 18 I. C. C. 144; *Windsor Turned Goods Co* v. *Chesapeake & O. Ry. Co.,* 18 I. C. C. 162.

[3] See, *e. g., Humphreys Godwin Co.* v. *Yazoo & M. V. R. R. Co.,* 31 I. C. C. 25; *Alabama Packing Co.* v. *Louisville & N. R. R. Co.,* 47 I. C. C. 524, 529; *Williams Co.* v. *Pennsylvania Co.,* 50 I. C. C. 531, 533; *Virginia-Carolina Chemical Co.* v. *Atlantic Coast Line R. R. Co.,* 78 I. C. C. 107; *Davision & Namack Foundry Co.* v. *Pennsylvania R. R. Co.,* 81 I. C. C. 345; *La Crosse Chamber of Commerce* v. *Director General,* 93 I. C. C. 602.

No good reason is shown for denying to the words used their clear and natural meaning. Compare *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 564–568. On the other hand, there is good reason why the two prohibitions of § 4 should be treated similarly. Apart from statutory enactment it is *prima facie* unreasonable to charge more for a shorter than for a longer haul. To charge more for a through haul than the aggregate of the intermediate rates is likewise *prima facie* unreasonable. In each case conditions may exist which, if shown, would establish the reasonableness of the rate in question. Under the Act to Regulate Commerce as originally enacted the carriers were, in each class of cases, at liberty to introduce the rate without first securing the consent of the Commission. If its invalidity were later asserted, they could escape liability by establishing then its justification. By amendatory legislation, Congress provided, in each class of cases, that the rate should not be charged unless, prior to its introduction, the Commission had, upon special application, granted authority therefor. *Intermountain Rate Cases,* 234 U. S. 476.

The shippers' contention that relief from the operation of the aggregate-of-intermediates clause was not invoked by an adequate and timely application is also unsound. Under the second proviso of § 4 the rates complained of, if in effect on June 18, 1910 and then lawful, remained so, provided an application to suspend the operation of the section was duly made and was either allowed or remained undetermined. The District Court construed the report of the Commission as finding that the then existing rates here in question were so protected. We, also, construe the report as finding, in effect, that application for relief was made and was both adequate and timely.

It is true that the due filing of such an application for relief from the aggregate-of-intermediates clause or even an order granting relief thereon, would not render legal a

rate which violated some other section of the Act. See *United States* v. *Merchants, etc. Assn.*, 242 U. S. 178, 188. A through rate would be unlawful, despite such an order, if it violated § 3 because unjustly discriminatory, or if it violated § 1 because unreasonably high. The Commission is correct in holding, as before stated, that if a through rate higher than the aggregate of the intermediates is attacked under § 1, the *prima facie* presumption that such higher through rate is unreasonable, and hence unlawful, obtains now as it did before the 1910 amendment. But no such question could arise in a proceeding limited to § 4. In a proceeding for violation of either clause of § 4, there is no occasion to consider either the presumption of unreasonableness or the existence of a justification for making the through rate higher. Neither is relevant. For if there has been an adequate and timely application within the six months, which application remains undetermined—or an application filed later and granted—there can be no violation of that section. If there was no such application filed, the section is violated by the higher through rate, even if conditions are shown which would have justified the rate as against a charge of unreasonableness under § 1.

Since there can be no recovery under § 4 because of the pendency of an application for relief, we have no occasion to consider whether the rule of *Davis* v. *Portland Seed Co.*, 264 U. S. 403, as to damages applies to violations of the aggregate-of-intermediates clause, nor whether it applies alike to suits based on reparation orders and to those instituted in the courts without such prior order.

Affirmed.

UNITED STATES, EX REL. KENNEDY ET AL. *v.* TYLER, SHERIFF, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 125. Argued April 21, 22, 1925.—Decided October 12, 1925.

1. The power of a District Court to inquire by *habeas corpus* into the cause of the detention of a person held in custody by the authority of a state court in alleged violation of the Constitution, laws or treaties of the United States, is to be exerted in the exercise of a sound discretion; and the due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. P. 17.
2. Lack of ability to bear the expense of proceedings for relators' protection in the state courts or to furnish bonds required on appeal, does not alter this rule. P. 19.
3. Persons who were imprisoned by a New York court for contempt in disobeying its order prohibiting further proceedings in the Peacemakers' Court of the Cattaraugus Indian Reservation, claimed that the land in question was outside the sovereignty of the State and the jurisdiction of its courts, and that their arrest and detention violated their rights as Seneca Indians, under treaties with the Seneca Nation, and their rights under the Federal Constitution. *Held,* inasmuch as the state courts were proceeding under state laws passed in response to a request of the Seneca Nation and which apparently for the greater part of a century had not been challenged as impeding the authority of the Federal Government, that it was peculiarly appropriate that the questions raised should be dealt with by those courts in the first instance, subject to review by this Court, and that a writ of *habeas corpus,* issued by the District Court, should have been discharged upon that ground rather than upon the merits.

294 Fed. 111, affirmed.

APPEAL from a judgment of the District Court, discharging upon the merits a writ of *habeas corpus,* issuance of which was procured by Walter S. Kennedy, on behalf of his son, Warren Kennedy and Sylvester J. Pierce, to

test the validity of their arrest and imprisonment for contempt of a prohibitory order of the Supreme Court of New York. The United States and Alice Estella Spring intervened in the District Court and joined in the appeal. William F. Waldow, then Sheriff of Erie County, was named defendant; upon the expiration of his term, Frank M. Tyler, his successor, was substituted.

Mr. George P. Decker, for appellants, Kennedy and Pierce.

Mr. Edward G. Griffin, Deputy Attorney General of New York, with whom *Mr. Albert Ottinger,* Attorney General of New York, was on the brief, for Tyler, Sheriff.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney General Wells,* were on the brief, for the United States.

Mr. Edward G. Griffin, with whom *Mr. Thomas H. Larkin* and *Alice Estella Spring, pro se,* were on the brief, for appellee Alice Estella Spring.

Mr. Justice Sutherland delivered the opinion of the Court.

Nathaniel C. Patterson, a duly enrolled Seneca Indian residing on the Cattaraugus Indian Reservation in the State of New York, died testate leaving a widow (a white woman), a daughter and three sons. The widow was named in the will as sole executrix. The will was regularly admitted to probate by the surrogate of Erie County, New York, and letters of administration granted. The widow thereupon presented her letters of administration together with the will to the peacemakers' court of the Cattaraugus Reservation, where the deceased had left real property, asking that the probate of the will be recognized or the

will itself be admitted there to probate. The peacemakers' court, holding that the widow and her children were not members of the Seneca Nation and, therefore, under tribal custom, not entitled to inherit lands in the reservation, declined to grant either prayer, but appointed Pierce administrator. Pierce brought an action in the peacemakers' court to eject the widow from the property and to set aside the probate of the will by the surrogate of Erie County. The widow appeared specially and objected to the jurisdiction of the peacemakers' court. That court overruled the objection and entered judgment against her for possession of the property. Upon the application of the widow, the supreme court of the state issued its final order prohibiting Pierce, administrator, and the members of the peacemakers' court from taking any further steps in the matter. In violation of that order, Pierce caused a mandate of the peacemakers' court to be issued and delivered to Warren Kennedy, marshal of the reservation, under which the latter took possession of the property. Thereupon, contempt proceedings were had before the state supreme court, as a result of which Pierce and Kennedy were adjudged guilty of a contempt of that court in having wilfully disobeyed its prohibition order and sentenced to pay a fine in the sum of $184.50 with imprisonment as the alternative. Upon their failure to pay the fine, Pierce and Kennedy were ordered committed to the Erie County jail and to that end were taken into custody by the sheriff of Erie County. A writ of *habeas corpus* was immediately sought in the federal district court for the western district of New York upon the grounds that Pierce and Kennedy were Seneca Indians and their detention was in violation of their rights under treaties with the Seneca Nation; that both the Indians and the lands in question were outside the sovereignty of the state and, consequently, of the jurisdiction of its courts; and that by their arrest and detention they were denied the due

process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The writ was sued out by the relator Walter S. Kennedy father of Warren.

The district court exercised its discretion in favor of issuing the writ principally upon the ground that Pierce and Warren Kennedy being Seneca Indians were wards of the Nation and entitled to the protection of the federal courts. But in deciding the case upon the merits, that court pointed out that as early as 1849 the State of New York, at the earnest request of the Indians themselves, had assumed jurisdiction over them and their lands and possessions within the state; that to that end state laws had been enacted for their civil government and the regulation of their internal affairs; that the peacemakers' courts on the several reservations were created by state law; and that the courts of the state had uniformly held that the power of the state in respect of these matters had never been doubted or questioned, and such sovereignty as the Indians may have formerly possessed had been merged and lost in the sovereignty of the state under which they must look for protection of life and property. In the absence of congressional action, the district court concluded that these state laws and decisions, by long acquiescence on the part of the Indians, had become rules of property within the state and were controlling. The writ was accordingly dismissed. *United States* v. *Waldow*, 294 Fed. 111.

We are asked to enter upon a review of these matters and of the historical relations of the Indians to the Nation and to the State of New York from a time long anterior to the adoption of the federal Constitution. The conclusion we have reached makes this unnecessary. It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property, passed laws creating and defining the jurisdiction of the

peacemakers' courts, administered these laws through its courts, and that Congress has never undertaken to interfere with this situation or to assume control. Whether the state judicial power extends to controversies in respect of the succession of Indian lands within the boundaries of the state, whether the peacemakers' court in the exercise of its jurisdiction is subject to the authority of the state supreme court, whether the subject matter of these controversies and proceedings was one exclusively within the control of the national government and beyond the authority of the state, are all questions which, under the circumstances recited, it is peculiarly appropriate should in the first instance be left to be dealt with by the courts of the state. In so far as they involve treaty or constitutional rights, those courts are as competent as the federal courts to decide them. In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him.

The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of *habeas corpus* to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. *Ex parte Royall,* 117 U. S. 241, 250–253; *In re Wood,* 140 U. S. 278, 289; *In re Frederich,* 149 U. S. 70, 77–78; *New*

York v. *Eno,* 155 U. S. 89, 98; *Whitten* v. *Tomlinson,* 160 U. S. 231, 240–242; *Baker* v. *Grice,* 169 U. S. 284, 290; *Tinsley* v. *Anderson,* 171 U. S. 101, 104–105; *Davis* v. *Burke,* 179 U. S. 399, 401–403; *Riggins* v. *United States,* 199 U. S. 547, 549; *Drury* v. *Lewis,* 200 U. S. 1, 6; *Glasgow* v. *Moyer,* 225 U. S. 420, 428; *Johnson* v. *Hoy,* 227 U. S. 245, 247.

In *New York* v. *Eno, supra,* a federal circuit court had discharged a prisoner held by virtue of the judgment of a state court on the ground that the offenses for which he was indicted were exclusively cognizable under the authority of the United States. This court reversed the judgment, holding that the state court of original jurisdiction was competent to decide the questions in the first instance and that "its obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused is the same that rests upon the courts of the United States. When the claim of the accused of immunity from prosecution in a state court for the offences charged against him has been passed upon by the highest court of New York in which it can be determined, he may then, if the final judgment of that court be adverse to him, invoke the jurisdiction of this court for his protection in respect of any federal right distinctly asserted by him, but which may be denied by such judgment."

This general rule is emphasized by a consideration of the few cases where this court has upheld the allowance of the writ. They were all cases of exceptional urgency. Such, for example, were *In re Neagle,* 135 U. S. 1, where a deputy marshal of the United States was discharged on *habeas corpus* from state custody on a charge of homicide committed in the performance of his duty to guard and protect a justice of this court; *In re Loney,* 134 U. S. 372, where petitioner, charged with perjury in testimony given in a contested congressional election case, was discharged

upon the ground that to permit him to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal; and *Wildenhus's case,* 120 U. S. 1, where a member of the crew of a foreign merchant vessel was discharged from the custody of the state because the arrest was contrary to the provisions of an international treaty. Thus, it will be seen, two of these cases involved interferences by the state authorities with the operations of departments of the general government, and the other concerned the delicate relations of that government with a foreign nation.

It is hardly necessary to say that this case presents no such exceptional and imperative circumstances. The state courts proceeded under laws passed in response to the request of the Indian Nation of which contemners are members,—laws which apparently for the greater part of a century had not been seriously challenged as impeding the authority of the federal government. Under these conditions, contemners, deliberately having taken the risk of setting at defiance the judgment of the state court, must look for redress, if they are entitled to any, to the appropriate and authorized appellate remedies. They are not entitled to relief in a federal court by the writ of *habeas corpus.*

Something is said in the opinion of the court below to the effect that the relators pleaded lack of ability to bear the expense of proceedings for their protection in the state courts or to furnish bonds required on appeal. We are unable to find anything in the record to support this claim, but even if it were true it would afford no basis for a different conclusion. *Markuson* v. *Boucher,* 175 U. S. 184, 185, 187.

The court below should have discharged the writ upon the foregoing grounds rather than upon the merits, but the result being the same, the judgment is

Affirmed.

AGNELLO ET AL. *v.* UNITED STATES.

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

No. 6. Argued April 23, 1925.—Decided October 12, 1925.

1. The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. P. 30.
2. But this right, which is incidental to the arrest, can not extend to the search of a man's dwelling, several blocks distant from the place of his arrest, after the offense has been committed, and while he is in custody elsewhere. *Carroll* v. *United States*, 267 U. S. 132, distinguished. *Id.*
3. So *held*, assuming that the house searched, which was the house of one A who had shortly before been arrested with others who were in the act of consummating a conspiracy to violate the Anti-Narcotic Act by selling cocaine without having registered and paid the prescribed tax, was the place from which the cocaine sold had been taken by some of the defendants to the place of sale; and that other cocaine, discovered in the house by the search, was there in A's control in violation of the Act, was subject to forfeiture thereunder, and was part of the cocaine constituting the subject-matter of the conspiracy. *Id.*
4. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search in the house without a warrant; such searches are unlawful notwithstanding facts unquestionably showing probable cause. P. 32.
5. When properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. P. 33.
6. Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and whom it is sought to incriminate by evidence so obtained, may not invoke protection of the Fifth Amendment immediately, by objection

to the evidence, without having made any application for the return of the thing seized. P. 34.

7. Evidence of an unlawful search of an accused person's house and of seizure therein of an incriminating article, can not be introduced against him at the trial as evidence in rebuttal of his testimony on cross-examination that he never saw the article. P. 35.

8. Where several are tried jointly and convicted for conspiracy, erroneous admission of evidence of an unlawful search and seizure in the dwelling of one will not require a reversal as to the others, if the evidence was adduced only against the one, in proof of guilty knowledge and intent in performing acts with the others for executing the conspiracy, since they would be equally guilty whether he acted as guilty participant or as their innocent agent. P. 35.

290 Fed. 671, reversed in part; affirmed in part.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction and judgment in the District Court on a prosecution of the petitioners (named in the opinion) for conspiracy to violate the Federal Narcotic Tax Act.

Mr. George Gordon Battle, with whom *Mr. Isaac H. Levy* was on the briefs, for petitioners.

There was error in the admission, over proper objection, of evidence obtained by an unlawful search and seizure. *Youmans* v. *Commonwealth,* 189 Ky. 159; *People* v. *Chiagles,* 237 N. Y. 193; *Entick* v. *Carrington,* 19 How. St. Trials, 1029; *Burns* v. *Erben,* 40 N. Y. 463. *People ex rel. Kingsley,* 22 Hun, 300, distinguished.

This Court has without deviation applied the principle that a search of person or of residence, or a seizure of property or effects, may not be had for the mere purpose of obtaining evidence. In contrast with this simple rule, we have here suggested for the first time a test derived, not from the words of the Amendment, but from an exception to the rule. The reasonableness and justification of the arrest, are made the standards for determining the reasonableness of the search, or of the right to make it. And the exception to the rule that permits a person at the

time of arrest to be searched for the instruments of his offense, or to deprive him of the means of resistance or escape, grows not only to over-shadow, but to supplant the rule to which it is an exception. With the result that the belief of a revenue agent is made to satisfy the provision of the Constitution that secures home and person against search until a magistrate entrusted with judicial functions is satisfied by oath that there exists probable cause for the search.

The decision of the Circuit Court of Appeals is contrary to the decisions of this Court. *Boyd* v. *United States,* 116 U. S. 616; Cooley's Const. Lim., p. 374; Hale, 2 P. C., p. 150; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Entick* case, *supra; Weeks* v. *United States,* 232 U. S. 383; *Amos* v. *United States,* 255 U. S. 313.

Even upon the principle adopted by the court below, the search by the officers was not justified, since they did not have such probable cause as would have justified the issuance of a search warrant. Cooley Const. Lim., p. 367. The possession of opium is not an offense under the Harrison Act. A warrant to search the premises for narcotics cannot be granted merely upon proof that narcotics will be found upon the premises, but upon proof that a crime against the statute of the United States is being committed upon the premises by the sale of narcotics. Narcotics are not forfeitable to the United States. Search warrants, it is said in *Gouled* v. *United States,* 255 U. S. 309, "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders

possession of the property by the accused unlawful and provides that it may be taken."

The Revenue Agents had no information that justified the issuance of a search warrant upon the ground that a crime was being committed at No. 167 Columbia Street. Assuming that the information they possessed was probable cause to believe that cocaine would be found in the bedroom, then a search warrant issued after the arrest would have been a warrant to search for evidence. No search is reasonable if the officer who makes it would have been unable to make oath or affirmation to facts that would establish probable cause, and would designate the place or person to be searched, *Ganci* v. *United States*, 287 Fed. 65. "Probable cause" as used in the Fourth Amendment does not mean mere inference or supposition. The oath or affirmation required must be as to facts. The purpose of an oath is to subject the affiant to prosecution for perjury if he bears false witness. The court or magistrate acts judicially. It is obvious, therefore, that the ground of belief and the basis of probable cause must consist of facts, and not mere suppositions.

The Court is confined to the facts shown by the record to have been known to the particular agents who made the search. The search cannot be justified by its results; nor by what the officers who made the search may later have learned from the stool pigeons, Dispenza and Napolitana.

The indictment does not state facts sufficient to constitute a crime. It does not charge a conspiracy to sell within the United States. The sale of cocaine without the United States is not an offense.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for the United States.

The article seized was not a thing which had merely evidentiary value, but a thing inherently vicious, used

as the means of committing crime, analogous to burglars' tools or lottery tickets. *Commonwealth* v. *Dana,* 2 Metc. (Mass.) 329. In the second place, the seizure was practically contemporaneous with the arrest. The arrest was lawfully made without a warrant, for a felony committed in the actual sight and presence of the officers; and, immediately thereafter, a search was made in the place whence the officers themselves had just seen the culprits emerge. This search disclosed the can of cocaine hydrochloride, an article used in the commission of crime, in the bedroom of one of the persons just arrested. Finally, no demand was made by the defendants, either before or during the trial, for the return of the articles seized, although they must have known of the seizure. *Adams* v. *New York,* 192 U. S. 585; *Weeks* v. *United States,* 232 U. S. 383.

An officer who arrests a person for felony committed in his presence may search not merely the person, but also the place where he is discovered, and other places in the immediate vicinity which are clearly indicated as having formed part of the scene of the crime. *Dillon* v. *O'Brien,* 16 Cox C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Cr. Proc., § 211 (2d Ed.); 1 Wharton, Cr. Proc., § 97 (10th Ed.). The foregoing were cited with approval in *Carroll* v. *United States,* 267 U. S. 132. See also, *People* v. *Chiagles,* 237 N. Y. 193, affirming 204 App. Div. 706; *People* v. *Cona,* 180 Mich. 641; *Smith* v. *Jerome,* 47 Misc. (N. Y.) 22; *State* v. *Mausert,* 88 N. J. L. 286; *Closson* v. *Morrison,* 47 N. H. 482; *Spalding* v. *Preston,* 21 Vt. 9. The Constitution protects from unreasonable searches. It is admitted that searches are not necessarily reasonable when they are made under warrants, for the warrant may have been issued for an improper purpose. *Robinson* v. *Richardson,* 13 Gray (Mass.), 454. A search without warrant may be reasonable when made upon probable

cause. *Carroll* v. *United States, supra.* Sanctity of the home is no greater than sanctity of the person. Indeed, the immunity of the person from arbitrary arrest is more highly prized than the immunity of the home from arbitrary search.

The officers were undoubtedly apprised by their senses that a crime was committed in their presence by the selling of narcotics at 138 Union Street. They were also apprised by their senses that the instrument of the crime was concealed in the places where the search was afterwards made. Two of the officers saw the sale through the window. Two had seen all the defendants (except Alba) emerge from No. 167 Columbia Street a few minutes before the arrest. The Government's informers, Napolitano and Dispenza, had been told by Centorino that he would go out to his friend's house and bring back the stuff. The officers knew, before making the arrests, that a sale of drugs would be consummated at 138 Union Street. They knew, moreover, that the supply was coming from some other house in the vicinity. But until the night of the arrests there was nothing to show them from which house; so it would have been impossible to apply for a search warrant in advance.

It is submitted that where an officer may arrest without warrant, he may also at that same time search without warrant in any place in the immediate vicinity where it is clearly indicated that the instruments of the crime (not evidence merely) are hidden. *Milam* v. *United States,* 296 Fed. 629; *Lambert* v. *United States,* 282 Fed. 413; *Vachina* v. *United States,* 283 Fed. 35; *McBride* v. *United States,* 284 Fed. 416; *Herine* v. *United States,* 276 Fed. 806; *United States* v. *Hart,* 214 Fed. 655; *Ex parte Morrill,* 35 Fed. 261. According to the rule laid down in the case last cited, it might well be argued that a crime was committed in the presence of the officers, not only at 138 Union Street, the place of the arrest, but also at 167

Columbia Street, the place of the search. The officers had probable cause for the search as well as for the arrest under the recent decision of this Court in the *Carroll case, supra.* Cf. *Stacey* v. *Emery,* 97 U. S. 642. And upon this theory, the search would of itself be clearly valid, even when viewed apart from the arrest.

No demand was made on behalf of Agnello or any of the other defendants for the return of the narcotic, although they must have known of the seizure. There is not a word in the record to show that the defendants were taken by surprise by the introduction in evidence of the seized article. Even after the Government had sought, unsuccessfully, to introduce the seized article as part of its main case, the defendants made no motion for its return, but contented themselves with objecting to its admission in evidence. Under these circumstances, there is no room to apply *Gouled* v. *United States,* 255 U. S. 298, or *Amos* v. *United States,* 255 U. S. 313.

This Court has never receded from the doctrine enunciated in *Adams* v. *New York,* 192 U. S. 585, and *Weeks* v. *United States,* 232 U. S. 383, that a collateral issue as to the source of evidence will not be permitted to interrupt a criminal trial, unless the ground has been prepared by a timely motion for the return of the articles alleged to have been wrongly taken. *Weeks* v. *United States* lays down the requirement of a preliminary motion for the return of articles unlawfully seized. *Gouled* v. *United States* dispenses with the necessity for this motion where it is obvious that the defendant is taken by surprise and had no opportunity to make the motion before trial.

Again, the evidence of the search was used only as a medium of discrediting the witness, and was not used as a direct part of the Government's main case, or as an indirect clue toward obtaining other evidence. In this respect the case differs from all the previous cases in which this Court has discountenanced the practice of unlawful

search and seizure to obtain evidence on which to build up a case against the defendant. Here the Government's case was complete without resort to the evidence of the search; and the error, if it existed, was not prejudicial. *Laughter* v. *United States,* 259 Fed. 94, 100. Certiorari denied, 249 U. S. 613; Judicial Code, § 269, as amended by Act of February 26, 1919, c. 48, 40 Stat. 1181; *Hall* v. *United States,* 277 Fed. 19; *Rich* v. *United States,* 271 Fed. 566.

In any event, the evidence of the search and seizure tended to prejudice only the defendant Agnello. The other defendants are not entitled to object. The case against them was complete without that evidence, and the jury was fully warranted in finding them guilty. *Hyde* v. *United States,* 225 U. S. 347; *Isaacs* v. *United States,* 159 U. S. 487.

The indictment states that the defendants conspired in Brooklyn, and sets forth as one of the overt acts a transportation and sale in Brooklyn. An indictment for conspiracy need do no more than this. *Hyde* v. *United States,* 225 U. S. 347; *Wallace* v. *United States,* 243 Fed. 300; certiorari denied, 245 U. S. 650; *Vane* v. *United States,* 254 Fed. 28.

It also states that the conspiracy was to sell " without having first registered with the Collector of Internal Revenue of this district." It is a reasonable inference that the sale was to be made within the United States and within the particular Internal Revenue district where the Grand Jury was sitting.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Thomas Agnello, Frank Agnello, Stephen Alba, Antonio Centorino and Thomas Pace were indicted in the District Court, Eastern District of New York, under § 37, Criminal Code, c. 321, 35 Stat. 1088, 1096, for a conspiracy to violate the Harrison Act, c. 1, 38 Stat. 785, as amended by

§§1006, 1007, 1008 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1130. The indictment charges that defendants conspired together to sell cocaine without having registered with the Collector of Internal Revenue and without having paid the prescribed tax. The overt acts charged are that defendants had cocaine in their possession, solicited the sale of it, met in the home of defendant Alba at 138 Union Street, Brooklyn, and made arrangements for the purpose of selling it, brought a large quantity of it to that place, and sold it in violation of the Act. The jury found defendants guilty. Each was sentenced to serve two years in the penitentiary and to pay a fine of $5,000. The Circuit Court of Appeals affirmed the judgment. 290 Fed. 671.

The evidence introduced by the Government was sufficient to warrant a finding of the following facts: Pasquale Napolitano and Nunzio Dispenza, employed by government revenue agents for that purpose, went to the home of Alba, Saturday, January 14, 1922, and there offered to buy narcotics from Alba and Centorino. Alba gave them some samples. They arranged to come again on Monday following. They returned at the time agreed. Six revenue agents and a city policeman followed them and remained on watch outside. Alba left the house and returned with Centorino. They did not then produce any drug. After discussion and the refusal of Napolitano and Dispenza to go to Centorino's house to get the drug, Centorino went to fetch it. He was followed by some of the agents. He first went to his own house, 172 Columbia Street; thence to 167 Columbia Street,—one part of which was a grocery store belonging to Pace and Thomas Agnello, and another part of which, connected with the grocery store, was the home of Frank Agnello and Pace. In a short time, Centorino, Pace and the Agnellos came out of the last mentioned place, and all went to Alba's house. Looking through the windows, those on watch saw

Frank Agnello produce a number of small packages for delivery to Napolitano and saw the latter hand over money to Alba. Upon the apparent consummation of the sale, the agents rushed in and arrested all the defendants. They found some of the packages on the table where the transaction took place and found others in the pockets of Frank Agnello. All contained cocaine. On searching Alba, they found the money given him by Napolitano.

And as a part of its case in chief, the Government offered testimony tending to show that, while some of the revenue agents were taking the defendants to the police station, the others and the city policeman went to the home of Centorino and searched it but did not find any narcotics; that they then went to 167 Columbia Street and searched it, and in Frank Agnello's bedroom found a can of cocaine which was produced and offered in evidence. The evidence was excluded on the ground that the search and seizure were made without a search warrant. In defense, Centorino and others gave testimony to the effect that the packages of cocaine which were brought to and seized in Alba's house at the time of the arrests had been furnished to Centorino by Dispenza to induce an apparent sale of cocaine to Napolitano, that is, to incite crime or acts having the appearance of crime, for the purpose of entrapping and punishing defendants. Centorino testified that, after leaving Napolitano and Dispenza with Alba at the latter's home, he went to his own house and got the packages of cocaine which had been given him by Dispenza and took them to 167 Columbia Street, and there gave them to Frank Agnello to be taken to Alba's house. Frank Agnello testified on direct examination that he received the packages from Centorino but that he did not know their contents, and that he would not have carried them if he had known that they contained cocaine or narcotics. On cross examination, he said that he had never seen narcotics. Then, notwithstanding objection

by defendants, the prosecuting attorney produced the can of cocaine which the Government claimed was seized in Agnello's bedroom and asked him whether he had ever seen it. He said he had not, and specifically stated he had never seen it in his house. In rebuttal, over objections of defendants, the Government was permitted to put in the evidence of the search and seizure of the can of cocaine in Frank Agnello's room, which theretofore had been offered and excluded.

The case involves the questions whether search of the house of Frank Agnello and seizure of the cocaine there found, without a search warrant, violated the Fourth Amendment, and whether the admission of evidence of such search and seizure violated the Fifth Amendment. The Fourth Amendment is: "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." The provision of the Fifth Amendment invoked is this: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places. Frank Agnello's

house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrests. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 391; *People* v. *Conway,* 225 Mich. 152; *Gamble* v. *Keyes,* 35 S. D. 645, 650.

Under the Harrison Act (§ 8; § 1 as amended by § 1006) it is unlawful for any person who has not registered and paid a special tax, to have cocaine in his possession, and all unstamped packages of such drug found in his possession are subject to forfeiture. We assume, as contended by the Government, that defendants obtained from Frank Agnello's house the cocaine that was taken to Alba's house and there seized; that the can of cocaine which later was found in Agnello's house was unlawfully in his control and subject to seizure, and that it was a part of the cocaine which was the subject matter of the conspiracy.

The Government cites *Carroll* v. *United States, supra;* but it does not support the search and seizure complained of. That case involved the legality of a search of an automobile and the seizure of intoxicating liquors being transported therein in violation of the National Prohibition Act. The search and seizure were made by prohibition agents without a warrant. After reference to various acts of Congress relating to the seizure of contraband goods, the court said (p. 153): "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a

search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." It was held that, "The facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." (p. 162.) And on that ground the court held the search and seizure without warrant justified.

While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd* v. *United States,* 116 U. S. 616, 624, *et seq.,* 630; *Weeks* v. *United States, supra,* 393; *Silverthorne Lumber Co.* v. *United States, supra,* 391; *Gouled* v. *United States,* 255 U. S. 298, 308. The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. II, § 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house. And later, to the end that government employees without a warrant shall not invade the homes of the people and violate the priva-

cies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such search. Act of November 23, 1921, c. 134, § 6, 42 Stat. 222, 223. Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the constitution or laws of every State of the Union.* We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in § 25 of the National Prohibition Act. Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See *Entick* v. *Carrington,* 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See *Temperani* v. *United States,* 299 Fed. 365; *United States* v. *Rembert,* 284 Fed. 996, 1000; *Connelly* v. *United States,* 275 Fed. 509; *McClurg* v. *Brenton,* 123 Ia. 368, 372; *People* v. *Margolis,* 220 Mich. 431; *Childers* v. *Commonwealth,* 198 Ky. 848; *State* v. *Warfield,* 184 Wis. 56. The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment.

It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by

* See p. 1268, Index Digest of State Constitutions (prepared for New York State Constitutional Convention Commission, 1915); also § 8, c. 7, Consolidated Laws, New York, as amended by L. 1923, c. 80.

the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. *Boyd v. United States, supra,* 630, *et seq.; Weeks* v. *United States, supra,* 398; *Silverthorne Lumber Co.* v. *United States, supra,* 391, 392; *Gouled* v. *United States, supra,* 306; *Amos* v. *United States,* 255 U. S. 313, 316. The Government contends that, even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine. The reason for such application, where required, is that the court will not pause in a criminal case to determine collateral issues as to how the evidence was obtained. See *Adams* v. *New York,* 192 U. S. 585, 594, affirming 176 N. Y. 351. But in this case, the facts disclosing that the search and seizure violated the Fourth Amendment were not in controversy. They were shown by the examination of the witness called to give the evidence. There was no search warrant; and from the first, the position of the Government has been that none was necessary. In substance, Frank Agnello testified that he never had possession of the can of cocaine and never saw it until it was produced in court. There is nothing to show that, in advance of its offer in evidence, he knew that the Government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure. It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. "A rule of practice must not be allowed for any technical reason to prevail over

a constitutional right." *Gouled* v. *United States, supra,* 313. And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search. As said in *Silverthorne Lumber Co.* v. *United States, supra,* 392, " The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The admission of evidence obtained by the search and seizure was error and prejudicial to the substantial rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded.

But the judgment against the other defendants may stand. The introduction of the evidence of the search and seizure did not transgress their constitutional rights. And it was not prejudicial error against them. The possession by Frank Agnello of the can of cocaine which was seized tended to show guilty knowledge and criminal intent on his part; but it was not submitted as attributable to the other defendants. During the summing up of the case to the jury by the prosecuting attorney, the court distinctly indicated that the evidence was admissible only against Frank Agnello. The other defendants did not request any instruction to the jury in reference to the matter, and they do not contend that any erroneous instruction was given. *Isaacs* v. *United States,* 159 U. S. 487, 491.

The packages of cocaine seized at Alba's house were carried to that place by Frank Agnello. He did this at the instance of Centorino; and in his behalf it is claimed he acted innocently and without knowledge of the con-

tents of the package. The evidence of the search and seizure made in his house tended to show that he knew what he was doing and was a willing participant in the conspiracy charged. But so far as concerns the other defendants, it is immaterial whether he acted innocently and without knowledge of the contents of the package or knowingly to effect the object of the conspiracy. In either case, his act would be equally chargeable to his codefendants. They are not entitled to a new trial. See *Rossi* v. *United States,* 278 Fed. 349, 354; *Belfi* v. *United States,* 259 Fed. 822, 828; *Feder et al.* v. *United States,* 257 Fed. 694; *Browne* v. *United States,* 145 Fed. 1, 13; *United States* v. *Cohn,* 128 Fed. 615, 626.

Judgment against Frank Agnello reversed; judgment against other defendants affirmed.

DRUGGAN *v.* ANDERSON, U. S. MARSHAL, ET AL.

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

No. 415. Argued October 5, 6, 1925.—Decided October 19, 1925.

1. Although by the terms of the Eighteenth Amendment the prohibition thereby decreed did not go into force until one year from the ratification (January 16, 1919) of the Article, the amendment itself became effective as a law upon its ratification and empowered Congress thereupon to legislate in anticipation for the enforcement of the prohibition when the year should expire, without awaiting that event. P. 38.
2. A preliminary injunction issued under § 22 of Title II of the Prohibition Act, without the notice required by Equity Rule 73 and the Act of October 15, 1914, is not void. P. 40.

Affirmed.

APPEAL from an order of the District Court dismissing a petition for *habeas corpus.* The imprisonment in question was imposed upon the petitioner for disobedience of an injunction issued under the Prohibition Act.

Mr. Michael J. Ahern, with whom *Mr. Thomas D. Nash* was on the briefs, for appellant.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war powers of Congress. The Eighteenth Amendment did not go into effect or become operative as a part of the Constitution until January 16, 1920. *Dillon* v. *Gloss,* 256 U. S. 368; § 3, Title II, National Prohibition Act; *National Prohibition Cases,* 253 U. S. 350; *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88.

The Government of the United States is a government of limited and defined powers. Congress has power to legislate only where it has constitutional authority to do so. Title II of the National Prohibition Act having been passed October 27, 1919, prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution and is, therefore, unconstitutional.

Section 24 of Title II is an invasion of the judicial power and therefore unconstitutional. The power to punish for contempt is inherent in courts. *Bessette* v. *Conkey Co.,* 194 U. S. 324; *Ex parte Terry,* 128 U. S. 289. Section 24 of Title II limits the discretion of the court in the fixing of penalties and thereby invades the inherent power of the court. *Ex parte Garner,* 179 Cal. 409. Section 24 violates the Sixth Amendment. The injunctional order upon which the judgment is founded is absolutely void, as District Courts are without power, and are expressly prohibited by Equity Rule 73, to grant temporary injunctions without notice.

Solicitor General Mitchell and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order dismissing a petition for a writ of *habeas corpus* on demurrer. The petitioner is imprisoned for contempt in disobeying a temporary injunction issued under Section 22 of Title II of the National Prohibition Act; October 28, 1919, c. 85; 41 Stat. 305, 315. The bill upon which the injunction was issued alleged the existence of a public nuisance used for the manufacture, sale, &c., of intoxicating liquor, and charged that the petitioner among others was conducting the business. An injunction was ordered, *pendente lite*. Subsequently an information was filed against the petitioner and others for contempt and the petitioner was sentenced to a fine and to imprisonment for one year. He was committed to jail on November 11, 1924. The main ground for the present petition is that Title II of the Act, with immaterial exceptions, is unconstitutional because it was enacted before Amendment XVIII of the Constitution went into effect. The Amendment prohibits the manufacture, sale, &c., of intoxicating liquors for beverage purposes, 'after one year from the ratification of this article'. The date of the ratification is fixed as January 16, 1919, *Dillon* v. *Gloss*, 256 U. S. 368, 376, and the National Prohibition Act was passed on October 28, 1919 before a year from the ratification had expired. It is said that the prohibition is the Amendment; that until there is a prohibition there is no Amendment, and that without the Amendment the Act of Congress, although it was not to go into effect until after the Amendment did, Title II, § 3, was unauthorized and void.

We will give a few words to this argument notwithstanding the difficulties in the way of proceeding by *habeas corpus* in a case like this, *Howat* v. *Kansas*, 258 U. S. 181, 189, 190; *Craig* v. *Hecht*, 263 U. S. 255, and notwithstanding the fact that the validity of the statutes has been supposed to have been established heretofore.—It is

not correct to say that the Amendment did not exist until its prohibition went into effect; in other words that there was no Amendment until January 16, 1920, although one had been ratified a year before. The moment that the Amendment was ratified it became effective as a law. The operation of its words a year later depended wholly upon what had happened on or before January 16, 1919. Nothing happened after that date except the lapse of time. This distinction is maintained by the language of the Amendment, which is not that the Amendment shall go into operation a year after it is ratified but that the acts against which it is directed are prohibited after that time, although we attach no other importance to the precise form of words used than that of showing an accurate instinct in those who drew it. Whichever form was used, the world had notice of it, and we apprehend that there would be little difficulty in holding void a contract made in July, 1919, and contemplating performance in disregard of the prohibition in July, 1920. Every dogmatic statement of the law is prophetic of what will happen in a certain event. There is no more reason why the Constitution should not give the warning for the next year than there is for its not giving it for the next moment. We have no doubt of the authority of Congress to pass the law. *Barbour* v. *Georgia,* 249 U. S. 454. *Diamond Glue Co.* v. *United States Glue Co.,* 187 U. S. 611, 615, 616. Indeed it would be going far to say that while the fate of the Amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place.

A shorter answer to the whole matter is that the grant of power to Congress is a present grant and that no reason has been suggested why the Constitution may not give Congress a present power to enact laws intended to carry out constitutional provisions for the future when the time comes for them to take effect.

It is argued that the preliminary injunction was void for want of the notice required by Equity Rule 73 and the Act of October 15, 1914, c. 323, § 17; 38 Stat. 730, 737. The statute provides that if it is made to appear that the nuisance exists, a temporary injunction shall issue forthwith. § 22. In view of the drastic policy of the Amendment and the statute, we see no reason why the words should not be taken literally, to mean what they say. *McFarland* v. *United States,* 295 Fed. 648. But if notice were required the injunction could not be disregarded as void. *Howat* v. *Kansas, supra.*

We think the case too clear for extended discussion, but it seemed worth while to say what we have said in explanation of our judgment, although we did not think it necessary to hear the other side.

Judgment affirmed.

AMERICAN RAILWAY EXPRESS COMPANY *v.* DANIEL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 53. Argued October 16, 1925.—Decided October 26, 1925.

1. Where the tariff schedules of an express company governing interstate shipments offer a lower rate for goods below a specified value and a higher rate for goods more valuable, a stipulation in an express receipt fixing the lower value in consideration of the lower rate binds the shipper, although both his agent and the carrier's, in making the shipment, were unaware of the fact that the value was higher, and the latter knew the former to be thus ignorant. P. 41.
2. The sender is bound to know the relation established by the carrier's schedules between values and rates, and in an action to recover the value of the goods, it is error to exclude the schedules from evidence. P. 42.

157 Ga. 731, reversed.

CERTIORARI to a judgment of the Supreme Court of Georgia affirming a recovery of damages for goods not delivered, in an action against an express company.

Mr. Blair Foster, with whom *Messrs. H. S. Marx, Robert C. Alston* and *A. M. Hartung* were on the brief, for petitioner.

No appearance for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit against the petitioning Express Company for the value of a parcel that was received by the Company for carriage but was not delivered. The Company admitted liability for fifty dollars but alleged that it could not be held for more, because the receipt that it gave fixed that sum as the value of the goods and a higher value would have required the payment of a higher rate. Under the ruling of the Court a verdict was found against the petitioner for a hundred dollars, interest and costs, subject to questions of law reserved, and judgment on the verdict was affirmed by the Supreme Court of the State, without opinion, by an evenly divided Court.

The goods were delivered by an agent and, after conversation between him and the agent of the Express Company, the latter put fifty dollars into the receipt as the value, neither party having any clear knowledge, and the receipt later was handed to and bound the sender of the goods. *Great Northern Ry. Co.* v. *O'Connor,* 232 U. S. 508, 514. The rate for carriage of property valued at more than fifty dollars was higher than that charged. The schedules filed with the Interstate Commerce Commission were offered, to show the rates, but were excluded, and the judgment was affirmed seemingly on the ground that the sending agent was not shown to have known that a lower valuation secured a lower rate, and that the car-

rier knew that the agent was ignorant of the true value of the goods. No argument is made for the respondent and it is plain that the judgment cannot be sustained. The carrier's knowledge of the agent's ignorance of the value was immaterial. It acted in good faith. The carrier's schedules should have been admitted and bound both parties. *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 652, 653. *Southern Express Co.* v. *Byers,* 240 U. S. 612, 614. *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584. The sender is bound to know the relation established by them between values and rates. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury,* 254 U. S. 357, 360. *Western Union Telegraph Co.* v. *Esteve Brothers & Co.,* 256 U. S. 566.

Judgment reversed.

BUCKEYE COAL & RAILWAY COMPANY ET AL. *v.* HOCKING VALLEY RAILWAY COMPANY ET AL.

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

No. 51. Argued October 15, 1925.—Decided November 16, 1925.

1. Where a decree of the District Court, dissolving a combination violative of the Anti-Trust Act, retains jurisdiction for the purpose of making such further orders as may be necessary to execute the decree, a subsequent order finally approving a specific sale of property for that purpose exhausts the reserved jurisdiction in so far as that sale is concerned, and cannot be altered by that court upon the same facts and upon the application of private interests, after expiration of the term at which such order was made. P. 47.
2. An order approving a sale of the stock of a coal company under a contract between the purchaser and a railroad company owning the stock, necessarily approved also a stipulation in the contract saving from impairment an existing pledge of the coal company's lands under the railroad's mortgage and an obligation of the coal

company under the mortgage to pay a royalty upon coal mined by it to the railroad's mortgagee. P. 47.

3. Where a coal company, whose stock, owned by a railroad company, was sold with the approval of the District Court in execution of a decree against the railroad, its mortgage trustee and others, dissolving a combination as violative of the Anti-Trust Act, afterwards, in the state court, sued the railroad and the trustee for the purpose of avoiding obligations claimed under the railroad's mortgage, *held* that the decree of the state court denying relief was *res judicata* against the coal company in so far as its personal and private right to be relieved of such obligations was concerned. P. 48.
4. One who has no interest of his own entitling him to urge measures in execution of a decree dissolving a combination under the Anti-Trust Act has no *locus standi* to do so in the public interest, that being the function of the United States. P. 48.
5. A corporation which was not injured by such a combination, and not party to the original decree dissolving it, and which is controlled by a person who bought all its shares under an order of the court made in execution of the decree, has no standing to intervene for the purpose of ridding itself, and so, in effect, the purchaser, of its obligations to other parties which existed at the time of the sale and were recognized by the order which authorized the sale. P. 49.

Affirmed.

APPEAL from an order of the District Court dismissing the appellants' petition in intervention seeking relief in a suit brought by the United States under the Anti-Trust Act and in which a decree had been entered for the dissolution of a combination of railway and coal companies. See 203 Fed. 295.

Messrs. William O. Henderson and *William Burry,* for appellants.

Mr. John F. Wilson, with whom *Messrs. A. C. Rearick* and *Paul Smith* were on the briefs, for appellee Hocking Valley Railway Company.

Mr. Arthur H. Van Brunt, for appellee Central Union Trust Company.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The suit in equity in which this is an appeal was begun by the United States in the District Court for the Southern District of Ohio, Eastern Division, against the Hocking Valley Railway Company, five other railway companies, and three coal companies, and was heard before the three Circuit Judges of that circuit. It was a proceeding under the Anti-Trust Act to dissolve an illegal combination of the defendants to monopolize the business of transporting and selling coal from the coal fields of Ohio in interstate commerce. Act of February 11, 1903, 32 St. 823, ch. 544. A full hearing resulted, March, 1914, in finding that the illegal combination existed and in a comprehensive decree radically dissolving the combination. (203 Fed. Rep. 295.) The railway companies were directed to part with all their interests in the coal companies and the business of mining and selling coal was ordered to be separated from that of railway transportation by the sale of the stocks of the defendant coal companies held by the railway companies, and the dissolving of other relations which had made the combination possible and effective. Jurisdiction of the cause was retained by the court for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree and the complete dissolution of the combination and monopoly therein condemned.

The Buckeye Coal & Railway Company was not a party to the original suit. All of its stock was owned by the Hocking Valley Railway Company. Its property consisted of 11,000 acres of coal land in the coal fields of Ohio, with an estimated deposit of 18,000,000 tons. In 1899, the Buckeye Company had pledged its coal lands in a mortgage of the Hocking Valley Railway Company to the Central Trust Company to secure $20,000,000 of the Railway Company's bonds. In the same mortgage, the Buck-

eye Company agreed to pay 2 cents royalty on each ton of coal mined by it to the Central Trust Company, the mortgage trustee, to be applied to the redemption of the bonds. The Buckeye Company was not an obligor on the bonds. The Hocking Valley Railway Company in addition to the pledge of its railway property, the Buckeye coal lands and the royalty, included in the mortgage also all the capital stock of the Buckeye Company. Upon an intervening petition of the original complainant, the United States, and after a hearing to which the Hocking Valley Railway Company and the Central Trust Company, the mortgage trustee, were parties, an order was made by the court by which the capital stock of the Buckeye Company was directed to be sold, freed from the lien of the mortgage, and subject to the approval of the court. This order was made May 19, 1916. The Hocking Valley Railway Company then made a contract with one John S. Jones, to sell him all the Buckeye Coal Company stock for $50,000 under a contract by which it was agreed that the stock sold should be released from the pledge of the mortgage. There was an express stipulation that the contract was not to impair the covenants of the Buckeye Company in the Hocking Valley Railway mortgage in respect of the lands of the Coal Company or of the 2 cents royalty, except that the Hocking Company agreed that its railroad property pledged under the mortgage should be first exhausted before any recourse should be had to the coal lands of the Buckeye Company. The contract of purchase was made subject to the presentation of its terms to the court and its approval. On October 5, 1916, the Hocking Valley Company reported the sale to the court, reciting the contract. On November 10, 1916, the District Court, after reciting the report of the contract of purchase and the dismissal of the appeal, and the tender of the purchaser for examination, found the purchaser satisfactory and approved the purchase. Jones took pos-

session of the stock and organized a new company, the Sunday Creek Coal Company, which by exchange of stock succeeded to the ownership of the coal lands of the Buckeye Company and that of other companies. It is conceded by counsel for the coal companies that the value of the property of the Railway Company which must first be resorted to to pay the bonds is far greater than the amount due on them, so that the lien on the coal lands is negligible.

In April, 1919, the coal companies brought a suit in a state court against the Central Trust Company and the Hocking Valley Railway Company, in Ohio, to quiet their title to the coal lands. The Common Pleas Court of Ohio, after a full hearing, denied the prayer and sustained the validity of the mortgage lien upon the coal lands and the royalty. The decree of the Common Pleas Court was affirmed in the intermediate appellate court and in the Supreme Court of Ohio. The final disposition of the cause was on June 7, 1921. This is pleaded herein by the Central Trust Company, trustee, as *res judicata.*

The coal companies, on December 6, 1921, applied for leave to the court below to file the intervening petition, here the subject of consideration. Leave was granted, and the Hocking Valley Railway Company and the Central Trust Company parties were required to answer. The prayer is that they be enjoined from enforcing the mortgage lien upon the coal lands of the Buckeye Company or the two cents a ton royalty. The ground urged is that the maintenance of these two liens constitutes such a relation between the coal companies and the Railway Company as to be a violation of the main decree and the Anti-Trust law, in that it furnishes a motive for the Railway Company illegally to favor the coal companies in their interstate transportation of coal to the selling markets. Thereafter, the United States by leave also filed a petition against the same defendants in which, in the public

interest, it asked that the association between the Railway Company and the coal companies be dissolved by cancelling the liens with or without compensation.

The petition of the United States and the petition of the coal companies came on for hearing together. The District Court denied the petition of the coal companies, on the ground, first, that the order of November 10, 1916, approving the sale of the stock of the Buckeye Company was a final order and the District Court had no power to alter it, and, second, that the decree against the two companies in the state court was *res judicata*. As to the petition of the United States, the court conceded that, under the reservation of the main decree, such an application could be made to it for further relief to achieve the purpose of the main decree. It said that the fact that the court had approved the sale of the stock of the Buckeye Company indicated that the court had found that the release of the liens was not essential to carrying out the purpose of the decree and did not involve such an association between the Railway Company and the Coal Company as to interfere with the effectiveness of that decree. But, while dismissing the petition, it left opportunity open in its order to the United States to apply for further relief in the matter, if such an association came to be used as a means of defeating the main decree. The United States has not appealed from this order of dismissal of its petition. The only appeal is that of the two coal companies.

There is an embarrassment of reasons why the appeal of the two coal companies should fail. Their intervening petition seeks to vary or set aside the order of the District Court, which necessarily approved not only the sale of the Buckeye stock but also the stipulation in the contract of sale that the pledge of the coal lands and the 2 cent royalty should be unimpaired. That order was made November 10, 1916. It was a final order in respect of the sale ap-

proved. The clause of reservation in the main decree, as the court below said, was exhausted so far as that sale was concerned. All the facts, including the contract of purchase, were then before the court. No new ones have since been developed. The term has long passed within which that order could be altered by the court which made it.

Second, the validity of the covenants of the mortgage entered into by the Buckeye Company was affirmed by the decree in the litigation between the Hocking Valley Railway Company, the Central Trust Company, the mortgage trustee, and the two coal companies, appellants. This was *res judicata,* so far at least as the personal and private rights of the coal companies were concerned.

Third, even if we assume that the United States might apply under the reservation clause to the District Court to direct the cancellation of the mortgage lien on the coal lands and the covenant as to the royalty, on a showing that they were being used to continue the illegal combination condemned in the main decree, it could only be done in the interest of the public represented by the United States. The petition of the United States on this head was denied by the court below, and the United States has taken no appeal. The status of the two coal companies in the court below and here is merely that of informers. Their attitude, if it is nicely analyzed, seems to be, that unless the mortgage lien on their coal lands to secure the railway bonds, and the 2 cent royalty, are cancelled, they may be induced to enter a conspiracy with the Railway Company by which the Railway Company will grant them unlawful and discriminating favors in railway transportation to enable them to increase the coal mined and the royalty to be applied to redeem the bonds. They wish to have this temptation to crime on their part removed, and incidentally have themselves relieved from obligations which were recognized by the court as valid and binding

in the judicial sale of the entire capital stock of the Buckeye Company, and which, as against them, have been adjudged valid by the courts of Ohio. The United States, which must alone speak for the public interest, does not appear with them on this appeal. They have therefore no *locus standi. United States* v. *Northern Securities Co.*, 128 Fed. 868.

Underneath all these reasons for dismissing the appeal, is the fundamental objection that these coal companies presented no case upon their petition justifying their intervention. They were not parties to the original suit. Their interest was not of persons who had suffered by the original combination made the subject of the main decree, who might have had relief under the 16th section of the amendment to the Anti-Trust Act, October 15, 1914, c. 323, 38 St. 730. They were really put forward as intervening parties in the interest of Jones, the purchaser at the judicial sale of all their stock through which he continues to manage them. His, and therefore their, only claim to be heard at all must be based on the decree confirming the purchase, part of the consideration for which, as approved by the court, they now seek to impeach.

Decree affirmed.

DONEGAN *v.* DYSON, U. S. MARSHAL.

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

No. 185. Motion submitted October 5, 1925.—Decided November 16, 1925.

1. In view of the saving clause in the Act of October 22, 1913, abolishing the Commerce Court, that Act did not repeal § 201, Judicial Code, providing that the circuit judges appointed to the Commerce Court, when designated and assigned by the Chief Justice of the United States for service in a district court or circuit court of ap-

peals, shall have the powers and jurisdiction conferred in the Code upon a circuit judge in his circuit. P. 53.

2. Jud. Code § 201 gives the Chief Justice full discretion, without further designation by any other judge under § 18, as amended Sept. 14, 1922, to vest in a commerce court circuit judge full authority to act as judge of the district court specified in the designation. *Id.*

1 Fed. (2d) 63, affirmed.

APPEAL from a judgment of the District Court in a *habeas corpus* proceeding remanding the appellant to custody. See also 296 Fed. 843; 265 U. S. 585. The case is decided on a motion to dismiss or affirm.

Messrs. Alexander Akerman and *W. M. Toomer* were on the brief, for appellant.

Solicitor General Mitchell and *Assistant to the Attorney General Donovan* were on the brief, for appellee.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from a judgment in a *habeas corpus* case remanding the petitioner. It is brought under § 238 of the Judicial Code, on the ground that it involves the construction or application of the Constitution of the United States.

March 5, 1919, Donegan was indicted in the United States District Court for the Southern District of Florida, in the Tampa Division, charged with the offense of misapplication and abstraction of funds of a National Bank in violation of the banking laws of the United States. At a subsequent term he was tried, convicted and sentenced to a term of three years' imprisonment in the Atlanta Penitentiary. On a writ of error his conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit. He applied for a writ of certiorari in this Court, which was denied. 265 U. S. 585. While in the custody

of the United States marshal, after the coming down of the mandate of the Circuit Court of Appeals, he filed this petition for the writ of *habeas corpus*. The ground for the petition is that United States Circuit Judge Julian W. Mack, who presided in the cause in which the petitioner was convicted, had no power or jurisdiction to act as judge in the District Court for the Southern District of Florida. Judge Mack, as the petition avers, was one of the five additional United States circuit judges appointed at the time of the creation of the Court of Commerce, by virtue of the Act of June 18, 1910, 36 St. 539, c. 309. The petition sets out the designation in accord with which Judge Mack sat:

"Honorable Julian W. Mack,
United States Circuit Judge,
New York, N. Y.

"Sir:

"The Senior Circuit Judge of the Fifth Circuit having certified that on account of the accumulation and urgency of business in the United States District Court for the Southern District of Florida, it would be a great public advantage if you could be assigned to service in said District Court, and your consent in writing to be designated and appointed to serve in said District Court having been duly signed and exhibited to me, now, therefore, pursuant to the authority vested in me by section 201 of the Judicial Code of the United States as amended by the act of Congress approved October 22, 1913, I do hereby designate and assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923, and for such further time as may be required to complete unfinished business.

"Dated January 11th, 1923, Washington, D. C.

WM. H. TAFT,
Chief Justice of the United States."

It is said that this designation was without authority of law and, therefore, that the proceeding in the District Court against the petitioner was *coram non judice,* and his conviction and present custody in pursuance thereof are without due process of law, in violation of the Fifth Amendment.

The original Act creating the Commerce Court had this provision (36 Stat. 541, c. 309):

"If, at any time, the business of the commerce court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any circuit court or circuit court of appeals."

When, by the Judicial Code, the circuit courts were abolished (36 St. 1087), and in Chapter 13 the powers of the circuit courts were conferred upon the district courts, §§ 291 and 292 of that chapter provided:

"Sec. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

"Sec. 292. Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made."

In addition to these provisions, § 201 of the Judicial Code provided expressly as follows (36 Stat. 1087, 1147):

"Sec. 201. The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from

time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, *and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.*"

The Commerce Court was abolished by the Act of October 22, 1913, c. 32, 38 Stat. 208, 219. While the court was abolished, no attempt was made to abolish the offices of the judges. More than that, there was this special saving clause in the Act abolishing the Commerce Court, 38 Stat. 219:

"Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals."

The contention is, first, that §§ 200 to 206 of the Judicial Code, which incorporated the provisions of the Act establishing the Commerce Court, were necessarily repealed by the Act of October 22, 1913, taking effect December 31, 1913. In view of the saving clause of that Act, we think this view quite untenable, and that § 201 was entirely saved in its application.

It is then submitted that, even if § 201 was saved, the circuit judge surviving the Court of Commerce is a judge without a circuit and that, when assigned to the Fifth Circuit or any other circuit, he goes to the circuit as *pro tempore* a judge of that circuit, and has only the powers and jurisdiction of such circuit judge provided in § 201, which are the powers and jurisdiction conferred in the Judicial Code "upon a circuit judge in his circuit." Now it is said that a regularly appointed circuit judge in a circuit can exercise power and jurisdiction in a district

court of his circuit only after designation and assignment by the circuit justice of his judicial circuit, or by the senior circuit judge thereof, in accordance with the language of § 18, which is, as amended September 14, 1922 (42 Stat. 837, ch. 306):

"Section 5. The Chief Justice of the United States or the Circuit Justice, in any judicial circuit, or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a judicial circuit to hold a district court within such circuit."

The reference to the Chief Justice, it is said, is to him only as a circuit justice in the circuit to which he is allocated by order of the Court; and that, at the time, was the 4th circuit, not the 5th. It is urged, therefore, that, after the Chief Justice had under § 201 assigned this former commerce court circuit judge to the 5th circuit, it was, in addition, necessary that the circuit justice of the 5th circuit, or the senior circuit judge of that circuit, should then assign him as a *pro tempore* circuit judge of the 5th circuit to the particular district court of that circuit in which he was to exercise the duties of a district judge. We think such reasoning is making complex a very simple statute and going out of the way to create confusion. Section 201 gives to the Chief Justice full discretion, without further designation by any other judge, to vest in a commerce court circuit judge full authority directly to act as judge either in a particular district court or in the circuit court of appeals of any circuit, and the designation of Judge Mack in this case was ample for the purpose. We thus do not think it necessary to consider whether, even if the designation had not been valid, the sitting judge should be regarded as a judge *de facto* whose authority could not be questioned in a collateral attack, like a proceeding in *habeas corpus*.

No question has been made whether the appeal really involves the construction or application of the Federal

Constitution, such that if the construction contended for were correct and the judge were sitting without warrant, the trial would be without due process of law. We have assumed that for the purposes of the decision, and also that the question could be raised on *habeas corpus*.

The action of the District Court in dismissing the petition and remanding the prisoner is

Affirmed.

OLD DOMINION LAND COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 55. Argued October 16, 1925.—Decided November 16, 1925.

1. The general purpose of a statute to authorize acquisition of property only to carry out existing agreements of the Government, will not control a specific provision therein for the acquisition of property specifically mentioned, as to which there was no agreement. Act of March 8, 1922, c. 100, § 1, 42 Stat. 418. P. 63.
2. The United States erected costly buildings on land which it leased during the war, and, after expiration of the term, began proceedings to condemn the land on the last day of a period allowed by the lease for removing improvements. *Held* that the buildings were the property of the United States and not to be considered in fixing the land owners' compensation. P. 65.
3. Therefore, the Act of March 8, 1922, *supra*, in excluding compensation for such improvements on the land in question, is not unconstitutional. *Id.*
4. Whether the purpose of saving the loss of buildings erected on leased land by the Government may be a public purpose justifying condemnation of the land, is not here decided. P. 66.
5. Although the purpose moving the Secretary of War to request condemnation proceedings may not be a public one, yet, if the authorizing Act import an implied declaration of purpose by Congress to acquire the land for military uses, which are public, this must be accepted, if not shown to involve an impossibility. P. 66.

6. * Jurisdiction over a condemnation suit brought at the request of the Secretary of War under the Act of August 1, 1888, is not dependent upon the precise shade of opinion, expressed by him in his letter of request to the Attorney General, concerning the necessity or advantage to the Government of procuring the land in question. P. 66.

296 Fed. 20, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court condemning land in a proceeding brought by the United States.

Messrs. J. Winston Read and *Thomas H. Willcox*, with whom *Mr. R. G. Bickford* was on the brief, for the plaintiff in error.

It was essential for the petition to show that, in the opinion of the Secretary of War, it was necessary or advantageous to the United States that the lands mentioned in the petition should be acquired by condemnation by the United States. Act of August 1, 1888. The Government filed with its amended petition the letter of the Secretary of War. This not only shows a failure to comply with the Act, but also shows that the lands sought to be condemned were not sought or needed by the United States for public use, but simply for the public benefit to protect the Government's interest in certain expenditures made, or improvements placed on said lands. The Secretary's certificate may properly be silent as to the purpose of the taking, but if it indicates that that purpose is not for the "public use", the certificate does not comply with the statutory requirement.

There was no statutory authority for the taking. The Acts of March 8, and July 1, 1922, show on their face that

* The Secretary's letter requesting the institution of condemnation proceedings reviewed the Government's relation to the land, referred to the value of the improvements, and expressed his opinion that "To protect the Government's interests it is necessary and highly advantageous to acquire title to the lands upon which these improvements are situated."

the fundamental purpose was to purchase only what the United States had previously obligated itself to purchase. The Act of July 1, 1922, in nowise enlarges the scope of the Act of March 8, 1922, and gives no additional authority. It simply makes appropriation for the purchases, etc., provided for in the Act of March 8, 1922. The Act of July 11, 1919, indicated that the general policy of Congress was to stop war expenditures. The Act of March 8, 1922, proposed to purchase war properties. This was, without explanation, a violation of the policy of the Act of July 1, 1919, above referred to, and the language of the opening clauses of the later act was inserted to show that it did not create an exception to that policy, but was merely a recognition by the Government of obligations in certain cases in the event they existed prior to the Act of July, 1919.

The circumstances under which the Act was enacted, and the representations made as an inducement to its passage, clearly indicate that it was not the intention of the Act to authorize purchases of land which the United States held on lease for an agreed term and in respect to which it owed the duty that every tenant owes to his landlord. It is true that the Quartermaster Warehouses at Newport News are specifically mentioned in the Act of March 8, 1922, but they are mentioned after the scope of the Act has been specifically declared and their mention is preceded by the language: "For the purpose of carrying out the provisions of this section, the following amounts are hereby authorized to be appropriated." The language immediately preceding the language above quoted shows that the Act is only intended to operate as to real estate "in respect whereof" the United States has become obligated.

The Act of March 8, 1922, is in violation of the Fifth Amendment. The value of land should be fixed as of the date of the proceedings. The location and surround-

ings must be considered in estimating value. On several occasions Congress has attempted to exclude items of value from awards to be made in condemnation proceedings. So far as our research extends, the courts have invariably declared them unconstitutional. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *In re Montgomery,* 48 Fed. 901; *In re Manderson,* 51 Fed. 501. See also *Hanson Lumber Co.* v. *United States,* 261 U. S. 581.

Reports of the House and Senate Committees, and statements of the committee members in charge of the bills are admissible to show the legislative intent.

The lands are taken, not for the public use, but simply for the public benefit. " Public use " and " public benefit " are not synonymous. Lewis on Em. Dom. § 165; *Richmond* v. *Carneal,* 129 Va. 388; *Salisbury Land & Imp. Co.* v. *Massachusetts,* 215 Mass. 371; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.,* 196 U. S. 239; *In Re Opinion of Justices,* 204 Mass. 607; *Bloodgood* v. *Mohawk,* 18 Wend. (N. Y.), 9; *Strickley* v. *Highland Boy Co.,* 200 U. S. 527; *Hairston* v. *Danville & Western Ry.,* 208 U. S. 598; *Brown* v. *United States,* 263 U. S. 78, distinguished.

The United States, in this proceeding, is endeavoring to save money for the Government by an outside land speculation. The incidental saving in money to the United States arising from this condemnation proceeding does not constitute such public use as is contemplated by the constitutional provision.

But it is said that the use in the Act of the words " for the quartermaster warehouses at Newport News," is an expressed declaration that the property is to be taken for the plainly public use of quartermaster warehouses. Such language is merely descriptive of the property as it existed at the time of the passage of the Act. The Act

must be read in connection with the facts that existed at the time. Long before, these properties were known as "Quartermaster Warehouses." The Secretary's letter to the Attorney General authorizing these proceedings speaks of the "Quartermaster's Warehouses" as structures which had long been in existence, which structures he had previously stated to the Military Committees were no longer necessary for the public use. This recommendation, showing that the purpose of the act was to acquire the site for the quartermaster warehouses then in existence, was transmitted to Congress by the Chairman of the Committee of Military Affairs of the House and of the Senate.

There is nothing in either Act to show that the future use of the property would be for quartermaster warehouses. It is true that the caption of the section of the Act of July, 1922, making appropriations for the purchase of the warehouse lands is "Sites for military purposes," but this Act neither authorizes, nor attempts to authorize anything more than is authorized in the Act of March 8, 1922. It is merely a conventional designation. The fact that the words "for the Quartermaster warehouses, etc.," were merely used to identify this particular property, and not to indicate the future use to which said property was to be devoted, is abundantly supported by the record.

All that this Court can say after reading the statutes relied on by the Government and reading the petition of the Government is that the property may have been intended for a public use or may not have been. If it gives any effect at all to the reports of the two chairmen of the Committees it will be compelled to hold that the property was not required for a public use. If the Court gives any effect to the granting of a lease by the Secretary of War, it becomes entirely clear that no then present public use existed for the taking of the land, since that

lease could not be given except under the provisions of the Act of July 28, 1892, which authorized such leases only during the period when there was no public use. That lease by its terms begins on the first day of August, 1922, one day after the institution of these proceedings. The Government is authorized to sell or lease this property, if acquired. Army Appropriation Act, 41 Stat. 129, 130.

The facts proven upon trial should have been considered by the court in determining whether the property of the plaintiff in error was taken for a public use. It is the sole province of the courts to determine whether a use is a public use. *United States* v. *New River Collieries,* 262 U. S. 341; *Monongahela* v. *United States,* 148 U. S. 312; *Sears* v. *Akron,* 246 U. S. 242; *Rindge* v. *Los Angeles,* 262 U. S. 700. In this view of the case, it is not a question whether the court can deny the truth or good faith of the expressed declaration in the statute, as suggested in the opinion of the Circuit Court of Appeals. When the language of the statute is considered in the light of the facts proved in the case, and the congressional history of the Act is likewise taken into consideration, it is clear that the words "for the Quartermaster warehouses," which otherwise might have been construed to designate the use to which this property was to be put by the Government, are simply used to point out the particular property to be taken. The statute would then be silent on the question of future use; and under all of the authorities evidence would be admissible to show that the purpose of the Government was to sell or lease the improvements it had placed upon the land. If Congress, by a mere *ipse dixit,* can determine the question of public use, and take away from the courts the power in that regard, what protection is the constitutional provision to the citizen? 20 C. J. 549; *Block* v. *Hirsch,* 256 U. S. 135; *Alfred Phosphate Co.* v. *Duck River Phosphate Co.,* 120 Tenn. 260; *Varner* v. *Martin,* 21 W. Va. 534.

Plaintiff in error is entitled to compensation for the value of the buildings erected on the leased premises and not removed within the time provided in the lease.

The facts of this case do not bring it within *Nor. & O. Ry. Co.* v. *Turnpike Co.,* 111 Va. 131; *New River Etc., Co.* v. *Honaker,* 119 Va. 641; *Bear Gulch Placer Mining Co.* v. *Walsh,* 198 Fed. 351; *Searl* v. *Lake County,* 133 U. S. 553; *Consol. Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 596. On the contrary, when the leases in controversy were made the United States had no idea of taking them in condemnation proceedings, but took the precaution to execute a written contract with the owner, whereby the right of removal was given it within a certain limited time. Under these circumstances, there being no intention to take this property by purchase or condemnation when the improvements were erected, and the facts simply showing a case of neglect to remove the improvements within the time limited in the contract of lease, the improvements now belong to the owner. Buildings not removed during the term, or time limited by lease, become the absolute property of the lessor, 2 Minor's Inst., 613; 25 C. J. 706; 11 R. C. L. 1072; *Freeman* v. *Dawson,* 110 U. S. 264; *Kinkead* v. *United States,* 150 U. S. 483; *United States* v. *Bostwick,* 94 U. S. 65; *Clifford* v. *United States,* 34 Ct. Cls. 232; 32 Op. Atty. Gen. 114; 26 C. J. 705; Wood on Landlord and Tenant, 529; *Morey* v. *Hoyt,* 62 Conn. 542; *Ray* v. *Young,* 160 Iowa 613; *Tunis Lumber Co.* v. *Dennis Lumber Co.,* 97 Va. 682; *Highes* v. *Kershaw,* (Colo.), 51 L. R. A. (N. S.), 723. The right of possession of the plaintiff in error was complete except as to such possession of the United States as was necessary to enable it to remove the warehouses.

The filing of the condemnation proceedings could not extend the time of the United States for the removal of the buildings.

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

The statutes authorized and directed the Secretary of War to acquire the land by condemnation if necessary. § 3, Act March 8, 1922, 42 Stat. 418; *United States* v. *Chase,* 135 U. S. 255; *Townsend* v. *Little,* 109 U. S. 504; *In re Rouse, Hazard & Co.,* 91 Fed. 96; *Old Dominion Land Co.* v. *United States,* 296 Fed. 21.

The land was condemned for public use. *District of Columbia* v. *Washington Market Co.,* 108 U. S. 243; *United States* v. *Trans-Missouri Freight Ass'n.,* 166 U. S. 290; *Maxwell* v. *Dow,* 176 U. S. 581; *United States* v. *Des Moines Navigation Co.,* 142 U. S. 510; *Soon Hing* v. *Crowley,* 113 U. S. 703; *Old Dominion Land Co.* v. *United States, supra; Shoemaker* v. *United States,* 147 U. S. 282; *Strickley* v. *Highland Boy Mining Co.,* 200 U. S. 527; *Sears* v. *City of Akron,* 246 U. S. 242; *Rindge Co.* v. *City of Los Angeles,* 262 U. S. 700; *Brown* v. *United States,* 263 U. S. 78; *Hairston* v. *Danville & Western Ry.,* 208 U. S. 598; *United States* v. *Forbes,* 259 Fed. 585; *In re Military Training Camp,* 260 Fed. 986; *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668; Cooley's Const. Limit'ns. pp. 766, 777; Lewis, Eminent Domain, §§ 259, 369.

The Act of March 8, 1922, which excludes the right of the land company to recover compensation on account of addition to the value of the land resulting from the improvements made by or at the expense of the Government, is a valid exercise of congressional power. *United States* v. *New River Collieries,* 262 U. S. 341; *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53; *Old Dominion Land Co.* v. *United States, supra; Pearson* v. *United States,* 267 U. S. 423.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a proceeding for the condemnation of land in Newport News, Virginia, for the use of the United States. Act of August 1, 1888, c. 728; 25 Stat. 357. It has resulted in a condemnation fixing the sum to be paid, subject to questions of law reserved by the plaintiff in error, the Old Dominion Land Company, at the trial and decided by the Circuit Court of Appeals. 296 Fed. Rep. 20.—During the late war the Government took leases of the land from the Old Dominion Land Company for military purposes and put structures upon it costing more than a million and a half dollars. The leases were for short terms and were renewed, until in 1922 the lessor refused to renew them again. By the terms of the agreements the United States had a right to remove the structures but not beyond thirty days from the termination. An offer to purchase the land was made by the United States but was refused, and this proceeding was instituted on July 29, 1922, just before the thirty days allowed by the leases had run out. The main contentions of the plaintiff in error are that the Acts of Congress relied upon do not authorize the taking attempted here; that one of those Acts is unconstitutional, and that the taking, although it might be for the benefit of the United States, to save its buildings, was not a taking for public use. We are of opinion that these contentions, so far as material to the case, cannot be sustained and that the decision below was right.

The statute authorizes this proceeding. The Appropriation Act of July 11, 1919, c. 8, 41 Stat. 104, 128, and its Amendments of the same year, c. 44; *ibid.* 278, and c. 90; *ibid.* 453, had stopped the purchase of land in connection with military purposes generally, except in certain cases when it was more economical to buy than to pay rent or damages. This Act was further amended how-

ever by the Act of March 8, 1922, c. 100, § 1; 42 Stat. 418, so as to "authorize completion of the acquisition of the real estate hereinafter specified in respect whereof requisition notices had been served or given before July 11, 1919, . . . or in respect whereof agreements had been made for purchase thereof, or proceedings begun for condemnation thereof." "For the purpose of carrying out the provisions of this section the following amounts are hereby authorized to be appropriated, to wit: . . . for quartermaster warehouses, Newport News, Virginia, $223,670." This is the land in question. By § 3 of the same Act the Secretary of War was authorized to renew leases in order to enable the Government to remove its buildings and other property, and to approve awards and to have new awards made for the purchase or condemnation of land necessary in his judgment for the operation of water plants now located thereon, &c., provided "that any addition to the value of the premises resulting from the improvements thereto or in the vicinity thereof made by or at the expense of the United States shall be excluded from the sum paid to or recovered by the owners." The later Deficiencies Appropriation Act of July 1, 1922, c. 258, 42 Stat. 767, 777 supplies deficiencies: "Sites for military purposes: For completion of acquisition of real estate as authorized by" the last mentioned Act: "For quartermaster warehouses, Newport News, Virginia, $223,670."

It is argued that the general purpose of this exception to the stopping of expenditures was only to carry out agreements by which the Government already was bound; and that the specific appropriations were made only in case the property mentioned was the object of such previous agreement. No doubt the general purpose was that suggested, but the rest of the Act showed that the appropriation was not confined to that alone, and the specific unqualified mention of the land in question as land of

which the acquisition was to be completed overrides the general statement, however much confirmed by citations from the congressional debates.

Then it is said that the Act of March 8, 1922, was unconstitutional by reason of the proviso that we have stated, excluding from the compensation improvements upon the land or in the vicinity thereof made by the United States. There might be cases in which this provision could not be sustained, but there is no trouble here. For supposing that the proviso were extended beyond the taking in aid of a water plant to which it immediately referred, it could have no bearing except upon the issue agreed to by counsel, "whether the value of the warehouses constructed by the United States Government on the lands sought to be condemned should be included in the valuation of said lands." But upon this issue the statute was superfluous. When these proceedings were begun the buildings belonged to the United States. It would not be just to allow the delay necessary in legal proceedings to deprive the United States of rights that it had and endeavored by this suit to assert. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 602. In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston,* 15 Pick. 198, 208. It in no way appeared that the value of the land was increased by other improvements in the vicinity, or otherwise than by the structures upon the land so that the most indefensible aspects of the statute are not before us here. Furthermore the instructions to the jury were that they were to determine the fair market value of the land as well for its present purposes as for those for which it might be reasonably

adapted at the time or in the immediate future, and to take into consideration the facts and circumstances of its location, &c., with no language that excluded consideration of improvements in the vicinity, if any there were.

But it is said that the taking was not for a public use, because it is said that the Secretary of War at least was thinking not of a future use of the land by the public or the Government but of saving the country from the loss of the buildings. We shall not inquire whether this purpose was or was not so reasonably incidental to the necessarily hurried transactions during the war as to warrant the taking, upon the principle illustrated by *Brown* v. *United States*, 263 U. S. 78. Congress has declared the purpose to be a public use, by implication if not by express words. If we disregard the heading quoted from the latest Act, 'Sites for military purposes', which we see no reason for doing, and treat 'For quartermaster warehouses' as descriptive rather than prospective, still there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use.

Some question is made as to whether a letter from the Secretary of War to the Attorney General sufficiently authorized the present proceedings by showing that in his opinion it was necessary or advantageous to the Government to take them. The Act of August 1, 1888, c. 728; 25 Stat. 359, allows the Secretary to acquire by condemnation lands which he is authorized to procure for public purposes, 'whenever in his opinion it is necessary or advantageous to the Government to do so'; gives jurisdiction to the courts of the United States, and makes it the duty of the Attorney General upon every application of such officer to cause proceedings to be commenced. We

perceive no requirement that the Secretary should go further than to apply to the Attorney General. Moreover, the Secretary's letter certainly showed that he thought the suit would be advantageous to the Government, and we should be slow to suppose that the precise shade of his opinion upon the point affected the jurisdiction of the Court.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* STATE OF GEORGIA, AS OWNER OF WESTERN & ATLANTIC R. R., ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 24. Argued October 9, 1925.—Decided November 16, 1925.

1. A law authorizing suits in behalf of the State for the assertion of its title to property does not impair any contract rights that a party thus proceeded against may have in the subject matter. P. 68.
2. Consequently an adjudication for the State is not reviewable in this court by the defendant on the ground that the statute authorizing the suit violated the contract clause of the Constitution. *Id.*

Writ of error to review 156 Ga. 409, dismissed; certiorari denied.

ERROR to a judgment of the Supreme Court of Georgia affirming a decree denying the claim of the Telegraph Company to an easement of way in railroad property owned by the State, and enjoining the Company to remove its wires, poles and structures. Certiorari also was applied for, and denied.

Messrs. John G. Milburn and *Francis Raymond Stark,* with whom *Messrs. Arthur Heyman* and *William L. Clay* were on the briefs, for plaintiff in error.

Mr. Henry C. Peeples, with whom *Messrs. Fitzgerald Hall* and *Hooper Alexander* were on the briefs, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the State of Georgia and the Nashville, Chattanooga and St. Louis Railway for a decree enjoining the Western Union Telegraph Company from occupying or using any part of the right of way of the Western and Atlantic Railroad, a road built and owned by the State and let by it to the Railway company that joins with it as a plaintiff in this suit. The Telegraph Company claims a perpetual right of way over the State owned road by virtue of three alleged contracts. The trial Court decided that the Telegraph Company had no right in the premises, ordered it to remove its wires, poles and structures from the plaintiffs' right of way within twelve months from the final determination of the cause, and enjoined it from occupying or using the right of way after that time. This decree was affirmed by the Supreme Court of Georgia by an equally divided Court. 156 Ga. 409. The case is brought here by writ of error on the ground that the statutes warranting these proceedings impaired the obligation of the alleged contracts. There is also a petition for a writ of certiorari filed out of caution, but the only federal question is that raised by the writ of error and therefore the petition for a writ of certiorari is denied.

The first, and in this case the only question to be decided is whether the statutes relied upon have been given an effect impairing the obligation of any contract that the Telegraph Company may have. The statutes are an Act of November 30, 1915, and one of August 4, 1916, amending the former. The Act of 1915 provided for the letting of the Western and Atlantic Railroad and created a Commission to determine among other things the extent and character of every use of the right of way by anyone other than the lessee, and the authority for the same. The Commission was to prepare bills for the General Assembly

carrying into effect any recommendation that it might make with respect to what steps should be taken to assert the title of the State to any part of the right of way or the road that might be adversely used. By the amendment the Commission was given power to deal with encroachments on the way and to determine whether they should be moved and discontinued and to take such action as it deemed proper to cause the removal, and to that end "the Commission is authorized and empowered to institute and prosecute, in the name and behalf of the State of Georgia, such suits and other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title." Under this statute the Commission, reciting that it was advised by its counsel that the occupation of the way by the Telegraph Company was without lawful authority, resolved that the counsel be instructed to institute suit for the removal of the encroachment in the name of the State, provided that the lessees should join in the suit and pay the costs. Thereupon this proceeding was begun.

This is all, and it is not enough to give the Telegraph Company a standing here. The statutes do not prejudge the Telegraph Company's case, or any case. They do not purport to subject the Company to any prohibition or command, or to determine or qualify the Company's rights; they do not attempt to delegate power to do so to the Commission. They do not even point out the Telegraph Company. So far as material to this case, they simply authorize the Commission to inquire, and in case it finds any encroachment that it believes unlawful, to sue. In *Columbia Ry., Gas & Electric Co.* v. *South Carolina*, 261 U. S. 236, the State law undertook to treat what this Court held to be only a covenant as a condition subsequent and as having entailed a forfeiture. The suit was brought upon this statute and a judgment rendered for the State in its courts was held to have given effect to the

statutory attempts to enlarge the obligations of the Railway Company under a grant from the State. The difference between that case and this is plain. A mere authority to test disputed rights by a suit does not impair the obligation of a contract upon which a defendant relies. When a claim is set up under a contract the Constitution does not forbid litigation to decide whether one was made or what it means. *St. Paul Gaslight Co.* v. *St. Paul,* 181 U. S. 142, 149. *Mercantile Trust & Deposit Co.* v. *Columbus,* 203 U. S. 311, 321. *Des Moines* v. *Des Moines City Ry. Co.,* 214 U. S. 179. *South Covington & Cincinnati Street Ry. Co.* v. *Newport,* 259 U. S. 97, 99, 100.

The statutes in question are still more remote from those which while valid on their face are construed by the State Courts to apply to a matter not subject to state control. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. Here there was no attempt to control otherwise than by the result of a suit in which the Telegraph Company could set up all its alleged contracts and protect all its constitutional rights. The plaintiff in error shows no law impairing the obligation of contracts and therefore no ground for coming here. See *Cross Lake Shooting & Fishing Club* v. *Louisiana,* 224 U. S. 632, 639; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 452.

Writ of error dismissed.

HICKS, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* GUINNESS ET AL.

GUINNESS ET AL. *v.* HICKS, ALIEN PROPERTY CUSTODIAN, ET AL.

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

Nos. 80 and 81. Argued October 22, 23, 1925.—Decided November 16, 1925.

1. In an action under the Trading with the Enemy Act to recover on the debt of a German to an American citizen, which was due and payable here in German marks before this country entered the late war, the damages are to be measured by the value of marks in dollars as of the time when default occurred. P. 80.
2. The liability to damages having become absolute before the war began, interest should include the time covered by the war. P. 81.

299 Fed. 538, affirmed in part; reversed in part.

CERTIORARI, allowed on cross petitions, to review a judgment of the Circuit Court of Appeals, which affirmed a decree of the District Court (291 Fed. 768, 769) allowing a recovery, without interest during the war, in a suit under the Trading with the Enemy Act.

Mr. Alexander B. Siegel, for petitioners, Benjamin Guinness et al.

Mr. Dean Hill Stanley, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Mitchell* and *Mr. Assistant Attorney General Letts* were on the brief, for respondents, Hicks, Alien Property Custodian, and White, Treasurer of the United States.

The district court in calculating the amount of the German firm's indebtedness in United States money should have adopted the rate of exchange existing at the date of the entry of the final decree. This question arises principally because a court in the United States can not

enter a decree or judgment in foreign money. *The Edith* (1871), Fed. Cas. No. 4281; *Erlanger* v. *Avengno,* 24 La. Ann. 77; *Bronson* v. *Rodes* (1868), 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258.

The following cases either directly or inferentially hold that the proper rate of exchange to be adopted is the rate existing at the date of judgment. They seem to represent the weight of authority in the American courts upon the subject prior to the Great War. *Taan* v. *LeGaux* (1793), 1 Yeates (Pa.), 204; *Smith* v. *Shaw* (1808), 2 Wash. C. C. 167; *Lee* v. *Wilcocks,* 5 Serg. & Rawle (Pa.), 48; *Grant* v. *Healey* (1839), Fed. Cas. No. 5696; *Cropper* v. *Nelson,* Fed. Cas. No. 3417; *Smith* v. *Shaw,* Fed. Cas. No. 13170; *Hawes* v. *Woolcock,* 26 Wis. 629; *Robinson* v. *Hall,* 28 How. Prac. 342; *Scott* v. *Hornsby,* 1 Call. (Va.) 35; *Comstock* v. *Smith,* 20 Mich. 338; *Murphy* v. *Camac,* Fed. Cas. No. 9948; *The Blohm* (1867) Fed. Cas. No. 1556; *Marbury* v. *Marbury* (1866), 26 Md. 8; *Hargrave* v. *Creighton* (1873), 1 Woods. 489; *Capron* v. *Adams* (1868), 28 Md. 529; *Benners* v. *Clemens* (1868), 58 Pa. 24. And see Story, Confl. Lws., (7th ed.), § 308.

There were American cases, however, decided prior to the war which seem to take a contrary view. Amongst these are: *Spreckles* v. *The Weatherly* (1891), 48 Fed. 734; *Forbes* v. *Murray* (1869), 3 Ben. 497, Fed. Cas. 4928; *Grunwald* v. *Freese* (1893), 34 Pac. (Calif.) 73; *McKiel* v. *Porter* (1842), 4 Ark. 534; *Hussey* v. *Farlow* (1864), 91 Mass. 263; *Stringer* v. *Coombs* (1873), 62 Me. 160; *Jelison* v. *Lee,* 3 Woodb. & M. 368.

The text writers, in so far as they adopt any rule, adopt the rule that the proper rate of exchange is the rate existing at the date of the trial or at the date of the actual payment of the money. Sutherland on Damages, (4th ed.) § 213; Sedgwick on Damages, (9th ed.) § 274.

The earlier English decisions seem to be as much confused as the American. *Elkins* v. *East India Co.* (1717),

1 P. Williams, 395; *Scott* v. *Bevan* (1831), 2 Barn. & Adol., 78; *Delegal* v. *Naylor* (1831), 7 Bing. 460; *Cash* v. *Kennion* (1805), 11 Vesey 314. Coming down to more recent decisions, the last English case upon the subject prior to the very recent cases, was *Manners* v. *Pearson* (1898), 1 Ch. Div. 581, which in its proper interpretation, clearly lays down the rule that the rate of exchange prevalent at the date of judgment is to be adopted under circumstances such as the present.

The recent American decisions are not in accord upon this question, some favoring the date of breach, others the date of judgment. In the latter cases, the decisions result mostly from following *S. S. Celia* v. *S. S. Volturno,* (1921), L. R. 2 App. Cas. 544, which was a case sounding in tort. See *The Hurona,* 268 Fed. 910; *The Verdi,* 268 Fed. 908, distinguished as a tort case; *Page* v. *Levenson,* 281 Fed. 555; *Liberty Nat. Bank* v. *Burr,* 270 Fed. 251; *Saigon Maru* (1920), 267 Fed. 881; *Hoppe* v. *The Russo-Asiatic Bank,* 200 App. Div. 460, aff. 235 N. Y. 37; *Gross* v. *Mendel,* 171 App. Div. 237; *Sirie* v. *Godfrey,* 196 App. Div. 529; *Revillon* v. *Demme,* 114 Misc. 1.

The English courts, since the outbreak of the Great War, have finally adopted the rule that the rate of exchange existing at the date of the breach of the contract to pay or the commission of the tort, is the proper rate to be used in computing in the money of the forum the amount of a debt or tort in foreign currency. *Kirsch & Co.* v. *Allen,* (1919), 36 T. L. R. 59; *S. S. Celia* v. *S. S. Volturno* (1921), L. R. 2 App. Cas. 544. See also *Lebeaupin* v. *Crispin & Co.* (1920), 2 K. B. D. 714; *Di Ferdinando* v. *Simon Smits & Co.* (1920), 3 K. B. D. 409; *Société des Hotels* v. *Cummings* (1921), L. R. 3 K. B. D. 459; *in re British American Continental Bank Ltd.* (1922), 2 Ch. 575; *Uliendahl* v. *Pankhurst Wright & Co.* (1923), 39 T. L. R. 628; *Barry* v. *Van den Hurk* (1920), 36 T. L. R. 663.

The following American cases, besides the ones already cited, adopt the breach date rule: *Simonoff* v. *Bank* (1917), 279 Ill. 248; *Rasst* v. *Morris* (1919), 135 Md. 243; *Katcher* v. *American Express Co.* (1920), 94 N. J. Law 165; *Wormser* v. *Marroquin,* 249 Fed. 428; *Dante* v. *Miniggio* (1924), 298 Fed. 845; *Wichita Mill & Elevator Co.* v. *Naamlooze, etc.,* 3 Fed. (2d) 931. The nearest approach to a consideration of the question by this Court is found in *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317.

It will, of course, be apparent from an examination of the cases cited above, which have been decided since the outbreak of the Great War, that the decided weight of authority is in favor of the rule that the rate of exchange existing at the date of the breach of the contract is the proper one. On the other hand, it would seem, in so far as the cases prior to the war are helpful, that the rule prior to that time was that the rate of exchange prevalent at the date of judgment is the correct one. And it is interesting to note that some of the old cases which adopt the latter rule gave the same reason for adopting it as do many of the modern cases for adopting the former, namely, that the plaintiff should not be penalized for the failure of the defendant to pay his obligation, the situation being in the older cases that it was more advantageous to the plaintiff to have the rate existing at the time of the breach of obligation used. There must be a correct rule based upon reasoning which will be applicable under all circumstances. In a suit to recover the amount of an obligation owing in marks or any other foreign currency, the plaintiff is not suing to recover loss he has incurred by reason of the failure of the defendant to deliver a commodity, and it is perfectly apparent that the general rule of damages will not apply, for the very reason that there is no contract price of the marks to be delivered. Hence, the difference between the contract price of the so-called commodity and the market price can not

be found. As a matter of fact the parties did not make their contract with a view to treating the currency dealt with in the contract as a commodity. The parties intended the foreign currency to be treated as money. Gluck, "The Rate of Exchange in the Law of Damages," 22 Columbia L. Rev., p. 217. There may be much reason in a suit to recover damages for tort injuries where the amount of the damages is expressed in foreign currency, to adopt the rate of exchange existing at the date of the commission of the tort, as the proper rate, since in such instances the court is endeavoring to secure the payment to the plaintiff of compensation for the injuries done. In the case of a breach of contract to pay money the situation is somewhat different. While it may be true that in the case of a breach of contract to pay money a new right, namely, the right of damages, is created by the breach, and it is not a question of enforcing the payment provided for in the contract, it is also quite true that, while there may be a right of action for damages under such circumstances, the damages to be recovered are merely nominal. I Chitty on Pleading, (16th ed.), p. 121.

The only recompense which the law recognizes for failure to pay the amount of a debt is the payment of interest. When the parties made their contract they contracted with respect to a specific currency. The mere fact that a court in the United States, for reasons of policy, can not give judgment in marks should not affect the fundamental nature of the obligation. The obligation of the defendant is to pay marks; and although he may have committed a breach of contract for failure to pay the marks on the date they were due, the right of action which accrued is in its nature a right of action to recover damages expressed in marks, and while there may be damages for failure to pay, these damages, as Chitty remarks, are merely nominal. The right of action to

recover marks continues on down to the very time that the judgment is to be entered. The court in the trial of the action must find first how many marks are due as a result of the breach. The court, in the very nature of things, must consider the action as an action to recover marks, and it is impossible to arrive at a result without taking into consideration the number of marks that are due. When the court proceeds to enter judgment it should then consider the subject as if the defendant were about to pay his obligation, which payment would be made in marks, and the value of those marks as of that moment in American money is the amount the plaintiffs should recover in American money.

For comments upon the subject see notes in the following publications: 29 Harv. L. Rev. 873; 34 *Id.* 422 and 435; 20 Columbia L. Rev. 914 and 922; 31 Yale L. Jour. 198; 19 Michigan L. Rev., 652; 68 Pennsylvania L. Rev. (59 American Law Register), 395; 37 Law Quarterly Rev. 38.

The plaintiffs are not entitled to recover interest upon their debt for the period between April 6, 1917, and July 14, 1919. The common law is that interest upon such obligations is suspended during the period of war, because it is then impossible for the debtor legally to discharge his obligation. *Brown* v. *Hiatts,* 15 Wall. 177; *Hoare* v. *Allen,* 2 Dallas, 102; *Jackson Ins. Co.* v. *Stewart,* 1 Hughes, 310; *Mayer* v. *Reed,* 37 Ga. 482; *Roberts, Adm.,* v. *Cocks,* 28 Gratt. 207; *Biglar* v. *Waller,* Chase, 316.

The only provision in the Trading with the Enemy Act which permits the discharge of a debt owing by an enemy to a citizen of the United States is the provision of § 9, permitting the filing of a claim by the creditor and the collection of the obligation out of property of the enemy seized by the Alien Property Custodian. Unless the common-law rule is adhered to in all cases, to permit interest

to run during the period of the war on debts which are collected pursuant to § 9 of the Trading with the Enemy Act would be to adopt one rule as to interest where a particular German debtor had property in the United States, which had been seized, and to adopt another rule in those cases where a German debtor had no property in the United States which was subject to seizure. *Miller* v. *Robertson,* 266 U. S. 243; *New York Life Ins. Co.* v. *Davis,* 95 U. S. 425, distinguished. In the present case there is no evidence, and it is apparently not a fact, that the enemy debtor had any agent in this country.

The treaty of peace between the United States and Germany, signed on August 25, 1921, has no application to the questions involved in this case.

Mr. Thomas G. Haight, with whom *Mr. Amos J. Peaslee* was on the brief, for respondents, Carl Joerger et al.

The rate of exchange prevailing when judgment is entered should be used in converting foreign currency indebtedness into currency of the country of the forum. In addition to authorities cited by the Government on this head, see *Metcalf* v. *Mayer,* App. Div. N. Y., October 2, 1925.

Interest should not be allowed for the period while this nation and Germany were at war. The provisions of the treaty of Versailles which were made a part of the treaty between the United States and Germany do not affect the rate of exchange to be used or interest to be allowed in suits under § 9 of the Trading with the Enemy Act.

There is nothing in the Trading with the Enemy Act itself which requires the universal application of any particular rate of exchange to all suits brought under it. If it is necessary to consider the provisions of the treaty of Versailles, then it is apparent from the history and language of the Trading with the Enemy Act and the treaties that creditors, in suits under § 9 of the Trading with the Enemy Act, are entitled to enforce only their

common law contractual rights, and that § 9 was never intended to give to a few American creditors the right to enforce an extra-contractual claim, which is in essence a claim against the German Government, for losses resulting from the unusual depreciation of the German mark.

By the reservations in the Congressional resolution and the treaty of Berlin which incorporated certain provisions of the treaty of Versailles, American nationals were protected in their claims against the German government for losses from depreciation of the German mark, and they can enforce and collect them through the Mixed Claims Commission under the general award which has already been made by that Commission. The plaintiffs' claim for exactly this same debt has been filed with the Commission and no possible injustice can result from an interpretation of the Trading with the Enemy Act in the way in which it was obviously intended to operate.

Congress may, if it so elects, utilize the sequestered German property, after the contractual common law claims of their creditors have been satisfied out of it, as well as all other German sequestered property, for the payment of all claims of all American creditors and all other claimants; but up to the present time Congress has not yet determined whether it will apply the sequestered property for this purpose or whether it will arrange to satisfy these claims by some other means. On the contrary, Congress has expressly declared that the sequestered property shall stand as security for all American claimants. The claimants in the case at bar have no right to preferential treatment respecting the portion of their claim which is, in essence, a claim against the government of Germany.

By special leave of Court, briefs of *amici curiae* were filed as follows: (1) by *Messrs. Charles E. Hughes* and *Joseph M. Hartfield;* (2) by *Messrs. John W. Davis*

and *William C. Cannon;* (3) by *Messrs. William D. Guthrie, Lewis R. Conklin, Isidor Kresel,* and *Bernard Hershkopf.*

Mr. Justice Holmes delivered the opinion of the Court.

These are cross petitions based upon a suit brought against the Alien Property Custodian by Guinness and others, doing business under the firm name of Ladenburg, Thalmann & Co., in New York. The facts are not in dispute. A German firm, Joerger and others doing business under the name of Delbrück, Schickler & Co., was indebted to the American firm under an account stated on December 31, 1916, for 1079.35 marks, subject to a setoff of $35.35. The debt was not paid when the war between Germany and the United States began, April 6, 1917. The Alien Property Custodian had taken property of the German firm of a value greater than the debt and the American firm brought this suit in equity to recover what was due to it, as provided by the Trading with the Enemy Act of October 6, 1917, c. 106, § 9; 40 Stat. 411, 419, amended by the Act of June 5, 1920, c. 241; 41 Stat. 977. The only questions raised and argued here are whether interest is to be allowed for the time covered by the war, from April 6, 1917, to July 14, 1919, and at what date the value of the mark is to be estimated in dollars in order to fix the amount of the decree. The District Court held that interest was suspended during the war, 291 Fed. Rep. 768, and that the value of the mark at the time when the debt should have been paid was the proper measure. (This value is fixed as 17½ cents.) 291 Fed. Rep. 769. The decree was affirmed by the Circuit Court of Appeals. 299 Fed. Rep. 538. The Alien Property Custodian in the interest of the German debtors seeks to reverse the latter ruling, in No. 80, and the American firm seeks to reverse the former ruling, in No. 81.

We take up the second question first as the principles that govern it have some bearing upon the matter of interest also. We are of opinion that the Courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors "You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force. *Gould* v. *Banks*, 8 Wend. 562, 567. The event has come to pass upon which your liability becomes absolute as fixed by law." *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 543. There is no doubt that this rule prevails in actions for a tort, *Preston* v. *Prather*, 137 U. S. 604, and in actions for the failure to deliver merchandise. *Hopkins* v. *Lee*, 6 Wheat. 109. The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is "the loss of what the contractor would have had if the contract had been performed," *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 100; it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time. The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and on the other hand the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come seems to us to flow from fundamental theory and not to need other support. It is in accord with the decisions of several State Courts

and Circuit Courts of Appeals as well as of the English House of Lords. *Hoppe* v. *Russo-Asiatic Bank,* 235 N. Y. 37. *Katcher* v. *American Express Co.,* 94 N. J. L. 165, 171. *Simonoff* v. *Granite City National Bank,* 279 Ill. 248, 255. *Wichita Mill & Electric Co.* v. *Naamlooze &c. Industrie,* 3 Fed. (2d) 931; *S. S. Celia* v. *S. S. Volturno* [1921] 2 A. C. 544.

The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young* v. *Godbe,* 15 Wall. 562, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid, interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions, but here again what we regard as principle has prevailed in later days, *Miller* v. *Robertson,* 266 U. S. 243; *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie,* [1918] A. C. 239, 245; s. c. [1917] 1 K. B. 842, 850. The case of *Brown* v. *Hiatts,* 15 Wall. 177, although criticized in the last cited decision, is consistent on its facts with the principle adopted here, since war existed at the time when the cause of action otherwise would have accrued, and it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law. Our decision makes it unnecessary to consider arguments drawn from

the Treaty with Germany and the Trading with the Enemy Act.

No. 80, decree affirmed.
No. 81, decree reversed as to interest.

MR. JUSTICE STONE took no part in this case.

ENRIQUE DEL POZO Y MARCOS ET AL. *v.* WILSON CYPRESS COMPANY.

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

No. 184. Motion submitted October 5, 1925.—Decided November 16, 1925.

1. An appeal from a decree of the Circuit Court of Appeals entered prior to the Jurisdictional Act of February 13, 1925, was not affected by that Act. P. 87.
2. Under Jud. Code §§ 128, 241, a decree of the Circuit Court of Appeals in a case not of a class defined by § 128 as final in that court was reviewable by appeal to this Court if involving $1000, exclusive of costs. *Id.*
3. Upon a motion to affirm, questions determined on a former appeal of the case, after a full hearing followed by denial of a petition for rehearing, and which were so determined by reaffirming and applying earlier decisions which covered the questions—can not reasonably be regarded as debatable. P. 88.
4. On the former appeal in this case (236 U. S. 635) this Court held, in substance:

   (*a*) The purpose of the Act of May 23, 1828, c. 70, 4 Stat. 284, in confirming the land grant in controversy, was not to create a new right, but to recognize, in fulfilment of treaty obligations, a right conferred by Spain while the land was under her dominion;

   (*b*) As the grant contained a less acreage than a league square, the confirmation by that Act was subject only to a needed survey giving precision to the boundaries of the grant;

   (*c*) When the survey was made, and received the approval of the Surveyor General in 1851, the confirmation was complete and the land was thenceforth effectively separated from the public domain and subject to the taxing power of the State;

(*d*) The survey did not require the special approval of the Commissioner of the General Land Office; for under the law and practice of that period the approval of the Surveyor General sufficed;

(*e*) The patent, issued in 1895, was in the nature of a convenient muniment or record of the confirmation already effected by the Act of 1828 and the approved survey, rather than a conveyance speaking from the date of its issue. P. 86.

5. As the record shows that the original plat was approved in 1851, and the patent recites that the description of the land in the patent was taken from the approved field notes of the original survey, a mention in the patent of a descriptive plat and notes "authenticated and approved" by the Surveyor General shortly before its date, obviously refers to a plat and notes made from the approved survey of 1851 to provide a suitable description for the patent, authentication and approval of which by the then Surveyor General amounted to no more than a certificate that they were accurately taken from the earlier survey as shown on the records of his office. P. 88.
6. A claimant under a Spanish grant whose claim was confirmed by an Act of Congress and approved survey was not obliged by the Act of March 3, 1807, c. 46, 2 Stat. 445, to abstain from acts of proprietorship until subsequent issue of a patent. P. 89.
7. When title so passed by confirmation and approved survey, the doctrines of laches and adverse possession became applicable against the claimant; also a local statute of limitations which did not begin to run as to lands derived from the United States, "until the passage of the title" from the Government. P. 89.
8. Concurrent findings of fact of two federal courts below, having substantial support in the evidence, and sustaining defenses of adverse possession and laches, are accepted by this Court. P. 89.

299 Fed. 261, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court dismissing on the merits a suit brought by the appellants to quiet title to a confirmed land grant in Florida. The decision now reported was made on a motion to affirm the decree appealed from; an alternative motion to dismiss the appeal being overruled. Upon a former appeal, taken by the Cypress Company, this Court reversed a decree which had been rendered in favor of the plaintiffs. See 236 U. S. 635.

Messrs. Joseph H. Jones, John C. Jones and *William Whitwell Dewhurst* were on the briefs for appellants.

Messrs. J. C. Cooper and *Henry C. Clark* were on the briefs for appellees.

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

This is a suit to quiet title to a confirmed land grant in Florida. The plaintiffs claim as heirs of the original grantee. The defendant claims under tax deeds, and also asserts that the plaintiffs are barred from maintaining the suit, first, by adverse possession on the part of the defendant and those through whom it claims for the period fixed in the local statute of limitation, and, secondly, by inexcusable laches.

The grant was made in 1815 by Spain to Miguel Marcos, purported to cover 5,500 acres, and described the land in terms which made a survey essential to give precision to its boundaries. There was no survey during the Spanish dominion. After the cession to the United States, the heirs of the grantee presented a claim for confirmation to commissioners charged by Congress with the duty of examining and reporting on such claims. The commissioners found the grant valid and recommended it, with others, to Congress for confirmation. The report stated that the grant was without any condition. 4 Am. State Papers, Duff Green Ed., pp. 276, 283, 471.

By the Act of May 23, 1828, c. 70, 4 Stat. 284, Congress acted on the commissioners' report by confirming this and other claims, with the general qualification that if any claim exceeded the number of acres in a league square the confirmation was limited to such acreage, to be located by the claimants, within the original grant. That and other acts contemplated that the claims should be surveyed by way of precisely defining their boundaries and of con-

necting them with the public land surveys. Because of delay in making the surveys, possibly resulting from inaction on the part of claimants, Congress, by the Act of June 28, 1848, c. 83, 9 Stat. 242, directed that the work proceed as soon as practicable. Early in 1851 this claim was surveyed under the direction of the Surveyor General, and on June 20 of that year the survey received the approval of that officer. As surveyed the claim contained 5,486.46 acres.* In 1889 the grantee's heirs applied for a patent for the claim as surveyed. The application was denied by the Commissioner of the General Land Office on the mistaken theory that the claim as surveyed was more than a league square and therefore more than was confirmed by the Act of 1828. On an appeal from that ruling the Secretary of the Interior recognized that a league square, in the sense of the confirmatory act, comprised 6,002.50 acres and directed that a patent issue for the claim " in accordance with the survey." 18 Land Dec. 64. In 1895 a patent was issued under that direction.

The tax deeds under which the defendant claims were issued—the earliest in 1852 and others before 1872. The one of 1852 may be put out of view. The plaintiffs say in their bill that the others " are fair upon their face " but otherwise invalid. The bill contains a like statement respecting the mesne conveyances whereby the defendant succeeded to the tax title.

This suit by the heirs was begun in 1907. The present appeal is the second one to this Court.

Originally the District Court and the Circuit Court of Appeals ruled that the title was in the United States, and the land not taxable, until the issue of the patent, and therefore that the tax deeds, all of which preceded the patent, were absolutely void and did not give even color of title. In that view the District Court gave and the

* In some parts of the record the acreage is mistakenly given as 5,426.82.

Circuit Court of Appeals affirmed a decree for the plaintiffs, without considering the conformity of the tax proceedings to the local law or the questions arising out of the evidence bearing on the defenses of adverse possession and laches. On the first appeal to this Court that view was disapproved and the decree reversed. 236 U. S. 635. In keeping with prior decisions this Court held, in substance, that—

1. The purpose of the confirmatory Act of 1828 was not to create a new right but to recognize, in fulfilment of treaty obligations, a right conferred by Spain while the land was under her dominion;

2. As the grant contained a less acreage than a league square, the confirmation by that Act was subject only to a needed survey giving precision to the boundaries of the grant;

3. When the survey was made and received the approval of the Surveyor General the confirmation was complete and the land was thenceforth effectively separated from the public domain and subject to the taxing power of the State;

4. The survey did not require the special approval of the Commissioner of the General Land Office, for under the law and practice of that period the approval of the Surveyor General sufficed;

5. The patent was in the nature of a convenient muniment or record of the confirmation already effected by the Act of 1828 and the approved survey rather than a conveyance speaking from the date of its issue.

The cases of *Beard* v. *Federy,* 3 Wall. 478, 491, and *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339, 344, were cited in support of the last proposition and were pertinent; but the proposition has further and special support in other cases, where rights based on tax sales, adverse possession, etc., occurring after a like legislative confirmation and before the issue of patent, were upheld, such as

Langdeau v. *Hanes,* 21 Wall. 521, 529; *Morrow* v. *Whitney,* 95 U. S. 551, 554, 555; *Joplin* v. *Chachere,* 192 U. S. 94.

On the first appeal this Court did not pass upon the question of the conformity of the tax proceedings to the local law, nor on those arising out of the evidence bearing on the defenses of adverse possession and laches. They had not been considered in the courts below and were of a kind that should be examined and determined in the first instance by the District Court and then, if need be, by the Circuit Court of Appeals. The decree of reversal was so framed as to require that this course be taken.

When the case got back to the District Court it was heard anew on the record before made. That court found that the defenses of adverse possession and laches were well taken in fact and in law, and accordingly entered a decree dismissing the bill on the merits. The Circuit Court of Appeals affirmed that decree. 299 Fed. 261. The plaintiffs then brought the case here on the present appeal.

Various motions have been submitted on briefs. One by the appellee asks that the appeal be dismissed as taken where an appeal was not admissible, or in the alternative that the decree be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument. See rule 6, par. 5, 222 U. S. appendix and 266 U. S. appendix.

The motion to dismiss must be denied. The appeal was taken under §§ 128 and 241 of the Judicial Code as existing when the decree of affirmance by the Circuit Court of Appeals was entered, and is not affected by the subsequent Act of February 13, 1925, c. 229, 43 Stat. 936. Section 128 provided that the decisions of the Circuit Courts of Appeals in certain classes of cases should be final, in the sense of being not reviewable by this Court on writ of error or appeal; and § 241 provided that

the decisions of those courts in other cases should be subject to such a review where the matter in controversy, exclusive of costs, exceeded $1,000. This suit was not within any of the classes named in § 128, and the matter in controversy exceeded $1,000, apart from costs. Therefore the suit was one in which an appeal was admissible.

The motion to affirm is well taken. A reference to the questions presented and to what is plainly shown in the record will make this clear.

The appellants seek to reopen the questions determined on the first appeal. A full hearing was had at that time. The questions were not novel but covered by prior decisions. As a result of the hearing those decisions were reaffirmed and applied. There was also a petition for rehearing, which was denied. In this situation the questions reasonably cannot be regarded as now debatable.

The contention is made that the decision on that appeal proceeded on the assumption that the survey was approved by the Surveyor General in 1851, whereas according to the record the approval was given shortly before the patent issued, which was in 1895. But the record is plainly otherwise. It contains a certified copy of the original plat of the survey, as made in January, 1851, by Marcellus A. Williams, deputy surveyor; and the plat bears an endorsement signed by the then Surveyor General showing that he examined it, compared it with the field notes, and approved it, June 20, 1851. In addition, the patent recites that the description there given of the land was "taken from the approved field notes" of Williams' survey made in January, 1851. True, the patent also refers to a descriptive plat and notes "authenticated and approved" by the Surveyor General shortly before the date of the patent; but it is obvious from the patent and other parts of the record that the descriptive plat and notes so mentioned were made up from the approved survey of 1851 merely as a means of providing a suitable

and convenient description of the land for insertion in the patent. Their authentication and approval by the then Surveyor General amounted to no more than a certificate by him that they were accurately taken from the survey made and approved in 1851, as shown on the records of his office. See *Joplin* v. *Chachere, supra,* 102, 107.

A further contention is that there could be no laches, nor any adverse possession, prior to the issue of patent, because the claimants were prohibited by the Act of March 3, 1807, c. 46, 2 Stat. 445, from exercising acts of proprietorship until their claim was "recognized and confirmed" by the United States. A complete answer to this is that their claim was both recognized and confirmed by the Act of 1828, and the confirmation became effective when the claim was surveyed and the survey approved in 1851. The subsequent patent, although serving as a convenient muniment of title as confirmed, added nothing to the force of the confirmation. *Langdeau* v. *Hanes, supra,* 530, and other cases before cited.

Reliance is also had on a provision in the local statute of limitation declaring that, as respects lands derived from the United States, the period of limitation should not begin to run "until the passage of the title" from the Government. The answer to the last contention is equally good here. Such title as the United States possessed passed to the claimants when the confirmation became effective through the approved survey. The cases just cited are conclusive on this point.

Lastly, complaint is made of the findings of fact sustaining the defenses of adverse possession and laches. The courts below concurred in these findings and explained them in considered opinions. The record shows with certainty that the findings had very substantial support in the evidence. This Court accepts concurrent findings with such support. *Morewood* v. *Enequist,* 23 How. 491, 495;

Stuart v. *Hayden,* 169 U. S. 1, 14; *National Bank of Athens* v. *Shackelford,* 239 U. S. 81, 82; *Yuma County Water Ass'n.* v. *Schlecht,* 262 U. S. 138, 146; *United States* v. *State Investment Co.,* 264 U. S. 206, 211.

No question is presented which can be regarded as debatable in this Court, so there is no need for holding the case for further argument.

Decree affirmed.

LIPSHITZ & COHEN *v.* UNITED STATES.

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

No. 68. Argued October 21, 1925.—Decided November 16, 1925.

An agent of the United States listed junk for sale at several forts, the list setting forth the kinds, and weight of each, at each location, with a statement, however, that the weights shown were approximate and must be accepted as correct by the bidder. Plaintiffs, without other information or inquiry, bid a lump sum for the material, "as is where is," the purchaser to remove it; and the offer was accepted. The quantities turned out to be much less than those so listed. *Held,* a contract for the specific lots, without warranty of quantity; and that plaintiffs, standing on the contract, had no cause of action for the profits they would have made on resale if the quantities had been as listed.

Affirmed.

ERROR to a judgment of the District Court in favor of the United States, defendant in an action on a contract.

Mr. Henry A. Alexander, for plaintiffs in error.

Solicitor General Mitchell, Assistant to the Attorney General Donovan, and *Messrs. Howard W. Ameli* and *Joseph Henry Cohen,* Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Plaintiffs in error seek to recover profits which, it is alleged, would have been realized if the United States had complied with their agreement to deliver approximately 1,530,600 pounds of obsolete material. The cause was heard by the District Judge without a jury. He found the facts and upon them held that the contract had not been broken.

An agent of the United States put out a schedule which stated that certain obsolete material, classed as cast iron, cast and forged steel, armor steel, brass, bronze and lead, was held for sale at six specified forts. It set out the weights of each class at each place, and was headed—" List of junk for sale and location of same. The weights as shown below are approximate and must be accepted as correct by the bidder." Plaintiffs in error made a written offer at the foot of the schedule sheet to pay $1,055, " for all the above described material, as is where is, for which we are enclosing you Cashier's check for 20% of the amount—$211—with our option to remove material within six months from acceptance of this bid. . . ." This was accepted May 24, 1922. " At the time the offer was made and accepted the plaintiff did not inspect the material for sale at any of the fortifications, and had no knowledge of such material other than that given by the contract. It was later found in junk piles at the various forts."

In the following July the purchasers began to remove the material and found nearly all items short. Aggregated, these shortages amounted to approximately one-half of the total weight stated in the original schedule, but there is nothing to indicate bad faith. They complained but made no effort to repudiate or annul the contract.

Supporting his judgment in favor of the United States, the District Judge said—" Since the Government is not in

the business of buying and selling and its agents are authorized only to offer for sale such material as has been condemned as obsolete or useless, taking the language of this offer and acceptance I am of opinion that the contract must be construed as one offering to sell an approximate quantity of such cast iron, brass [cast and forged steel, bronze, armor steel] or lead, and as one offering to sell all of the materials of these descriptions which were on hand at the various points named, the intention being not to make a sale by the pound or ton, but to make an entire sale of specific lots of obsolete material, whether more or less than the weight, and to include all thereof. . . . I am satisfied that they [plaintiffs] cannot claim that this contract, worded as it was, has been broken because it turned out that there was less, even greatly less, of some of the materials described as on hand than the description would have led the purchaser to suppose. It is not made to appear that the United States failed or refused to deliver any of the material that was actually at the forts named at the time the contract was made."

We approve this construction of the agreement. Applicable principles of law were announced by Mr. Justice Bradley, speaking for the court in *Brawley* v. *United States,* 96 U. S. 168, 171. The negotiations had reference to specific lots. The naming of quantities cannot be regarded as in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it.

It is not necessary for us to consider whether the contract is sufficiently formal to comply with the requirements of R. S. 3744.

The judgment of the court below must be

Affirmed.

MARGOLIN *v.* UNITED STATES.

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

No. 254. Argued October 5, 1925.—Decided November 16, 1925.

1. Section 13 of the War Risk Insurance Act, as amended May 20, 1918, forbids an attorney to charge more than three dollars for any services rendered a beneficiary in respect of a claim under the Act for insurance on the life of a deceased soldier, when no action in court is instituted; and makes the violation of this prohibition a misdemeanor. P. 101.
2. So construed, the section is not in conflict with the Fifth Amendment. *Calhoun* v. *Massie*, 253 U. S. 170. *Id.*
3. Disregard of the plain language of a statute can not be justified by reports of the committees in Congress which recommended the bill, or by communications from the head of a Department incorporated in the reports. *Id.*

3 Fed. (2d) 602, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a sentence imposed by the District Court on the petitioner for receiving a fee of $1500 as compensation for services in preparing and presenting to the Veterans' Bureau a claim for insurance money under the War Risk Insurance Act.

Miss Susan Brandeis and *Mr. Benjamin S. Kirsh*, for petitioner.

The reports of the House and Senate committees accompanying the Bill, prior to enactment, and the communication of the Secretary of the Treasury, incorporated therein, establish, beyond doubt, that the limitation of $3.00 " for such assistance as may be required in the preparation and execution of the necessary papers " applies only to the clerical work of filling out a form. The trial judge and the Circuit Court of Appeals therefore erroneously construed the provisions of the Act in deciding that

a greater charge than $3.00 for useful, elaborate, and successful investigation and preliminary professional services was within the criminal prohibition of the statute. The reports of the committees are an important, and, indeed, a controlling aid in the construction of the statute. The intention of Congress with respect to the conduct prohibited under the enactment can be learned by reverting to the circumstances of the enactment. *Stafford* v. *Wallace,* 258 U. S. 495; *Duplex Co.* v. *Deering,* 254 U. S. 443; *Woodward* v. *De Graffenried,* 238 U. S. 284; *Ozawa* v. *United States,* 260 U. S. 178; *Holy Trinity Church* v. *United States,* 143 U. S. 457.

The criminal statute must be construed strictly against the Government, and liberally in favor of the petitioner. Effect must be given to every portion of the statute. A construction which renders part of the Act contradictory and repugnant to another must be avoided. The court is under a duty to construe the statute so as to render it harmonious and consistent in its entirety. The words "Except as herein provided" forbid merely "a charge for the particular services therein specified in excess of the limitations therein fixed." *United States* v. *Rodgers,* D. C. West Virginia, unreported. The limitation of compensation in the case of filling in of an affidavit of claim and in case of a law suit are the only two cases "herein provided." Elaborate investigation work and the discovery of facts upon which the claim is based are not provided for in the statute, and are not within the criminal prohibition of the Act. They are a subject matter upon which the Director of War Risk Insurance, in the absence of a prohibition upon his general powers, could properly announce rules and regulations. Since there is a limitation only on the Director's power with respect to the two specific items of filling in the form and the suit, there is no violation of the law by the petitioner in charging more than $3.00 for the comprehensive and useful professional

services which he rendered to his client. The phrase " that no claim agent or attorney shall be recognized in the presentation or adjudication of claims," is merely a limitation upon the power of an attorney or claim agent to represent the beneficiary, and is restricted to " presentation " and " adjudication." It does not render investigation work criminal.

A criminal statute must receive a reasonable, rational, and sensible construction in preference to one that is absurd, arbitrary, and unreasonable. The terms of the Act must be construed with relation to its object and the evils it was designed to remedy. The letter of the law must yield to the policy and spirit in order to avoid absurd consequences. The enormously disproportionate penalty prescribed by the statute, in contrast to the acts for which the petitioner was convicted, is another clear indication that the statute was designed to prohibit solely fraudulent, outrageous, and scandalous practices. The contrast in the wording of the prohibitions with respect to employment and compensation of attorneys contained in prior statutes, and the Act of May 20, 1918, under which the petitioner was convicted, clearly indicates that there was no criminal prohibition against the petitioner's charge for preliminary investigation work.

If the Act be construed so as to render criminal the receipt by an attorney of a sum in excess of $3.00, for elaborate and useful investigation work, and to nullify and make illegal an agreement between a client and the attorney for fair and just compensation in the investigation of a contract claim against the Government, it is oppressive, arbitrary, and unreasonable legislation, and in violation of the Fifth Amendment to the Constitution of the United States. Congress has no constitutional power to attach onerous and burdensome conditions, and to destroy contracts relating to the enforcement of a remedy, arising from private contract based upon a consideration, and

not a pension, bounty or other gratuity of the Government. By making void, illegal, and criminal the receipt of any adequate or appropriate fee by an attorney for the discovery of facts, the investigation of a claim, and any professional services, falling short of an actual judgment, in connection with a contract of insurance, Congress is, by legislative fiat, impairing the remedy it has granted to the client, and deprives the attorney, who has entered into a contract with the client for the effective enforcement of the remedy, of his liberty and property in violation of his constitutional rights. The effect of this legislation is to withdraw as a source of professional services, an extensive and lucrative field of practice, from which an attorney's professional work is derived. If this Act be held constitutional, like restrictions may be extended into every field in which the United States engages in a proprietary and business function. A capricious embargo by Congress against markets of a merchant is no more a deprivation of property than prohibiting an attorney from handling a class of cases which, but for the *ipse dixit* of Congress, would yield a profitable source of income. See dissenting opinion in *Calhoun* v. *Massie,* 253 U. S. 170; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Coppage* v. *Kansas,* 236 U. S. 1; *Adair* v. *United States,* 208 U. S. 161; *Frisbie* v. *United States,* 157 U. S. 160; *United States* v. *Hall,* 98 U. S. 343; *Ball* v. *Halsell,* 161 U. S. 72; *Kendall* v. *United States,* 7 Wall. 113.

Calhoun v. *Massie,* 253 U. S. 170, does not control the case at bar—for several reasons. It does not appear from the facts that the Omnibus Claims Act, considered there, was anything other than a moral, or gratuitous, assumption by the Government of a claim, where there was no legal obligation. There were further, as the majority opinion states, " special reasons " to the effect that no appropriation had been made by Congress. Finally, there

was not under consideration in that case the meagre and paltry fee of $3.00, but an adequate and liberal sum of 20% of the recovery. We would also state to the Court that the citation of the Act of June 12th, 1917, in the foot note in the opinion in that case, in so far as it is an indication of the constitutionality of certain generic enactments, is irrelevant in this case, because the Act of June 12th, 1917, dealt only with compensation and payments in the nature of pensions, and not with contracts of insurance discussed in the case at bar. Bearing in mind the effort of an attorney in a case of this character, and the total lack of compensation in the case of unsuccessful endeavor, we may well justify a charge of $1,500.00 as an attorney's fee for the collection of a sum, which will amount in the aggregate, to the sum of $12,360.00. The charge made of $1,500.00 also included hotel bills, railroad fares, and disbursements of various descriptions. *Taylor* v. *Bemiss*, 110 U. S. 42.

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

Mr. Justice McReynolds delivered the opinion of the Court.

An Act of Congress approved September 2, 1914, c. 293, 38 Stat. 711, provided for a Bureau of War Risk Insurance in the Treasury Department, directed it to insure American vessels, their freight, passage money and cargoes against war risks, and further authorized it to prescribe necessary rules and regulations. This was amended June 12, 1917, c. 26, 40 Stat. 102, so as to provide insurance for masters, officers and crews of American vessels; and the following new section was added—

"Sec. 5a. No claim agent or attorney shall be entitled to receive any compensation whatever for services in the

collection of claims against the Bureau of War Risk Insurance for death, personal injury, or detention, except when proceedings are taken in accordance with section five in a district court of the United States, in which case the judge shall, as a part of his determination and order, settle and determine the amount of compensation not to exceed ten per centum of amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his legal adviser or advisers, and it shall be unlawful for any lawyer or other person acting in that behalf to ask for, contract for, or receive any larger sum than the amount so fixed."

An Act approved October 6, 1917, c. 105, 40 Stat. 398, again amended the original Act, provided for Divisions of Marine and Seamen's Insurance and of Military and Naval Insurance, made definite provision for insuring members of the military and naval forces, and added another new section—

"Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections five and four hundred and five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions, to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with any of the matters

provided for in articles two, three, and four, and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the method of making investigations and medical examinations, and the manner and form of adjudications and awards."

An Act approved May 20, 1918, c. 77, 40 Stat. 555, amended Sec. 13, above quoted, so that it should provide—

"Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided, however,* That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers

shall not exceed $3 in any one case: *And provided further,* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

"Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

An Act approved August 9, 1921, c. 57, 42 Stat. 147, provided for the establishment of the Veterans' Bureau, with "the functions, powers and duties conferred by existing law upon the Bureau of War Risk Insurance."

Petitioner was found guilty under an indictment which charged that he unlawfully received fifteen hundred dollars as a fee and compensation for services in preparing and presenting to the United States Veterans' Bureau an affidavit executed by Yetta Cohen in support of her claim

for insurance money provided for by the Act approved October 6, 1917, and amendments thereto. The trial court imposed a fine of two hundred and fifty dollars and its judgment was affirmed by the Circuit Court of Appeals. 3 Fed. (2d) 602.

It appears that Yetta Cohen retained petitioner, a member of the bar, to press allowance of her claim as a beneficiary designated in a policy issued to her nephew under the War Risk Insurance Act. He corresponded with the Veterans' Bureau, made one trip from New York to Washington, where he examined records and interviewed officials, and prepared the necessary papers. It may be assumed that his services were useful and of some substantial value. For them he demanded two thousand dollars and received fifteen hundred. The exceptions raise the questions whether § 13, Act of May 20, 1918, forbids an attorney from charging more than three dollars for any services rendered a beneficiary in respect of a claim under the War Risk Insurance Act when no action in court has been instituted; and whether, if so construed, that section offends the Fifth Amendment.

Petitioner claims that the inhibition against receiving any sum greater than three dollars relates solely to the clerical work of filling out the form or affidavit of claim, and does not apply to useful investigation and preparatory work such as he did. He insists that this view is supported by the reports of the committees of the Senate and House of Representatives, which recommended passage of the bill; also by a communication from the Secretary of the Treasury, incorporated therein. See S. Rep. 429 and H. Rep. 471, 65th Cong., 2d Sess.

We find no reason which would justify disregard of the plain language of the section under consideration. It declares that any person who receives a fee or compensation in respect of a claim under the Act except as therein provided shall be deemed guilty of a misdemeanor. The

only compensation which it permits a claim agent or attorney to receive where no legal proceeding has been commenced is three dollars for assistance in preparation and execution of necessary papers. And the history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose.

The validity of § 13 construed as above indicated, we think, is not open to serious doubt. *Calhoun* v. *Massie*, 253 U. S. 170.

The judgment of the court below must be

Affirmed.

MR. JUSTICE BRANDEIS took no part in the consideration or determination of this cause.

WOERISHOFFER ET AL., EXECUTORS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 11. Argued October 7, 1925.—Decided November 16, 1925.

1. Upon the facts recited in the opinion, *held*,

(*a*) That certain legacy taxes, assessed under § 29 of the Spanish War Revenue Act, were "imposed" prior to July 1, 1902, within the saving clause of the repealing Act, c. 500, § 7, 32 Stat. 96, although the formal assessment by the Treasury Department was not made before that date. *Cochran* v. *United States*, 254 U. S. 387. P. 109.

(*b*) That interests of residuary legatees in a portion of the estate not distributed prior to July 1, 1902, were not contingent beneficial interests not absolutely vested in possession or enjoyment prior to July 1, 1902, within the meaning of § 3 of the Act of June 27, 1902, c. 1160, 32 Stat. 406. *Kahn* v. *United States*, 257 U. S. 244; *Simpson* v. *United States*, 252 U. S. 547. P. 109.

2. Where the Court of Claims overruled, without prejudice, a demurrer to the petition, and ordered the testimony limited to certain features of the case, objection to the making of the order, or to the findings of fact covering the entire case, should have been made in that court, as a basis for objection in this court on appeal. P. 109.

58 Ct. Cls. 410, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition in a suit to recover money voluntarily paid as legacy taxes.

Mr. H. T. Newcomb, for appellants.

In this case the record shows that the basis for determining the value of the large volume of securities held in the estate, for the purposes of the New York inheritance or transfer tax, was in litigation, which was not determined until after July 1, 1902, and that, when a return was made under the Act of June 13, 1898, long after July 1, 1902, the values assigned " for the most part were arithmetical averages of New York Stock Exchange prices or quotations on similar stocks and bonds during the three-months period immediately preceding the testator's decease. These values were in most instances different from the par or face values of such stocks and bonds, and were also in most instances different from the values assigned thereto by the executors in their distribution of them to the residuary legatees as a part of the residuary estate." (Finding of fact.) Even these arbitrarily determined values were disputed at the first opportunity by the Commissioner of Internal Revenue, who applied a different price to certain of the securities in 1914. The estate here represented was not settled on July 1, 1902; and funds in the hands of the executors remained liable for debts of the estate; but there is no reliance on these facts to establish the uncertainty now claimed. The present claim of uncertainty requiring administrative assessment rests upon the character and qualities of the assets of the estate. " The actual or clear value of said bonds and shares of stock and other assets of said estate could not be determined except by inquiry and investigation and the consideration of evidence therein."

The second section of the Act of July 27, 1912, requires the Secretary of the Treasury to refund legacy taxes illegally or erroneously assessed or collected under color

of the Act of June 13, 1898. If appellants are correct in their views, the whole sum exacted in respect of the interests of the three residuary legatees, except the portion exacted in respect of their legacies of $100,000.00 each, was erroneously and illegally assessed and collected and the amount thereof now retained should be refunded. The interests of the residuary legatees in that portion of the estate not distributed prior to July 1, 1902, were, on that date, contingent beneficial interests not absolutely vested in enjoyment or possession within the meaning of the Act of June 27, 1902, and any tax exacted in respect thereof in December, 1902, was illegally collected and should be refunded in compliance with the Act of July 27, 1912.

The conditions which removed the practical element of contingency in *Simpson* v. *United States,* 252 U. S. 547, do not exist in this case. The record shows that distribution kept pace with the possibilities of sound and reasonable administration; funds were not retained beyond the legitimate necessities of protection to the estate and the executors; and the margin held by the executors was at all times after July 1, 1902, a barely safe and workable margin. What, if anything, the residuary legatees would thereafter receive must have been uncertain and indefinite on July 1, 1902, and therefore their interests in the amounts thereafter becoming available were, on that date, and in the practical sense of the Act of June 27, 1902, contingent and not absolutely vested in possession or enjoyment.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Randolph S. Collins,* Attorney in the Department of Justice, were on the brief, for the United States.

The Government contends that the taxes voluntarily paid can not be recovered, for two reasons:

First. The subject of the tax or duty exacted by § 29 being predicated upon the right of succession which

passes by death to a beneficial right of possession or enjoyment of a legacy or distributive share (*Hertz* v. *Woodmen,* 218 U. S. 205, 219,) the liability for the payment of the tax accrued or arose the moment the right of succession by death passed to the claimants, which, as established, happened prior to July 1, 1902, and the occurrence of no other fact or event was essential to the imposition of a "liability" for the statutory tax upon the interest thus acquired. (*Id.* 220.)

There being present a "liability," the statute imposed the tax, which was properly collectible, for, as stated by this Court in the *Hertz Case,* "The plain purpose of the saving clause [in the repealing Act of April 12, 1902], was to preserve some liability which had been imposed under § 29 which would otherwise be lost. This it did by providing that all taxes 'imposed' prior to the going into effect of the act should, notwithstanding the repeal of the section which originated the tax, be preserved, and as to collection, lien, etc., be subject to the unrepealed section 30." (*Id.* pp. 221, 222.) Indeed, under the amendment of March 2, 1901, c. 806, 31 Stat. 948, making the tax due and payable within one year after the death of the testator, the time of payment was advanced so as to require payment within one year if there should be longer delay in paying the legacies. In the case at bar this statutory period expired on December 14, 1901.

There being, as shown by the Findings of Fact, an absolute right in the claimants to the possession and enjoyment of the legacies—the one-year period provided by the New York law after which payment of the legacies might have been required by the legatees as a matter of right, and the one-year period of limitation provided by the Act of 1901 within which the tax could be paid, both having expired—there was "imposed" a tax or duty exacted upon the right of succession which was preserved by the saving clause of the repealing Act of

April 12, 1902; hence assessment prior to July 1, 1902, became unnecessary. (*Id.* p. 224.) *King* v. *United States,* 99 U. S. 229, 233; *United States* v. *Erie Railway Co.,* 107 U. S. 1, 2; *United States* v. *Reading Railroad,* 123 U. S. 113.

Secondly. All of the legatees involved became vested in possession and enjoyment of their respective legacies prior to July 1, 1902, within the meaning of the Spanish War Revenue Act of 1898, as amended, and as interpreted by this Court, either by the absolute payment of the sums required by the will prior to that date or by virtue of the apparent termination by operation of law of the administration of the estate so far as these taxes are concerned; for, as pointed out by this Court in *Simpson* v. *United States,* 252 U. S. 547, 552-553, "It is obvious that legacies which it was thus the legal duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the Act of June 27, 1902, as it was interpreted in *United States* v. *Fidelity Trust Co.,* 222 U. S. 158; *McCoach* v. *Pratt,* 236 U. S. 562; and in *Henry* v. *United States,* 251 U. S. 393."

While it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refutation that an estate of the net personal value of over four and a quarter millions of dollars was or is in danger of embarrassment by the payment of legacies of about three and a half millions of dollars. And we have seen that the executors, who had knowledge of the condition of the estate and all that it might be made subject to, did not hesitate to make a return of the legacies to the Collector of Internal Revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims January 26, 1916, fifteen years

after the commencement of the administration of the estate, and nearly as long after the time of presentation of claims against it; and the record shows that the total of the claims and expenses for which the personal property was liable amounts to $298,646.12. In the face of this exhibition, you are asked to speculate upon the possibility of the existence of liabilities that fifteen years have not developed.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On January 26, 1916, the executors of Oswald Ottendorfer of New York City brought this suit in the Court of Claims to recover the sum of $543,708.44 voluntarily paid by them on December 10, 1902, for legacy taxes assessed under the Spanish War Revenue Act. June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, as amended. Section 29 had been repealed by Act of April 12, 1902, c. 500, § 7, 32 Stat. 96, 98, 99, the repeal to take effect July 1, 1902; but by a proviso all taxes theretofore imposed were continued in force. The time for presenting claims for the refunding of any tax under § 29 alleged to have been illegally assessed or to have been excessive or in any manner wrongfully collected was extended by Act of July 27, 1912, c. 256, 37 Stat. 240. The executors sought recovery of the whole amount paid on the ground that the tax had not been imposed prior to July 1, 1902. Recovery of part of the amount was sought also on the ground that it was assessed upon legacies which had not vested in possession or enjoyment prior to that date. There is no claim here that the assessment was excessive. The lower court dismissed the petition, 58 Ct. Cls. 410. The case is here on appeal allowed June 25, 1923, under § 242 of the Judicial Code.

The testator died on December 14, 1900. His will was duly probated and the executors qualified on March 28,

1901. There were some specific legacies; a residuary bequest which gave the bulk of the estate to three stepdaughters free from any trust; and a provision that all legacy or inheritance taxes should be paid out of the residue. The assets consisted largely of listed securities. On March 7, 1902, schedules were filed in the Surrogate's Court containing a description and the estimated value of all of the property known by the executors to have been owned by the testator at his death, together with statements of decedent's debts, of the payments for administration expenses, of estimated commissions of the executors, and of further administration expenses. On June 5, 1902, the appraiser appointed by the Surrogate's Court filed his report appraising the property of decedent, but it was not until July 16, 1902, that the Surrogate's order assessing thereon the New York inheritance tax was entered. The value of the personal property which passed to the executors was returned by them as $4,371,947.90. The debts and expenses to be set off against that sum were reported as $298,646.12. The assessment of the tax here in question was made by the Commissioner of Internal Revenue on December 10, 1902, in accordance with the executors' return which had been filed with him on November 7, 1902.

Under the laws of New York, the time for the presentation of claims against the estate had expired before July 1, 1902, and before that date the legatees were entitled to the full payment of their legacies. Under the laws of the United States, Act of March 2, 1901, c. 806, § 11, 31 Stat. 938, 948, the time within which payment of the tax was required to be made had also expired before July 1, 1902. Before that date, all the testator's debts and all the specific legacies had been paid, and each of the residuary legatees had received on account of the residuary bequest, $910,000, partly in cash and partly " in securities at New York Stock Exchange values " assented to by the legatees. Be-

tween that date and the end of the year 1908 each received in cash further sums aggregating $210,953.66. Some of the assets were still undistributed when the evidence was taken in this suit. The reason why no further or complete distribution of the residuary estate was made by the executors prior to July 1, 1902, was that they anticipated that the estate would be liable for payment of a New York estate transfer tax and the federal inheritance tax, for attorneys' fees and other expenses of administration, and that the exact amount of the residuary estate left for distribution could, therefore, not be definitely determined prior to July 1, 1902.

The contention that the taxes had not been imposed prior to July 1, 1902, because no formal assessment had in fact been made by the Treasury Department before that date is disposed of by *Cochran* v. *United States,* 254 U. S. 387. The contention that the interests of the residuary legatees in that portion of the estate not distributed prior to July 1, 1902, were contingent beneficial interests not absolutely vested in possession or enjoyment is disposed of by *Kahn* v. *United States,* 257 U. S. 244, *Simpson* v. *United States,* 252 U. S. 547, and earlier cases. An objection is made to the procedure pursued in the Court of Claims. The Government originally demurred to the petition. The demurrer was overruled without prejudice, and it was ordered that the testimony be limited to " the question of the amount of the residuary legacies not distributed until after July 1, 1902." Thereafter evidence was taken and the court made its findings. It is urged that the court erred in making findings of fact upon the entire case; that there are some findings inconsistent with allegations of the petition relating to matters other than those named in the order; and that as to such other matters the allegations of the petition must be taken as true. We have not discovered any inconsistency as to any material fact. Moreover, it does not appear that the executors objected

below either to the order restricting the scope of the evidence or to findings of fact made.

Affirmed.

BURK-WAGGONER OIL ASSOCIATION *v.* HOPKINS, COLLECTOR.

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

No. 67. Argued October 20, 21, 1925.—Decided November 16, 1925.

1. Unincorporated joint stock associations, like those described in *Hecht* v. *Malley*, 265 U. S. 144, though partnerships under the state law, are "corporations," within the definition of the Revenue Act of 1918, and are subject, like corporations, to the income and excess profits taxes imposed by that Act. P. 112.
2. Congress has power to tax the income earned through and in the name of such an association unaffected by the facts that, under the state law, the association is not recognized as a legal entity, can not hold title to property and its shareholders are liable for its debts. P. 114.

296 Fed. 492, affirmed.

ERROR to a judgment of the District Court in an action against an internal revenue collector to recover a tax, paid under protest.

Messrs. Harry C. Weeks and *Arnold R. Baar*, for the plaintiff in error.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Burk-Waggoner Oil Association is an unincorporated joint stock association like those described in *Hecht* v. *Malley*, 265 U. S. 144. It was organized in Texas and

carried on its business there. Under the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, it was assessed as a corporation the sum of $561,279.20 for income and excess profits taxes for the year 1919. It paid the tax under protest in quarterly instalments, and after appropriate proceedings brought this suit in the federal district court for northern Texas against the Collector of Internal Revenue to recover one of the instalments. The Association asserted that it was a partnership; contended that under the Act no partnership was taxable as such; and claimed that if the Act be construed as authorizing the taxation of a partnership as a corporation, or the taxation of the group for the distributive share of the individual members, it violated the Federal Constitution. The District Court entered judgment for the defendant, 296 Fed. 492. The case is here under § 238 of the Judicial Code, on direct writ of error allowed and filed April 21, 1924. Compare *Towne* v. *Eisner,* 245 U. S. 418, 425.

The Revenue Act of 1918, §§ 210, 211, 218a, 224, 335(c), provides in terms that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity, and that the members of partnerships are taxable upon their distributive shares of the partnership income, whether distributed or not. It subjects corporations to income and excess profits taxes different from those imposed upon individuals. See §§ 210–213, and §§ 230, 300. It provides in § 1: "That when used in this Act— . . The term 'corporation' includes associations, joint-stock companies, and insurance companies." By the common law of Texas a partnership is not an entity, *Glasscock* v. *Price,* 92 Tex. 271; *McManus* v. *Cash & Luckel,* 101 Tex. 261; an association like the plaintiff is a partnership; its shareholders are individually liable for its debts as members of a partnership, *Thompson* v. *Schmitt,* 115 Tex. —; *Victor Refining Co.* v. *City National Bank of Commerce,* 115 Tex. —; and

the association can not hold real property except through a trustee, *Edwards* v. *Old Settlers' Association* (Tex. Civ. App.), 166 S. W. 423, 426. A Texas statute provides that such associations may sue and be sued in their own name. Act of April 18, 1907, c. 128, Vernon's Sayles' Texas Civil Statutes, 1914, Title 102, c. 2, Arts. 6149–6154. Since the writ of error was allowed, this Court has held in *Hecht* v. *Malley* that associations like the plaintiff are, by virtue of § 1, subject to the special excise tax imposed by the Revenue Law of 1918 on every "domestic corporation."

The Burk-Waggoner Association contends that what is called its property and income were in law the property and income of its members; that ownership, receipt and segregation are essential elements of income which Congress cannot affect; that consequently income can be taxed by Congress without apportionment only to the owner thereof; that the income of an enterprise when considered in its relation to all others than the owners is not income within the purview of the Sixteenth Amendment; and that thus what is called the income of the Association can be taxed only to the partners upon their undistributed shares of the partnership profits; for otherwise such a distribution would neither enrich, nor segregate anything to the separate use of, a partner. The Association further contends that, while Congress may classify all recipients of income upon any reasonable basis for the purpose of imposing income taxes at different rates, or for other purposes connected with the levying and collection of such taxes, it cannot tax the income of the Association; for that would make out of a business group, whose property under the law of the State is owned by the members individually, an entity capable of owning property and receiving income; that to attempt this would constitute not classification but an unlawful invasion of the State's exclusive power to regulate the ownership of property with-

in its borders; that, on the other hand, if the tax be considered as one imposed upon the members and collected from the group, it would likewise be void, both because it is a direct tax not imposed upon income and not apportioned among the States, and because it is so arbitrary and variable in its rates and application as to conflict with the due process clause. The Association contends finally that there is a conflict between the specific provisions of the Revenue Act of 1918 for the taxation of partnership income to the members only and the definition of the term "corporation" in § 1; and that the grave constitutional doubts which necessarily arise, if the Act be construed as attempting to impose the corporation income tax upon associations which by the laws of the State are partnerships, present a compelling reason for construing the Act as not subjecting the Association's income to the taxes imposed upon corporations. Compare *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

There is no room for applying the rule of construction urged in aid of constitutionality. It is clear that Congress intended to subject such joint stock associations to the income and excess profits taxes as well as to the capital stock tax. The definition given to the term "corporation" in § 1 applies to the entire Act. The language of the section presents no ambiguity. Nor is there any inconsistency between that section and §§ 218(a) and 335(c), which refer specifically to the taxation of partnerships. The term partnership as used in these sections obviously refers only to ordinary partnerships. Unincorporated joint stock associations, although technically partnerships under the law of many States, are not in common parlance referred to as such. They have usually a fixed capital stock divided into shares represented by certificates transferrable only upon the books of the company, manage their affairs by a board of directors and exec-

utive officers, and conduct their business in the general form and mode of procedure of a corporation. Because of this resemblance in form and effectiveness, these business organizations are subjected by the Act to these taxes as corporations.

The claim that the Act, if so construed, violates the Constitution is also unsound. It is true that Congress cannot make a thing income which is not so in fact. But the thing to which the tax was here applied is confessedly income earned in the name of the Association. It is true that Congress cannot convert into a corporation an organization which by the law of its State is deemed to be a partnership. But nothing in the Constitution precludes Congress from taxing as a corporation an association which, although unincorporated, transacts its business as if it were incorporated. The power of Congress so to tax associations is not affected by the fact that, under the law of a particular State, the association cannot hold title to property, or that its shareholders are individually liable for the association's debts, or that it is not recognized as a legal entity. Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed.

Affirmed.

DAVIS, AGENT *v.* ALEXANDER ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 32. Argued October 12, 1925.—Decided November 16, 1925.

1. The Director General of Railroads was not suable generally as operator of all railroads under federal control, but only with reference to the particular transportation system or carrier out of

whose operations the liability in question arose. *Davis* v. *Donovan,* 265 U. S. 257. P. 116.

2. Where one railroad company actually controlled another and operated both as a single system, and the Director General, after taking them over, pursued the same practice, damages to freight shipped over the system during federal control and occurring on the subsidiary line, are recoverable in an action against the Federal Agent when sued and served as in charge of the dominant carrier. P. 117.

93 Okla. 159, affirmed.

CERTIORARI to a judgment of the Supreme Court of Oklahoma, which affirmed a recovery of damages for negligent injury to live stock, in an action against the Agent appointed under § 206a of the Transportation Act, 1920.

Mr. William F. Collins, with whom *Messrs. C. O. Blake* and *W. R. Bleakmore* were on the brief, for petitioner.

Mr. Fred E. Suits, with whom *Mr. C. E. Hall* was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Cattle shipped during federal control over the Chicago, Rock Island and Pacific System from stations in New Mexico through Texas to Oklahoma City were negligently injured in transit. To recover the damages suffered this suit was brought in a state court of Oklahoma against James C. Davis, as Agent designated by the President, pursuant to § 206*a* of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 461. The injury was inflicted partly in New Mexico, partly in Texas, and partly in Oklahoma. The main controversy was whether plaintiffs could recover for the injury suffered in Texas. The jury returned a verdict for the entire damages. Judgment entered thereon was affirmed by the highest court of the

State. 93 Okla. 159. A petition for a writ of certiorari was granted under § 237 of the Judicial Code as amended. 265 U. S. 577.

The lines of the Rock Island in Texas were owned by a subsidiary—the Chicago, Rock Island and Gulf Railway Company, a Texas corporation. The petition described Davis as Agent, United States Railroad Administration, in charge of Chicago, Rock Island and Pacific Railroad and Chicago, Rock Island and Gulf Railroad. In the trial court it was assumed that effective service of the summons pursuant to § 206*b* was made only upon Davis as Agent in charge of the Pacific. There, the shippers sought to recover against him as such on the ground that the transportation service undertaken was for the system; that, under federal control as before, the Pacific was the dominant carrier and operated, either alone or jointly with the Gulf, the whole system, including the Gulf lines; and that recovery for all damages suffered could, therefore, be had against Davis as Agent in charge of the Pacific. The defendant insisted that the Director General had operated the Pacific and the Gulf, not as parts of a single system, but as individual and distinct entities. The shippers introduced substantial evidence in support of their allegations. The case was submitted to the jury under instructions which made it clear that the verdict must be limited to the damage suffered on lines owned by the Pacific, unless the jury should find that the Gulf lines were being operated with the other Rock Island lines as parts of a single system.

To these instructions exceptions were duly taken, but the Supreme Court of Oklahoma deemed it unnecessary to pass upon their correctness. It affirmed the judgment on the ground that the Director General operated all the railroads of which the President took control as a single national system, not as separate companies or systems; that the Director General was liable in damages for

negligent operation regardless of the relation of the different lines to one another; and that under section 206*b* service of process on the service agent for any railroad gave jurisdiction over the Agent of the President in respect to all railroads under federal control in the operation of which the damages complained of resulted. Its opinion was delivered November 6, 1923. Later, this Court held in *Davis* v. *Donovan,* 265 U. S. 257, that under § 10 of the Federal Control Act and General Order 50–A the Director General was not suable generally as the operator of all the railroads, but only with reference to the particular transportation system or carrier out of whose operations the liability in question arose. The rule declared in the *Donovan* case has been applied in suits brought under Transportation Act, 1920, against the Agent of the President on causes of action arising during federal control. *Manbar Coal Co.* v. *Davis,* 297 Fed. 24. The Supreme Court of Oklahoma reached the same conclusion in *Davis, Federal Agent* v. *Benson,* 105 Okla. 41, overruling its decision in the case at bar.

While the ground on which the Supreme Court of Oklahoma rested its decision was thus unsound, the judgment of affirmance was right. Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company. *Lehigh Valley R. Co.* v. *Dupont,* 128 Fed. 840; *Lehigh Valley R. Co.* v. *Delachesa,* 145 Fed. 617; *Wichita Falls & Northwestern Ry Co.* v. *Puckett,* 53 Okla. 463. There was no error in the instructions excepted to.

Affirmed.

HICKS, ALIEN PROPERTY CUSTODIAN, *v.* POE ET AL.

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

No. 34. Argued October 12, 13, 1925.—Decided November 16, 1925.

1. A re-insurance company made a participation contract with a company engaged in the business of surety, fidelity and burglary insurance, whereby the former assumed one-third of the liability on risks written by the latter during a period of five years, and upon annual accountings was to receive one-third of any profits, or pay one-third of any losses, leaving, however, the managment of the business to the other without restriction. The second company being unsuccessful, its receivers, after the five year period, in winding up its business cancelled its outstanding risks by returning unearned premiums to policy-holders. *Held* that this was not a breach of the contract and did not relieve the re-insurer of its liability to pay the insured company one-third of the losses occurring after the five year period on business written within it. P. 119.
2. The rule that the liability of a re-insurer is not affected by the insolvency of the re-insured company, or the inability of the latter to fulfill its own contracts with the original insured, is applicable to a participation contract differing from customary re-insurance in that the re-insurer, instead of receiving premiums and paying its share of the losses, is to participate in profits and losses. P. 121.

293 Fed. 766, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (276 Fed. 949; 293 *Id.* 764), in favor of the receivers of a Maryland insurance company in a suit brought by them under the Trading with the Enemy Act to reach impounded funds belonging to a foreign insurance company, and for an accounting, etc.

Messrs. Daniel O. Hastings and *Hartwell Cabell*, for appellant.

Messrs. Stuart S. Janney and *J. Kemp Bartlett,* with whom *Mr. Joseph C. France* was on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit for an accounting was begun in the federal district court for Maryland on June 12, 1920, by the receivers of the United Surety Company, a corporation of that State, against the Munich Re-Insurance Company, a Bavarian corporation. The controversy arose out of a written agreement entered into by the companies in 1906. There had been active litigation in the Maryland courts where much became *res judicata.* See *Munich Re-Insurance Co.* v. *United Surety Co.,* 113 Md. 200; 121 Md. 479; *Poe* v. *Munich Re-Insurance Co.,* 126 Md. 520. This suit was then begun under § 9 of the Trading with the Enemy Act, October 6, 1917, c. 106, 40 Stat. 411, 419 as amended, because the receivers sought to reach funds of the Munich Company in the possession of the Alien Property Custodian. The District Court after careful opinions entered a decree for the receivers for $189,517.16 with interest. 276 Fed. 949; 293 Fed. 764. The Court of Appeals affirmed it without opinion. 293 Fed. 766. The appeal to this court, allowed January 7, 1924, was taken as of right under § 241 of the Judicial Code. We find no reversible error. Two matters only require mention. Neither presents a question federal in its nature.

The United engaged in the business known as surety, fidelity and burglary insurance. The Munich, by what is called a participation contract, agreed with it to assume one-third of the liability on every such risk written during a period five years. The management of the business was to be left to the United without restriction. Upon an annual accounting the Munich was to receive one-third of any profits or pay one-third of any losses. A

decree entered against the Munich in the state court for losses incurred during the five-year period had been satisfied. This suit is for losses incurred after its expiration on insurance of the United then still outstanding. The company had been unsuccessful. The state court after the expiration of the five-year period appointed receivers who proceeded to wind up the business. They sought in vain to re-insure all outstanding risks. Then, with the approval of the court, they secured, so far as possible, cancellation of the outstanding insurance by returning unearned premiums. The losses on account of which this suit was brought were on risks entered into during the existence of the participation contract and remaining unexpired upon its termination and which the receivers did not succeed in getting cancelled. The Munich argues that by the course pursued the assets were wasted through returning the unearned premiums on good risks, and that thus the poor risks were left unprotected; insists that it was entitled to have all the insurance carried to its expiry; and contends that the receivers, by securing the cancellation of much of it for the purpose of winding up the business, committed a breach of the participation contract which released it from further liability. The contention is unfounded. The participation contract did not restrict the discretion to be exercised by the United, and its receivers, in the conduct of the business or in winding it up after the termination of the agreement. The case of *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, upon which appellants rely, is without application.

There is a further contention that, because the United has not paid to its creditors any part of the amounts due on its contracts, and is likely to pay only twenty-five cents on the dollar, the Munich is under no liability to pay to it anything on account of losses incurred thereunder or, in any event, more than a *pro rata* share of the payments actually made by the United. The Munich became a re-

insurer. The liability of a re-insurer is not affected by the insolvency of the re-insured company or the inability of the latter to fulfill its own contracts with the original insured. *Allemania Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326. The participation contract differs from customary re-insurance in this: The Munich instead of receiving premiums and paying its share of losses was to participate in profits and losses. The difference is not one which affected the scope or character of the Munich's obligation.

Affirmed.

FRESHMAN *v.* ATKINS.

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

No. 41. Argued October 14, 1925.—Decided November 16, 1925.

1. The pendency of a voluntary petition in bankruptcy precludes consideration of a second voluntary petition in respect of the same debts. P. 122.
2. The District Court, on application for discharge in a voluntary proceeding in bankruptcy, may take judicial notice of the pendency, in its own records, of an earlier like application; and of its own motion, because of such pendency, may refuse the later application, in so far as the same debts are concerned. P. 123.

294 Fed. 867, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming an order of the District Court, which denied in part an application for a discharge in bankruptcy. 290 Fed. 609.

Mr. Paul Carrington, with whom *Messrs. Joseph Manson McCormick* and *Francis Marion Etheridge* were on the briefs, for petitioner.

No appearance for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On November 1, 1915, the petitioner filed in the federal district court for the northern district of Texas a voluntary petition in bankruptcy. Within the statutory time he applied for his discharge, which was contested. The referee, to whom it had been referred as special master, having died after a hearing, his successor as referee reviewed the record and recommended that the discharge be denied. The referee's report was filed with the clerk, but not acted upon by the court, nor was the matter ever brought to the court's attention by the petitioner or any other interested party. On November 11, 1922, a second voluntary petition was filed by the bankrupt. The creditors listed in the first petition were, together with others, included in the second. In February, 1923, the petitioner filed an application for a discharge under the second proceeding. The referee recommended that the discharge be granted. The court, upon its own initiative, took judicial notice of the pendency of the former application and denied the second, in respect of the creditors included in the first petition; granted it as to the additional creditors; and, upon an inspection of the record, denied, by a separate order, the discharge sought under the original proceeding. 290 Fed. 609. The order denying in part the second application was affirmed on appeal by the circuit court of appeals. 294 Fed. 867. A motion was made in the district court for a rehearing of the question of discharge under the original proceeding, but what, if any, action has been taken respecting it, does not appear.

The opinions of the two courts do not proceed upon precisely similar grounds, but they reach the same conclusion, which is, in effect, that the pendency of the first application precluded a consideration of the second in respect of the same debts. In this conclusion we concur. A proceeding in bankruptcy has for one of its objects the

discharge of the bankrupt from his debts. In voluntary proceedings, as both of these were, that is the primary object. Denial of a discharge from the debts provable, or failure to apply for it within the statutory time, bars an application under a second proceeding for discharge from the same debts. *Kuntz* v. *Young,* 131 Fed. 719; *In re Bacon,* 193 Fed. 34; *In re Fiegenbaum,* 121 Fed. 69; *In re Springer,* 199 Fed. 294; *In re Loughran,* 218 Fed. 619; *In re Cooper,* 236 Fed. 298; *In re Warnock,* 239 Fed. 779; *Armstrong* v. *Norris,* 247 Fed. 253; *In re Schwartz,* 248 Fed. 841; *Horner* v. *Hamner,* 249 Fed. 134; *Monk* v. *Horn,* 262 Fed. 121. A proceeding in bankruptcy has the characteristics of a suit, and since the denial of a discharge, or failure to apply for it, in a former proceeding is available as a bar, by analogy the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause.

Here there was no plea or objection by any interested party, and it is argued that this is a necessary prerequisite to a consideration of the matter—that the court may not refuse a discharge *ex mero motu.* That such is the rule where the action of the court is based upon one or more of the acts of the bankrupt which operate to preclude a discharge may be conceded. But the objection that the issue is already pending, as that it has been adjudged, goes to the right of the bankrupt to maintain the later application, not to the question of the evidence or grounds upon which the relief may be granted if the application be maintainable. The refusal to discharge was not on the merits but upon the procedural ground that the matter could not properly be considered or adjudged except upon the prior application. This application had been reported upon adversely by the referee, was still pending, and, in ordinary course, could have been considered and acted

upon by the court. To ignore it and make a second application, involving a new hearing, was an imposition upon and an abuse of the process of the court, if not a clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a discharge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and orderly administration of justice. What is said in the *Fiegenbaum Case, supra,* p. 70, is appropriate here: "Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees." There is nothing in *Bluthenthal* v. *Jones,* 208 U. S. 64, to the contrary. There the previous denial of a discharge had been in another court sitting in another state. This court held that, while an adjudication in bankruptcy, refusing a discharge, came within the rule of *res judicata,* the court in which the second proceeding was brought was not bound to search the records of *other* courts and give effect to their judgments. This is far from saying that the court may not take judicial notice of, and give effect to, its own records in another but interrelated proceeding, as this was. See *In re Loughran, supra,* p. 621; *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 217; *Dimmick* v. *Tompkins,* 194 U. S. 540, 548; *Louisville Trust Co.* v. *Cincinnati,* 76 Fed. 296, 318; *In re Sussman,* 190 Fed. 111, 112.

The order of the district court denying the first application is not before us for consideration. If erroneous, relief may be afforded by proper and timely application to that court or by an appellate review of the order.

Judgment affirmed.

GULF REFINING COMPANY OF LOUISIANA, NORVELL, ET AL. *v.* UNITED STATES.

McMULLEN ET AL. *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 59, 60. Argued October 19, 1925.—Decided November 16, 1925.

1. When a decree of the Circuit Court of Appeals reverses the decree of the District Court and remands the case for further proceedings not inconsistent with the former court's opinion, the opinion is, in effect, a part of the mandate; and, if the opinion, in effect, directs the District Court to enter a decree for a definite sum, permitting nothing further in that court but the performance of this ministerial duty, the decree of the Circuit Court of Appeals is final for purposes of appeal. P. 135.
2. In a suit to quiet title to land, regain possession, enjoin further trespass, and for an accounting for oil extracted, a decree of the District Court granting this relief to the plaintiff against the defendant and confirming an accounting made, was final for purposes of appeal to this Court, although it reserved jurisdiction to execute its provisions by compelling an additional accounting in respect of oil extracted *pendente lite*. P. 136.
3. An appeal from a decree in equity in a federal court is not a new suit in the appellate court, but a continuation of the cause; and the cause remains pending until the appeal is disposed of. P. 137.
4. The rule (in Louisiana) which allows a trespasser whose trespass is qualified by moral, though not by legal, good faith, to offset his expenditures against the value of products extracted from the land, when required to account in a suit brought by the land owner primarily to enforce the latter's title and right of possession, applies not only to the operations of the defendant preceding the filing of the bill and entry of decree against him in the court of first instance (*Mason* v. *United States*, 260 U. S. 545), but also to the continuance of those operations pending decision of his appeal while his possession is continued through a supersedeas. *Id.*
5. The moral good faith attending the trespass is not affected by the filing of the bill or the rendition of the first decree, but continues until final adjudication upon appeal. *Id.*

6. In suits by the United States to enjoin continuing trespasses upon withdrawn oil lands and for an incidental accounting for oil extracted, the District Court entered decrees granting the main relief and confirming accountings up to a date subsequent to the filing of the bill, in which the defendants, as trespassers in moral good faith, were allowed to offset expenses of extraction against value of oil extracted. The decrees having been in these respects affirmed upon appeal to this Court pending which the defendants continued their possession and operations through supersedeas, the District Court, pursuant to interlocutory directions contained in the original decrees, required further accountings for oil extracted since the first accounting. *Held,* That the second accountings were continuations of the first; and that it was proper, and within the authority of the District Court, to credit against the oil extracted since the first accounting not only the expenses during that subsequent period but also the earlier expenses in so far as they exceeded the value of the oil extracted during the period covered by the first accounting. P. 138.
7. A party who pays in money to the clerk of the District Court to satisfy a judgment in favor of the United States, is required by Rev. Stats. § 828 to pay the clerk a commission of 1% on the amount paid in, as part of the costs. P. 139.
8. The act placing the clerks of court on a salary basis left the taxability of clerks' charges where it was. The Government pays the salary and steps into the shoes of the clerk in respect of the right to fees and emoluments—where the Government is a party as well as in other cases. *Id.*

298 Fed. 281, affirmed in part; reversed in part.

Appeals from decrees of the Circuit Court of Appeals, reversing in part and affirming in part decrees entered by the District Court in two of the cases which were before this Court in *Mason* v. *United States,* 260 U. S. 545. The decrees related to final accountings for oil extracted from withdrawn oil lands, and one of them involved also a question of costs.

Mr. S. L. Herold, with whom *Messrs. H. L. Stone, Jr.,* and *D. Edward Greer* were on the brief, for appellants.

If evidence on the accounting had been heard originally in 1923, instead of 1918, there could be now, in view of

the ruling of this Court, no doubt that the United States could not get a money judgment because of the conversion of the oil, when its production was had at an expense far in excess of its value. This being an equity case, elementary principles make it clear that the purely adventitious circumstance that evidence happened to be taken five years earlier on the preliminary accounting could not change the plaintiff's right, nor affect the defendant's liability. If, as held by this Court, defendants are liable "only for the value of the oil, after deducting therefrom the cost of drilling, equipping and operating the wells," then clearly the Government cannot evade the legal consequences of the rule by securing two accountings: one at an early date, by which the large initial outlay of drilling should be absorbed, and another during which nothing should be expended except the cost of operating the wells whose drilling and equipping have been only partially recouped by the oil taken to the first accounting date. The drilling of the wells and the installation of all of the machinery required to equip them for production is as much a necessary expense in the raising of the last as of the first barrel of oil the wells should bring to the surface. The rights of the plaintiff and of defendants in this respect, moreover, are matters of substantive law, and can neither be diminished nor enlarged because of such purely accidental and irrelevant circumstances as that upon which it is now sought to circumvent the application of the doctrine announced by this Court.

There is no question here of legal bad faith. That is conceded. It was so adjudged by this Court. It continued throughout the possession. But nowhere does the record show, at any stage, a morally bad or dishonest use of the property. The decree of this Court, therefore, demands that defendants' possession, from beginning to end, be viewed as of like character. *Cooke Case,* 135 La. 610, cited in 260 U. S., p. 556. The former opinion of

this Court settles the law of the case, that the institution of the suit by the Government did not affect the substantive rights of the defendants to reimbursement for expenses out of production.

The defendants had the right to appeal. Their appeal was but a step in the original case. It was not a new proceeding. Although the decree awarding the Government possession, injunction and damages was final and appealable, the paragraph ordering an accounting for oil extracted after January 1, 1918, amounted to no more than an express retention of jurisdiction for the purpose of further and complete accounting. It was merely an interlocutory order, was never appealable and, consequently, was never before this Court on the former appeal, nor binding upon the District Court in its rendition of the final decree now here on this appeal. *Keystone Iron Co.* v. *Martin,* 132 U. S. 91; *California Nat. Bank* v. *Stateler,* 171 U. S. 447; *Craighead* v. *Wilson,* 18 How. 199; *Beebe* v. *Russell,* 19 How. 283; *Lodge* v. *Twell,* 135 U. S. 232; *McGourkey* v. *T. & O. Ry. Co.,* 146 U. S. 535; *Union Mut. Ins. Co.* v. *Kirchoff,* 160 U. S. 374; *Hollander* v. *Fechheimer,* 162 U. S. 326; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3; *Follansbee* v. *Ballard Co.,* 154 U. S. 651; *Guaranty Co.* v. *Mechanics Sav. Bank,* 173 U. S. 582.

The only reason why its interlocutory character did not prevent the appeal from the main decree was that such judgment ordered the delivery of possession of real property and decreed the payment of a definite sum of money. The purely incidental character of the further accounting ordered by the interlocutory decree was not allowed to affect the appealability of the final decree disposing of the title and possession of the land and condemning the defendants to pay a specific sum of money, all of which was immediately enforceable by execution. See review of authorities in *Keystone Iron Co.* v. *Martin, supra.*

The decree being interlocutory in character was not binding upon the District Court in the rendition of final judgment upon the accounting, *Fourniquet* v. *Perkins,* 16 How. 82; *Latta* v. *Kilbourn,* 150 U. S. 539; 16 Cyc. 503.

The Clerk's commission of one per cent should be disallowed, 15 Corpus Juris, 24; *United States* v. *Pennsylvania R. R. Co.,* 283 Fed. 943, dissent. op.; *United States* v. *Kurtz,* 164 U. S. 49; *Farmers Loan & Trust Co.* v. *Dart,* 91 Fed. 452; *Eastern* v. *H. & T. C. Ry. Co.,* 44 Fed. 720. Since the commission in question does not relate to services performed in the prosecution or defense of the case; since plaintiff could have paid the amount to the Treasurer of the United States, and since by statute the Government pays the clerk a salary in lieu of all costs or fees; since the rule itself claims only a " commission " of one per cent. upon the amount handled by the clerk, and since the statute does not specifically state that such commission is a part of the taxable costs, it is submitted that the amount in question is not an item of taxable costs, but is an item ordinarily deductible by the clerk from the funds in his hands. In general, after deducting this commission the clerk covers it over into the Treasury as all other collections; but here, where the Government is the successful party, it would be idle to deduct the commission and then pay it back to the party to whom the fund was payable. In such case there would be no deduction, and, since the Government is not obligated for the one per cent., it cannot recover it.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Beck, Assistant Attorney General Wells* and *Mr. Horace H. Smith,* Attorney in the Department of Justice, were on the brief, for the United States.

The decrees appealed from are not final. *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130; *Bruce* v.

Tobin, 245 U. S. 18; *Harris* v. *United States,* 257 U. S. 623. The jurisdiction of the District Court was at an end as to operations prior to January 1, 1918. The decree of August 12, 1919, fixed with definiteness the liability of the defendants with respect to operations during the accounting period covered by it; that is, up to January 1, 1918. Nothing further remained to be done by the court on that score. It was a final determination of the rights of the United States as to the matters then litigated and submitted to the court. The District Court so considered it, for no reservation was made in the decree nor by any order. That the decree was final as to liability to the Government to the date specified, and was so considered, is evidenced by the fact that in *Mason* v. *United States,* 260 U. S. 545, a kindred case, this Court modified the decree of the District Court to the extent of reducing the liability of the operating company by some eleven thousand dollars. After the term has ended all final judgments and decrees pass beyond the court's control, unless steps be taken during that term to set aside, modify, or correct them. *Bronson* v. *Schulten,* 104 U. S. 410; *Wetmore* v. *Karrick,* 205 U. S. 141.

The action of the District Court in taking into consideration the loss sustained in the operations prior to January 1, 1918, in passing upon the liability for oil produced after that date under a separate accounting, was in effect a reopening of the matter covered and settled by its decree of August 12, 1919, which was final and had been affirmed by this Court. The court was without power to do this. The subject matter of the decrees of 1919 in general was the title to the land and the oil produced before January 1, 1918, while the subject matter of the accounting provided for in the decrees was to be the oil extracted afterwards. The Master did not recommend that his report be suspended pending the accounting. It was not contemplated that the amounts stated in the decrees should

remain unpaid until after the subsequent accounting was made, or that such amounts should be reduced because of that accounting.

If the court had the power to reopen the account for the purpose of allowing the defendants to claim credit for prior losses, which had already been allowed, then there is, as a necessary consequence, no restriction whatever upon the court's authority in the premises. If the former accounting was to be reopened the Government could have taken the position that too much credit had been allowed for expenses, or that the quantity or value of the oil was greater than as found by the Master. The defendants would rightfully have resisted such a claim if made by plaintiff, and plaintiff has the equal right to oppose any attempt made by defendants to go behind and beyond the decrees. If the decrees can be opened, or vacated, to take out a deficit and carry it into future accounting, they can be opened to let in a deficit thereafter sustained, and thereby reduce, or wipe out entirely, the amounts which were payable absolutely and at all events under the decrees. The decrees positively condemn the defendants to pay certain specific amounts, and the language employed as to future accounting is equally positive and emphatic. The defendants received full credit for the cost of operation during the period for which the accounting was made in the Master's report. They were content to have the account closed for that period upon the basis of contemporaneous expense and value, with a deficit in their favor. They did not object to the closing of the Master's report without any reservation as to the loss disclosed in the operations up to that time, or with respect to future operations or future accounting.

But appellants assert that the decrees of August 12, 1919, were merely interlocutory upon the matter of accounting. If those decrees were interlocutory, how do appellants justify the former appeals, since appeals properly lie only from final decrees?

The accounting for the oil produced after January 1, 1918, and the liability of the defendant for it were entirely separate and distinct from the previous transactions. In the decree the only thing reserved, so far as the United States is concerned, was a future accounting for "future" production. It is significant that no reference was made to the accounting for the oil produced prior to January 1, 1918; the decree was not that such accounting be continued to cover the period after January 1, 1918. There was to be an accounting for oil extracted since January 1, 1918—a new accounting for a particular period. What was decreed was that the plaintiff should be paid for that oil extracted during that time, "as ascertained by said accounting," not by the former one, under which the rights and liabilities for previous trespasses had been determined. What was reserved was plaintiff's rights to recover the oil produced since January 1, 1918. Under the rule of damages fixed by this Court and followed in this new accounting defendants were allowed the cost of production. But what the District Court did was to allow not only the cost of the production of the particular oil produced after January 1, 1918, but also the cost of production of oil for a totally different period—that previous to January 1, 1918.

Further, the decree appointed a receiver to take possession and to continue operations, and defendants were directed to surrender possession to him. Instead of complying with that provision of the decree, the defendants superseded it and continued in possession and operation. Now, if a receiver had taken charge, will anyone assert that when he made his accounting the defendants could have been heard to demand that the proceeds of his operations be turned over to them to offset their losses on the operations conducted by them prior to receivership? We say that when defendants refused to surrender possession to the receiver appointed by the court they in equity became receivers of the property. And, when we say that,

we give them a better status than we candidly believe they deserve, because, however far their "moral good faith" extended in respect to operations during the litigation, it surely did not extend beyond the time when the District Court entered its decree quieting title to the lands in the United States. *Guffey* v. *Smith,* 237 U. S. 101. After the filing of the bill for injunction, defendants proceeded at their peril (*Wingert* v. *First National Bank,* 223 U. S. 670), and much more so after the adverse decree of the District Court was rendered. Notwithstanding their disregard of the executive order withdrawing these lands from entry and location, notwithstanding the decree of the court holding them to be trespassers, notwithstanding that they refused to surrender the property to the receiver as ordered by the court and continued their trespasses, these defendants now assert that the United States should insure them against loss in their unlawful operations. The action of the defendants in retaining possession of, and in operating, the wells was a continuance of the trespasses giving rise to new causes of action. 3 Sedgwick Damages (9 ed.), § 924. For this the United States might have maintained new suits at law for damages; and in that event the decrees of August, 1919, would not have been a bar to the subsequent suits.

The clerk's commission of one per cent is properly taxable as costs against the defendants. Section 828, Rev. Stats.; *Blake* v. *Hawkins,* 19 Fed. 204; *Fagan* v. *Cullen,* 28 Fed. 843; *United States* v. *Pennsylvania R. R.,* 283 Fed. 937; *Berkman* v. *United States,* 250 U. S. 144; *McGovern* v. *United States,* 272 Fed. 262; *United States* v. *Hunsicker,* 298 Fed. 278.

Mr. Justice Sutherland delivered the opinion of the Court.

These are second appeals of two of the cases which were before this court in *Mason* v. *United States,* 260 U. S.

545. The suits were brought by the United States to have its title to certain tracts of land confirmed, its possession thereof restored, and defendants enjoined from setting up claims thereto, etc. In addition, the government prayed for an accounting in respect of the oil and gas removed from the lands by the defendants. We held that the suits primarily involved the question of title to the lands and their protection against continuing trespasses, to which the accounting was incidental and dependent; and that the causes of action being, therefore, essentially local, the measure of damages to be allowed on the accounting came within the controlling scope of Article 501 of the Civil Code of Louisiana, under which the cost of production must be first deducted from the value of the oil produced even though the defendants went into possession in technical bad faith but in moral good faith.

The cases were referred to a master, who found the primary issues in favor of the government and made an accounting up to January 1, 1918. At that time, the cost of drilling, equipping and operating the wells, through and by means of which the oil was extracted, greatly exceeded the value of the oil produced, and, in accordance with the Louisiana rule, no recovery on the accounting was allowed by the master or the trial court, except in a particular not affected by the rule. The decree in each case was for the government and contained the following clause:

"That the defendants be and they are hereby ordered, directed and required to make a full, true and accurate accounting to plaintiff of all oil extracted from said land since January 1, 1918, and to pay to plaintiff the value thereof, as ascertained by said accounting, together with all rents and royalties derived therefrom, and that all of plaintiff's rights to recover the oil produced from said land by the defendants since January 1, 1918, be reserved."

Following the decision of this court, a stipulation was submitted to the trial court, by which it was agreed that a

decree should be entered against each of the defendants for a stated sum, if " the court should hold that plaintiff is entitled to recover the net value of the oil produced after January 1, 1918." It was further stipulated that the total value of all the oil produced from the beginning of operations until the abandonment of the wells was less in each case than the cost of production, that is to say, that the entire operations of each defendant in the production of oil were conducted at a loss, the profit after January 1, 1918, not being sufficient to offset the loss incurred in the production of oil prior to January 1, 1918. Upon the strength of the latter stipulation the trial court held that the government was not entitled to recover anything. The circuit court of appeals reversed the trial court, holding that defendants were not entitled to offset any part of the cost of production prior to January 1, 1918, against the value of the oil produced after that date. 298 Fed. Rep. 281.

The government first contends that the decrees are not final and that the appeals should be dismissed because the court of appeals remanded the cases " for further proceedings not inconsistent with the opinion of this court." The general rule established by many decisions, of which *Haseltine* v. *Cent. Bk. of Springfield* (No. 1), 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Co.* v. *Kaw Valley District,* 223 U. S. 519, 523. Under the stipulations above recited, the trial court was bound to enter decrees for the government for the stated sums of money if that court found that the government

was entitled to recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred " in entering the decrees denying the complainant the right to recover the net value of the oil, etc." The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulations. See *Moody* v. *Century Bank,* 239 U. S. 374, 376; *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U. S. 238, 241. There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.

The original decrees of the trial court, rendered August 12, 1919, confirmed the accounting to January 1, 1918. But defendants had operated the properties during the pendency of the suit and they were ordered to make a further accounting of oil extracted after that date. The decrees, however, were final for purposes of the original appeals to this court, since they decided the title to the properties, ordered their delivery to the plaintiff, and enjoined further trespasses upon them, jurisdiction being retained merely of so much of the decrees as might be necessary to carry them into execution by compelling an additional accounting in respect of oil extracted *pendente lite. Mo. Kansas & Texas R. R. Co.* v. *Dinsmore,* 108 U. S. 30; *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 183; *Forgay et al.* v. *Conrad,* 6 How. 201, 204; *Thomson* v. *Dean,* 7 Wall. 342, 345.

The decision of the circuit court of appeals seems to have proceeded from the standpoint that one who continues

in possession of lands, originally taken in good faith, after judgment against him, may not have the advantage of the good faith of his original entry to enable him to offset his expenditures against the value of the oil extracted after judgment pending proceedings on appeal. Whether, thus stated, this is an accurate view of the law we need not stop to inquire, since we are not here dealing with the common law doctrine in respect of trespassers in good faith but with the case of persons who knew all the facts from the beginning and who in the light of those facts upon common law principles were possessors in legal bad faith but in moral good faith. The adjudication of the trial court added nothing to their knowledge of these facts. It simply informed them that the conclusion in respect of their rights which they had drawn from the facts was erroneous, a conclusion with the knowledge of which they must be charged from the beginning, since, legally though not morally, they were conclusively bound to know the law even before it had been declared by the court. The *moral* quality of their possession was not affected by the institution of the government's suit or the resistance which they interposed before judgment to the government's contentions. And how can it be said that the moral quality of that possession was altered by the entry of the decrees? for *non constat* that they would not turn out on appeal to be wrong. An appeal is not a new suit in the appellate court, but a continuation of the suit in the court below, or, as this court has recently said, "a proceeding in the original cause and the suit is pending until the appeal is disposed of." *Mackenzie* v. *Engelhard Co.*, 266 U. S. 131, 142–143. It is but a step toward the final adjudication of the original cause which the law allows quite as much as it allows a defense in the first instance. We are of opinion that within the principle of the Louisiana rule the defendants continued in possession in moral good faith until the final adjudication upon appeal.

But it is said further that the accounting for oil produced after January 1, 1918, must be kept entirely separate and distinct from the operations prior to that date, because they had been concluded and finally adjusted by the previous accounting; and that, therefore, the costs incurred prior to January 1, 1918, were not to be considered in determining the offset against the value of the oil produced after that date. To this we cannot agree. The possession of the defendants was continuous. Its character after January 1, 1918, was the same as it had been before. The limitation of time over which the first accounting extended was purely adventitious. It as well might have been for a shorter or for a longer period. So far as the accounting was concerned, the effect of the decrees was to fix the principles, approve the master's report of a partial accounting, and direct a completion of it, retaining jurisdiction over the decrees only so far as might be necessary to that end.

If the production costs had been less than, or equal to, the value of the oil extracted prior to January 1, 1918, they would have been absorbed as credits. But they exceeded this value, and it was impossible on the first accounting to give defendants the benefit of the excess, since such costs could be utilized only by way of recoupment and not as the basis of an independent claim. The two accountings, it is true, were separate, but the separation was purely artificial. In substance, the latter was a continuation of the former, and, since the excess costs could not, and, therefore, did not, enter into the preliminary accounting, we see nothing in the mere form of the proceedings which should stand in the way of the excess being allowed in the final accounting where the circumstances were so far changed as to furnish a proper basis for allowing it as a further credit. The direction for the final accounting was interlocutory and incidental to the main decrees, made for the purpose of carrying them into

effect, and, hence, left the matter to which the direction related open to change and adjustment by the trial court and, upon its final disposition there, subject to separate appellate review. See *Forgay et al.* v. *Conrad, supra,* pp. 205–206; *Adams* v. *Sayre,* 76 Ala. 509.

There remains to be considered a matter of costs in No. 59. By the original decree in that cause, defendants were ordered to pay the aggregate sum of $4,000 for royalties received from the Gulf Refining Company by the other defendants. This amount, together with interest, was paid to the clerk in satisfaction. That officer demanded a commission of one per cent. under § 828 R. S., which provides: "For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid." The trial court, upon a rule to show cause why the commission should not be paid as part of the costs, entered an order disallowing the item, which order was reversed by the court of appeals. We are satisfied with the reasoning and decision of the appellate court which follows its previous decision in *United States* v. *Hunsicker,* 298 Fed. 278. See also *United States* v. *Pennsylvania R. Co.,* 283 Fed. 937; *Blake* v. *Hawkins,* 19 Fed. 204. The point is made that after the passage of the statute placing clerks of court on a salary basis (c. 49, 40 Stat. 1182, amended c. 46, 41 Stat. 1099) the commission was not a proper item of taxable costs, and that since the government is not obligated for the one per cent., it cannot recover. The salary act provides that "all fees and emoluments authorized by law to be paid to the clerks . . . shall be charged as heretofore, . . . collected . . . and paid into the Treasury of the United States." The effect of this is to leave the matter of the taxability of clerk's charges where it was. The government pays the salaries and steps into the shoes of the clerk in respect of the right to fees and emoluments collected where the government is a party as well as in other cases.

The decrees of the circuit court of appeals are reversed, except the matter of costs, as to which the decree in No. 59 is affirmed.

Affirmed in part.
Reversed in part.

ANDERSON *v.* CLUNE.

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

No. 331. Submitted October 5, 1925.—Decided November 16, 1925.

A soldier's additional homestead right (Rev. Stats. § 2306) is an inheritable property right, which, if not exercised or transferred by the donee, passes to his estate as other property, subject only to the exercise of the rights given by § 2307 to the widow and minor orphan children. *Webster* v. *Luther,* 163 U. S. 331. P. 141.

ANSWER to a question certified by the Circuit Court of Appeals, on an appeal from a decree of the District Court holding Anderson as trustee of a piece of land patented to him, which Clune claimed under a prior entry based on an assignment of an additional homestead right made by heirs of a deceased soldier.

Mr. Burgess W. Marshall, for appellant.

Mr. Norman T. Mason, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

In 1872, A. K. Johnson, an honorably discharged soldier of the Civil War, made a homestead entry of 80 acres. He died in 1875, leaving a widow, who died in 1917, neither having disposed of the husband's additional homestead right. Johnson also left four children, all over the age of 21 years at the date of the death of the widow; and they, together with the widow of a deceased son, sold and as-

signed the right to one Mason who sold and assigned it to the extent of 20.49 acres to Clune. By virtue of the latter assignment, Clune entered a tract of public lands in the United States Land Office in California; but the entry was rejected by the General Land Office on the ground that "the assignment of the soldier's additional homestead right had not been made by the soldier or his widow or his heirs prior to the administrative ruling of the Department of the Interior, February 15, 1917, (46 L. D. 32) and rulings and decisions of the Land Office, which construed §§ 2306 and 2307 of the Revised Statutes as limiting a soldier's additional homestead right to the exercise thereof (1) by the soldier himself entering the land, or indirectly by conveying his right to entry to an assignee during his lifetime (2) by the widow while her status as widow of the soldier continued; (3) in the absence of appropriation by the soldier or his widow, then by the minor orphan children during their minority acting through their guardian." In October, 1923, Anderson entered the lands in controversy under an assignment of the additional soldier's homestead right of one Dunn, and patent issued to him therefor. Anderson's entry was made with full knowledge that Clune had made prior entry thereof, under which he was claiming the land. Alleging these facts, suit was brought by Clune against Anderson to have it adjudged that the latter held the lands in trust for the former. The trial court overruled a motion to dismiss the bill and rendered a decree in favor of Clune. An appeal followed to the circuit court of appeals and that court has certified (Judicial Code § 239) the following question upon which instruction is desired:

"Under the Revised Statutes of the United States, sections 2306 and 2307, is a soldier's additional homestead right limited to the exercise thereof by the soldier himself entering the land, or indirectly by transfer of his right to an assignee during his lifetime, and to his widow while

her status as widow of the soldier continues, and in the absence of the appropriation by the soldier or his widow during their lives, then by his minor orphan children during their minority acting through a guardian?"

By § 2304 R. S., Johnson was given the right to enter and receive patent for 160 acres of public lands subject to homestead entry. Having entered only 80 acres, he became entitled to the benefits conferred by § 2306 R. S., which provides that every person entitled under the provisions of § 2304 to enter a homestead, who may have entered a quantity of land less than 160 acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." Section 2307 R. S. provides:

"In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; . . ."

It was held in *Webster* v. *Luther,* 163 U. S. 331, that Congress intended by § 2306 R. S. to vest a property right in the donee as a sort of compensation for his failure under § 2304 to obtain the full quota of 160 acres; that residence on or cultivation of the lands to be taken was not required as in the case of the original homestead entry; and that it was immaterial to the government whether the original donee should exercise the right or should transfer it to another. And the property right thus vested was held to be assignable. The rulings of the Land Office prior to this decision had been that the right was essentially personal and non-assignable,—to be exercised only by the original donee or his widow or his minor orphan children

through a guardian. After the decision, the rulings of the department were uniformly to the effect that the right not only was assignable, but inheritable; that in case a soldier entitled to the right died without exercising it, leaving no widow or minor orphan children, the right to entry vested in his personal representatives, *Williford Jenkins,* 29 L. D. 510; *Fidelo C. Sharp,* 35 L. D. 164, and other cases; but, if the right passed to the minor children, it became absolute in them, in no way conditioned upon an appropriation by the guardian during their minority. *John H. Mason,* 41 L. D. 361.

This view was adhered to until 1917, when the Secretary of the Interior by an administrative ruling held that the right must be used by the soldier in his lifetime, either by entering the land or assigning the right, or by the widow while her status as such continued, or by the minor orphan children during their minority, acting through their lawful guardian; and that if not exercised as thus indicated the right lapsed and ceased to exist. The officers of the land department were expressly instructed that no soldier's additional right assigned by the heirs or administrator of the estate of a deceased soldier or of his widow, or of his minor orphan children, or directly by such "minor children" after they had reached majority, should be recognized as a basis for the entry of public land. 46 L. D. 32. In a subsequent letter reviewing these instructions, 46 L. D. 274, 275, the Secretary of the Interior said: "The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property, and convertible into specific land by entry under it."

This is plainly in the face of the decision of this Court in *Webster* v. *Luther, supra.* See also, *Mullen* v. *Wine,* 26 Fed. 206; *Barnes* v. *Poirier,* 64 Fed. 14, 18. The grant of

the statute (§ 2306), *ipso jure,* vests a property right in the donee which he may exercise or sell and transfer. A property right, the ownership of which may be conveyed to and vested in a purchaser, must be accorded the quality of inheritability, which usually attaches as an incident of ownership, in the absence of some provision of law to the contrary; and we, therefore, hold that the soldier's additional homestead right, if not exercised or transferred by the donee, passes to his estate as other property, subject only to the exercise of the rights given by § 2307 to the widow and minor orphan children.

The question certified is answered in the negative.

STILZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 38. Argued October 13, 14, 1925.—Decided November 16, 1925.

A finding by the Court of Claims that claimant's patents were not infringed by the Government is a finding of fact and therefore not reëxaminable by this Court. P. 147.

59 Ct. Cls. 21, affirmed.

APPEAL from a judgment of the Court of Claims in an action brought by the appellant to recover compensation for use and manufacture by the United States of certain oil burners, alleged to infringe his patents.

Mr. Harry B. Stilz, pro se.

Mr. John W. Loveland, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Mr. Harry E. Knight,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff brought this action, under the Act of Congress approved July 1, 1918, c. 114, 40 Stat. 704, 705, to recover compensation for the use and manufacture, by or for the Navy Department, of certain oil burners alleged to infringe Patents 945873 and 1066161, granted him January 11, 1910, and July 1, 1913, respectively. The Court of Claims filed findings of fact and conclusion of law (59 Ct. Cls. 21), and adjudged that plaintiff was not entitled to recover.

The substance of the findings in respect of the prior art, the burners covered by plaintiff's patents, and the burners manufactured and used by the United States and alleged to be infringements, may be indicated briefly. Each of these patents was for improvements in oil burners. In order successfully to be used for fuel, oil must be atomized to permit its mixture with the proper amount of air for combustion. In the prior art to which plaintiff's patents relate, there were numerous structures disclosed by patents and publications referred to in the findings, including two types of burners in use and known respectively as mechanical atomizers and steam atomizers. In the former, the oil is atomized by means purely mechanical. It is projected, under heavy pressure from the burner into the furnace, in a whirling, cone-shaped film, which almost immediately develops into fine spray. In the latter there is a combination with the oil, while yet within the burner proper, of a stream of steam, air, or other gaseous fluid under pressure, for the purpose of aiding the atomization. In both, air for combustion is admitted through a surrounding register and is more or less intimately intermixed with the oil spray.

The burner covered by Patent 945873 provides for the use of steam, air or other gaseous fluid under pressure to aid in atomization of the oil. The oil, under heavy pres-

sure, is discharged tangentially into the annular space of the nozzle between the outer casing and center plug, thus giving the oil a rotary motion in the nozzle. The steam or other fluid, under heavy pressure, is also discharged tangentially into this space in the same direction as the oil with which it rotates; and thus aids in atomizing the oil, which issues from the orifice of the nozzle at a high velocity through an air register and into the furnace in a cone-shaped film and spray. Air for combustion is supplied through the register, and mixes with the oil spray in it and in the furnace.

The burner covered by Patent 1066161 also provides for the use of steam, air or other gaseous fluids under pressure as an aid in the atomization of the oil. This device includes an annular space between inner and outer casings of the nozzle. The oil and steam are not brought together until after the oil, under heavy pressure, is forced through a spiral and orifice into the front of this space in a rapidly rotating cone-shaped film. The steam, air or other fluid passes through a pipe under heavy pressure and is discharged tangentially into this space, rotating towards the outer orifice in a whirling layer. The oil leaving the inner orifice is struck by the rotating steam before it passes through the outer orifice. Air for combustion is supplied through a circular register attached to the front of the furnace through the center of which the oil is projected from the nozzle into the furnace in a cone-shaped spray. The air flows around the oil spray and mixes with it in the register and in the furnace where combustion takes place.

The type and character of the oil burners and equipment manufactured and used by the United States, and which are alleged by plaintiff to infringe his patents, are indicated by the findings. These oil burners and equipment provide for the atomization of the oil by means of its projection into the furnace under heavy pressure

through spiral passages in the nozzle of the burner in a whirling cone-shaped film which almost immediately upon leaving the nozzle develops into fine spray. The air for combustion is furnished under mild blower pressure in the furnace room through an air register surrounding the burner and burner opening into the furnace. The register is provided with vanes or other means for giving the air a whirling motion to facilitate the intermixture with the oil spray. The oil and air are whirled together in the same direction. No steam, air, or other gaseous fluid is introduced into or used in the burner proper for any purpose, nor used with any part of the equipment for the atomization of the oil. The air, which passes through the register encircling the burner, is to supply oxygen necessary for combustion.

From the findings it clearly appears that the mixing of the steam, air or other gaseous fluid with the oil in the annular space to aid atomization before the spray is brought into contact with the air supplied for combustion and before it passes into the furnace is the important feature distinguishing the burners covered by plaintiff's patents from those above described which are manufactured and used by the United States. The Court of Claims expressly found, "It does not appear that any of the devices of the plaintiff's said Letters Patent No. 945873 and No. 1066161 have been manufactured or used by the United States, or that said letters patent have been infringed by the United States."

Infringement is a question of fact. The quoted finding is in the nature of a special verdict of a jury. *United States* v. *Anciens Etablissements,* 224 U. S. 309, 322, 330; *Brothers* v. *United States,* 250 U. S. 88, 93. This Court accepts the findings of fact made by the Court of Claims and cannot review them. *Collier* v. *United States,* 173 U. S. 79, 80. And even where a finding determines a mixed question of law and fact, it is conclusive unless the

court is able to separate the question to see whether there is a mistake of law. *United States* v. *Omaha Indians,* 253 U. S. 275, 281; *Ross* v. *Day,* 232 U. S. 110, 116; *Whitcomb* v. *White,* 214 U. S. 15, 16; *Marquez* v. *Frisbie,* 101 U. S. 473, 476. Our consideration of the case is confined to questions of law. *Union Pacific Railway Co.* v. *United States,* 116 U. S. 154, 157; *Keokuk & Hamilton Bridge Co.* v. *United States,* 260 U. S. 125. And the situation is the same as it would be if the facts had been agreed upon by the parties. *United States* v. *Pugh,* 99 U. S. 265, 271. As no infringement was found, the facts are not sufficient to constitute a cause of action.

Judgment affirmed.

KANSAS CITY STRUCTURAL STEEL COMPANY *v.* ARKANSAS, FOR THE USE AND BENEFIT OF ASHLEY COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 54. Submitted October 15, 1925.—Decided November 16, 1925.

1. As to what constitutes doing business in a State within the meaning of its laws imposing preliminary conditions on foreign corporations, this Court accepts the decision of the state Supreme Court. P. 150.
2. But the questions whether a foreign corporation's business was interstate and whether the local enactments as applied were therefore repugnant to the Commerce Clause, will be determined by this Court for itself. *Id.*
3. Without first obtaining permission to do business in Arkansas, a Missouri corporation successfully bid for the construction of an Arkansas bridge; executed the contract in Arkansas; executed a bond; sublet all the work except the steel superstructure to a Kansas firm; shipped structural materials from Missouri to itself in Arkansas; delivered them there to the subcontractor which used them in its part of the work; and proceeded with the manufacture in Missouri of materials to be used by itself on the superstructure. *Held* that these activities, viewed collectively, and with special

reference to the local delivery of materials, were partly intrastate in character, and that infliction of a penalty for noncompliance with the Arkansas corporation law was not repugnant to the Commerce Clause of the Constitution. P. 151.

161 Ark. 483, affirmed.

ERROR to a judgment of the Supreme Court of Arkansas, sustaining a penalty for violation of the state statutes requiring foreign corporations to comply with certain conditions before doing local business.

Messrs. *Armwell L. Cooper, Ellison A. Neel, J. W. House, Jr., Chas. T. Coleman,* and *Joe T. Robinson* were on the brief, for plaintiff in error.

Mr. J. R. Wilson, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error, a corporation organized under the laws of Missouri, brings here for review (§ 237, Judicial Code) a judgment of the Supreme Court of Arkansas which affirms a judgment of the Circuit Court of Shelby County imposing a fine of $1,000 on plaintiff in error for doing business in Arkansas without obtaining permission. The laws of the State require every corporation incorporated in any other State, doing business in Arkansas, to file in the office of the Secretary of State certain evidence of its organization and a financial statement, to designate its general office and place of business in Arkansas, and to name an agent there and authorize process to be served upon him. It is provided that any corporation which shall do business in Arkansas without having complied with these requirements shall be subject to a fine of not less than $1,000. §§ 1825–1832, Crawford & Moses Digest, Laws of Arkansas.

Plaintiff in error contends that, as applied in this case, the state enactments are repugnant to the commerce clause of the federal Constitution.

The material facts are these: May 3, 1921, plaintiff in error made a bid to the Wilmot Road District for the construction of a steel bridge near Wilmot, in Ashley County, Arkansas. Its offer was accepted, and on that day, a contract covering the work was signed in Arkansas by the representatives of the parties. The contract was not to become effective until a bond was given by the contractor to secure its faithful performance. The bond was executed in Missouri two days later. June 14, 1921, plaintiff in error sublet all the work except the erection of the steel superstructure to the Yancy Construction Company, a partnership whose members were residents of Kansas. August 17, 1921, plaintiff in error secured permission, as required by the laws of Arkansas, to do business in that State. Before such permission was obtained, the greater part of the work sublet had been completed; plaintiff in error had made certain shipments of steel, consisting of reinforcing rods, steel piers, tubes and angles, from Kansas City, Missouri, to itself at Wilmot, Arkansas, for use in the construction of the bridge; and these materials had been delivered to the subcontractor and used in the performance of the work done by it. The steel for the superstructure was fabricated by plaintiff in error in its plant in Kansas City, some before and some after the permission was obtained.

The Supreme Court of Arkansas held that the things done by plaintiff in error before August 17, 1921, constituted intrastate business in Arkansas. But the plaintiff in error contends that all was interstate commerce. We accept the decision of the Supreme Court of Arkansas as to what constitutes the doing of business in that State within the meaning of its own laws. *Georgia* v. *Chattanooga,* 264 U. S. 472, 483. But this court will determine for itself whether what was done by plaintiff in error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause. Plain-

tiff in error cites *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. It was there held that, "Such commerce [among the States] is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse" (p. 290); and that, "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause" (p. 291). In that case, a Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purchase of wheat to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. It was held that the transaction was interstate commerce, notwithstanding the contract was made and was to be performed in Kentucky. All the things done in Kentucky had reference to and were included in the interstate transaction.

But in the case now before the court, the construction of the bridge necessarily involved some work and business in Arkansas, which were separate and distinct from any interstate commerce that might be involved in the performance of the contract. From the beginning, transactions local to Arkansas were contemplated. In fact, plaintiff in error obtained permission to do business in Arkansas in order to be authorized to erect the steel superstructure—the part of the work it had not sublet. But before obtaining such permission, it made the bid and signed the contract in Arkansas; it shipped from Kansas City to itself at Wilmot the materials for the performance of the work it had sublet, and, after the interstate transit had ended, delivered them to the subcontractor who used them in the work. We need not

consider whether, under the circumstances shown, the making of the bid, the signing of the contract and execution of the bond would be within the protection of the commerce clause, if these acts stood alone. But it is certain that, when all are taken together, the things done by plaintiff in error in Arkansas before obtaining the permission constitute or include intrastate business. The delivery of the materials to the subcontractor was essential to the building of the bridge, and that was an intrastate and not an interstate transaction. The fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the subcontractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials had been shipped into the State and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission. *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500; *Browning* v. *Waycross,* 233 U. S. 16; *York Manufacturing Co.* v. *Colley,* 247 U. S. 21.

Judgment affirmed.

MR. JUSTICE STONE dissents.

ARKANSAS *v.* TENNESSEE.

No. 2, Original. Argued October 5, 1925.—Decided November 16, 1925.

1. Commissioners appointed in this case to run, locate and designate part of the boundary between Arkansas and Tennessee along the middle of the main navigable channel of the Mississippi River as it was in 1876 immediately prior to changes wrought by avulsion, properly made a preliminary investigation and a provisional survey and location of the line in advance of hearing testimony on the subject. P. 154.

2. The objection that the line recommended by the commissioners was established by them without considering the evidence, *held* not justified. *Id.*
3. Absolute accuracy not being attainable, a degree of certainty that is reasonable as a practical matter, is all that is required in locating this boundary. The commissioners therefore did not err in accepting as a general guide, subject to corrections by other evidence available, a map made by a government engineer shortly before the avulsion, based on a reconnoissance by steamboat, conducted without accurate measurements or exact instrumental observations, for the purpose of ascertaining the general appearance of the river and gaining a general idea of the shape and location of the channel. P. 155.
4. Opinions of some witnesses that the line can not be located with reasonable certainty, *held* of little weight as against the facts proven and the determination of the commission. P. 157.
5. Costs and expenses apportioned equally between the two States; except the cost of unnecessary printing of testimony, which is placed upon the party which occasioned it. P. 158.

Exceptions overruled and final decree directed.

On defendant's exceptions to the report of the commissioners appointed to run, locate and designate part of the boundary between Arkansas and Tennessee. See 246 U. S. 158; 247 U. S. 461.

Mr. Caruthers Ewing, for the complainant.

Mr. G. T. Fitzhugh, for the defendant.

Mr. Justice Butler delivered the opinion of the Court.

The commissioners, who were named by the decree entered June 10, 1918, (247 U. S. 461), and directed to run, locate and designate the boundary line between the States along the portion of the Mississippi River that was left dry as a result of the avulsion in 1876, filed their report, May 24, 1921. They correctly understood,—and counsel for the parties agreed with them,—that the directions contained in the decree applied to the two branches of the river as it formerly flowed,—the Devil's Elbow

around Centennial Island and Island 37, and also the old river bed between Brandywine Island and the Tennessee shore. They found and recommended a line indicated by courses and distances set out in, and shown on a map attached to, their report. The defendant filed numerous exceptions which need not be quoted at length. The substance of its contentions is sufficiently indicated below.

Defendant asserts that the commissioners established the boundary line before its witnesses were heard and before cross examination of any witness for the plaintiff. But the record does not support the contention. In July, 1918, the commissioners examined the territory involved. In October, 1919, they took a survey party to the place to commence work. In 1920, they completed their surveys, including the line, then only provisional, which later was recommended in their report. The making of these surveys in advance of hearing the testimony was an appropriate step in the investigation. While the field work was in progress, the commissioners spent most of the time in the field, assisting, and examining the topography and comparing the evidence. Facts disclosed by the survey and so gathered well might be deemed to be useful to enable the commissioners the better to understand and determine the value of other evidence. The report states that the commissioners spared no effort to secure maps and evidence indicating the course of the channel from the earliest record down to the time of the investigation. And that statement seems well supported. There is nothing to justify the suggestion that the commissioners established the line without considering the evidence.

Defendant insists that the middle of the main navigable channel as it existed before the avulsion could not be located with reasonable certainty and that the commissioners should have so reported (decree, par. 5). It maintains that the recommended boundary, except that

portion between Island 37 and Arkansas, is based entirely on a reconnoissance made by Major Charles R. Suter, Corps of Engineers, United States Army, in 1874, and insists that the Suter line is not established by the evidence. Objection is also made to the location of the channel on the east side of Island 39, and to certain other parts of the commissioners' line.

The boundary line to be located is the middle of the main channel of the river as it existed in 1783 subject to subsequent changes occurring through natural and gradual processes. In 1823, the location of the river was substantially as indicated on a map referred to in the record as Humphrey's map, and there has been no map or survey, which tied the channel to any fixed monument, showing the location of the river as of any later date. The evidence shows that such channels are liable to change substantially from time to time. And the parties stipulated that from 1823 to 1876 the river and land lines had been altered as shown in the opinion of the Supreme Court of Tennessee in the case of *State* v. *Pulp Co.*, 119 Tenn. 47, 59. The Humphrey map is on page 60 and the Suter map on page 62 of the opinion. The changes found to have taken place in this period need not be specified. There is nothing to indicate that the 1823 map is useful as a guide to the boundary line as established by the interlocutory decree. The reconnoissance of 1874 was made pursuant to an Act of Congress approved June 23, 1874, c. 457, 18 Stat. 237, 242, providing for surveys and estimates for the improvement of certain transportation routes to the seaboard. Major Suter was assigned to make examination of the Mississippi River from Cairo to the Gulf. His party had a government steamboat and, in the performance of the work, passed over the part of the river here involved four times. The courses of the channel were taken by compass. Distances were determined by the speed of the boat. Widths of the river were

estimated, and to some extent these estimates were checked by triangulation. The purpose was to ascertain the appearance of the river and to get a general idea of the shape and location of the channel. No survey by actual measurements was made, and accuracy was not attained. From the evidence and a stipulation of the parties, the commissioners found that there had been no material change in the river between the time of the reconnoissance in 1874 and the avulsion in 1876. While not made according to actual measurements, the Suter map may be said to present the general situation as it existed immediately before the avulsion. The commissioners did not follow the map at all places and did not take it as their sole guide for the ascertainment of any part of the line. On satisfactory evidence that was not contradicted, the commissioners found that Island 37 was on the Tennessee side of the main channel as it existed in 1876, and not on the Arkansas side, as shown by the Suter map. The commissioners also found that the United States township plats show that Island 39 at the foot of Brandywine was included in the public surveys of Arkansas, and that the old maps which were used as guides for the navigation of the river show that island very close to or against the Arkansas side. They report that they could not find any evidence to the contrary. And so they determined the main channel to have been on the easterly side of that island. As their conclusion is well sustained by the evidence it is immaterial whether, as stated in the report, Suter's map shows a line on each side of the island.

Counsel for the defendant asserts that, "A map, to be of any value for the purpose of locating any particular lines or objects thereon, must be based upon a survey accurately made by measurement and instrumental observations, and must be a faithful and correct delineation of a faithful survey, in every detail." And on that basis,

he argues that the Suter map is valueless as a means accurately to fix the old channel, because not properly tied to some point or monument. But the standard demanded is not applicable. The thing to be done must be regarded. It is to locate the boundary along that portion of the bed of the river that was left dry as a result of the avulsion, according to the middle of the main navigable channel at the time the current ceased to flow therein as a result of the avulsion. Absolute accuracy is not attainable. A degree of certainty that is reasonable as a practical matter, having regard to the circumstances, is all that is required. The line of the greatest depth of water is not necessarily the middle of the channel. *Minnesota* v. *Wisconsin,* 252 U. S. 273, 282. The location, limits and width of the main navigable channel were not precisely defined or permanent. The determination of its location involved more than mere measurements and required the exercise of judgment based on experience. The degree of accuracy insisted on is not reasonable or practicable.

Defendant's principal reliance is on opinions expressed by some of the witnesses to the effect that the line cannot be located with reasonable certainty. But such opinions are of little weight as against the facts shown and the determination of the commission. In addition to the commissioners' careful investigation in the field, there was the testimony of steamboat men and others who were familiar with the situation as it existed before the avulsion in 1876. It is sufficient to say that when taken in connection with the Suter map and considered in the light of established physical facts and other evidence, the testimony of these witnesses clearly establishes the line reported by the commissioners. The exceptions are without merit and are overruled. The report of the commissioners is confirmed.

Plaintiff paid the cost of printing the report and testimony, and moves that such cost be borne by defendant.

The reasons stated by plaintiff are that defendant alone was dissatisfied with the report and, as a condition to excepting thereto, required plaintiff to pay for such printing, and that the exceptions are frivolous. We are of the opinion that the printing of the evidence was not necessary, and require defendant to bear the cost of that part of the printing. All other expenses, including the commissioners' compensation, will be divided equally between the parties.

The decree will be in accordance with this opinion. At any time within forty days the parties may submit suggestions as to form.

DAVIS, DIRECTOR GENERAL, *v.* JOHN L. ROPER LUMBER COMPANY.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 79. Submitted October 21, 1925.—Decided November 16, 1925.

1. A loss due to misdelivery of a shipment by the carrier is not included, as damage "in transit" or otherwise, within the classes of cases mentioned in the second proviso of the first Cummins Amendment, as to which classes it provides that no notice of claim nor filing of claim shall be required as a condition precedent to recovery. P. 161.
2. Section 10 of the Bills of Lading Act, which declares that a carrier delivering goods to any one not lawfully entitled to their possession shall be liable to any one having a right of property or possession in the goods, etc., does not excuse a shipper, whose goods were misdelivered, from compliance with a stipulation of his bill of lading relieving the carrier from liability if claim were not made within six months after a reasonable time for delivery had elapsed. P. 162.

138 Va. 377, reversed.

CERTIORARI to a judgment of the Supreme Court of Appeals of Virginia affirming a judgment for damages in an action against the petitioner for misdelivery of goods.

Messrs. A. A. McLaughlin and *R. M. Hughes, Jr.*, for the petitioner.

Mr. Claude M. Bain for respondent.

The shipment was in transit. *Blish Milling Co.* v. *Railway,* 241 U. S. 190; *Railroad* v. *Dettlebach,* 239 U. S. 588; *Erie R. R.* v. *Shuart,* 250 U. S. 465; *Michigan Central* v. *Mark Owen & Co.,* 256 U. S. 427; *Brown* v. *Western Union,* 85 S. C. 495; *Jennings etc. Co.* v. *Virginian Railway,* 137 Va. 207. The proviso is not limited to cases where there is actual physical damage. *Barrett* v. *Van Pelt,* 268 U. S. 85; *New York etc. R. Co.* v. *Peninsula Produce Exchange,* 240 U. S. 34; *Norfolk Exchange* v. *Norfolk Southern R. R.,* 116 Va. 466. The proviso is a part of § 20 of the Interstate Commerce Act. We see no good reason why the words "loss, damage or injury" should be construed actual physical damage in one part of the section and not in another part. The case comes within the proviso and no notice or filing of claim was necessary. *Barrett* v. *Van Pelt, supra; Gillette Razor Co.* v. *Davis,* 278 Fed. 864; *Hailey* v. *Oregon Short Line,* 253 Fed. 569; *Morrell* v. *Northern Pacific,* 46 N. Dak. 535; *Mann* v. *Fairfield Transp. Co.,* 176 N. C. 104; *Scott* v. *American Railway Express,* 189 N. C. 377; *Winstead* v. *East Carolina R.,* 186 N. C. 58.

The carrier is liable under the Bills of Lading Act, § 10. The cause of action is laid for carelessly and negligently delivering the shipment without surrender of the bill of lading; and for the failure and refusal of the defendant to deliver the shipment to the lawful holder of the bill of lading.

Mr. Justice Butler delivered the opinion of the Court.

There is here for review a judgment of the Supreme Court of Appeals of Virginia which affirmed a judgment

of the Court of Law and Chancery against petitioner for $1,046.88. 138 Va. 377. June 24, 1918, at New Bern, North Carolina, respondent delivered to petitioner, then operating the Norfolk Southern Railroad, a carload of scrap iron for transportation over that line and connecting lines to Clarksburg, West Virginia. Petitioner issued a bill of lading, consigning the shipment to the order of respondent, "notify George Yampolsky at Clarksburg." It contained a clause requiring surrender of the bill of lading properly endorsed before delivery of the property; and provided that, "Claims for loss, damage or delay must be made in writing to the carrier . . . within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." The shipment arrived at Clarksburg, July 15, 1918, and on that day was delivered to Yampolsky without surrender of the bill of lading and without the knowledge of the respondent, who at all times has been its lawful holder. No claim was made by respondent until March 5, 1920.

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, requires a common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the holder for any loss, damage, or injury to such property, and contains these provisos: "*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 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."

There is presented the question whether this case is one in which the right of recovery may be made to depend upon the making of claim as required by the bill of lading. The provisos in § 20 have been recently considered by this court in *Barrett* v. *Van Pelt,* 268 U. S. 85. It was there pointed out that the purpose of the second proviso is to take some cases out of the general rule declared by the first proviso. And, in view of the inapt language and defective structure of the second, it was held that the word, "damaged" should be read, "damage," and that the comma after "unloaded" should be eliminated. It was also held that "carelessness or negligence" is an element in each case of loss, damage, or injury there named. The judgment now before us was given prior to that decision. The state court held that the damage resulting to respondent from the misdelivery occurred while the shipment was "in transit," within the meaning of the proviso, and that therefore the provision of the bill of lading requiring claim to be made was invalid. It said that "in transit" means at any time after the property has been received by the initial carrier and before delivery in accordance with the contract of carriage.

But that view cannot be sustained. The loss was due solely to misdelivery; that is, "a failure to make delivery" in accordance with the bill of lading. *Georgia, Fla. & Ala. Ry.* v. *Blish Co.,* 241 U. S. 190, 195. As construed by this court the second proviso embraces three classes: (1) loss, damage, or injury due to delay, (2) damage while being loaded or unloaded, (3) damage in transit. Clearly, misdelivery is not in the first or second class. And, unless it is in the third class, the proviso does not apply. The context shows that the phrase, "in transit," was not intended to have the broad meaning attributed to it by the

state court. In the proviso, claims on account of damage "while being loaded or unloaded" are separate and distinct from those for "damage in transit." The creation of the former class would be wholly unnecessary and inappropriate if the latter is to be taken to include both classes. Loading precedes, and unloading follows, transit. In the ordinary and usual meaning of the word, "transit" ends before delivery at destination. Misdelivery is not mentioned in the proviso; and the language used is inconsistent with and negatives any intention to include claims for damages on account of misdelivery in the class defined as "damage in transit."

Respondent contends that under § 10 of the Bills of Lading Act, c. 415, 39 Stat. 538, 540, it was not necessary to comply with the requirement of the bill of lading. The point is without merit. That section provides: "Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods . . ." The rule of liability so declared is not inconsistent with the second proviso in § 20, which relates merely to the enforcement of liability. The provisions of both acts are to be read together, and applied in harmony with the bill of lading. More than nineteen months elapsed before respondent made any claim. There is nothing in the statutory provisions relied on by respondent to excuse its failure to make claim within the time specified in the shipping contract.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

STEPHENSON ET AL. *v.* KIRTLEY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 58. Submitted October 16, 1925.—Decided November 16, 1925.

1. An attachment affidavit stating generally the nature of the plaintiff's claim and setting forth, with reasonable certainty and the particularity of fact necessary to show a cause of action, the unpaid judgments upon which the claim was based, *held* a sufficient compliance with the requirement of the West Virginia Code that such affidavit state "the nature of the plaintiff's claim." P. 166.
2. Where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be so defective that an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ. *Id.*
3. Recitals in a decree of sale in a creditors suit, showing that the court acted on satisfactory evidence in adjudging that the deeds in question were made to defraud creditors, import verity and can not be drawn in question in a collateral attack by a party who was served only by publication and did not appear and who alleges that the court (under the West Virginia Code) could make no valid decree because no proof of fraud was offered. *Id.*
4. In such a suit, where the court has acquired jurisdiction by attachment and has entered a decree *nisi* on an order of publication, the allegations of the complaint that the deeds in question were fraudulent may be sustained by the default as well as by proof; and failure to hear proof before adjudging them fraudulent and ordering a sale is neither beyond the court's jurisdiction nor a denial of due process. *Id.*
5. Upon an appeal from a decree dismissing on motion a bill to set aside a judgment, this Court, finding the judgment valid against the objections made in the bill, will not consider other matters relating to it which are urged in the briefs. P. 167.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill, on motion, in a suit to annul proceedings of a West Virginia court, whereby deeds, made by one of the

appellants to the others, were set aside as in fraud of creditors, and the property sold to satisfy judgment debts.

Messrs. Edward W. Knight and *Harold A. Ritz,* with whom *Messrs. A. J. Horan, Lon H. Kelly* and *Herman L. Bennett* were on the brief, for appellants.

Mr. J. H. McClintic, with whom *Mr. A. N. Breckinridge* was on the brief, for Kirtley and Herold, appellees.

Mr. Justice Sanford delivered the opinion of the Court.

The appellants brought this suit in equity in the District Court to set aside certain proceedings in a Circuit Court of West Virginia, whose validity they challenged, *inter alia,* for repugnancy to the due process clause of the Fourteenth Amendment. The bill was dismissed by the District Court, upon defendants' motion, without opinion. This direct appeal was allowed, March 31, 1924, under § 238 of the Judicial Code.

The case made by the bill and exhibits is this: The plaintiffs are non-residents of West Virginia. Four of them claim to be the owners of certain undivided interests in lands in Nicholas County, West Virginia, conveyed to them by deeds from their co-plaintiff W. B. Stephenson, executed in good faith and for valuable considerations. The defendant Cawley, a creditor of W. B. Stephenson holding unsatisfied judgments against him, brought a suit in equity against the plaintiffs in the Circuit Court of the county to set aside the deeds as fraudulent and sell the lands to satisfy the judgments. The plaintiffs were proceeded against as non-residents, by an order of publication, without personal service of process. An order of attachment was also issued and levied upon the lands. The plaintiffs not having appeared within the time required by the order of publication, a decree *nisi* was entered and set for hearing; and thereafter a decree was

entered adjudging that the deeds from W. B. Stephenson were made to defraud his creditors, setting the same aside as to the debt to Cawley, and directing a sale of the lands in satisfaction of the judgments. They were purchased by the defendants Kirtley and Herold at the commissioners' sale. This sale was confirmed by a subsequent decree; and a deed was executed by the commissioners to the purchasers, who entered into possession of the lands. The plaintiffs, who under the laws of West Virginia were allowed to appear and make defense to the suit within two years from the date of the final decree, had no knowledge of these proceedings until after this time had expired.

The bill alleged that these proceedings were null and void: 1st, because the Circuit Court did not have jurisdiction to enter the decrees, since under the laws of West Virginia the order of attachment upon which its jurisdiction depended was void and conferred no jurisdiction for the reason that the affidavit upon which it was based lacked the required certainty and was invalid; and 2nd, because under the law of West Virginia there can be no valid decree in a suit in which no personal service has been had without proof of the facts upon which it rests, and the court was without jurisdiction to enter the decree setting aside the deeds and ordering the sale, for the reason that no proof was offered that the deeds were fraudulent.

The bill further alleged that the action of the Circuit Court in adjudging that the deeds were fraudulent, without personal service of process or hearing any evidence or having any trial upon the question, and decreeing the sale of the lands, was a denial of due process of law to the plaintiffs in violation of the Fourteenth Amendment; and it prayed that the decrees directing and confirming the sale of the lands, and the commissioners' deed thereto, be decreed to be null and void; that the cloud arising therefrom upon their title be removed; and that they be adjudged to be the owners of the lands.

1. Assuming, without deciding, that notwithstanding the constructive service of process by the order of publication, the jurisdiction of the court over the lands depended upon the attachment, we find no invalidity in the affidavit on which the order of attachment issued. The statute merely requires the affidavit to state "the nature of the plaintiff's claim." Barnes' West Virginia Code, ch. 106, § 1, p. 1995. Here, after stating generally the nature of the claim, it set forth, with reasonable certainty and the particularity of fact necessary to show a cause of action, the unpaid judgments held by Cawley against W. B. Stephenson upon which the claim was based. This was sufficient. *Flannigan* v. *Tie Co.*, 77 W. Va. 158, 159. Furthermore, where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be defective and an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ. *Cooper* v. *Reynolds,* 10 Wall. 308, 319; *Ludlow* v. *Ramsey,* 11 Wall. 581, 588; *Miller* v. *White,* 46 W. Va. 67, 71; *McIntosh* v. *Oil Co.,* 47 W. Va. 832, 837.

2. It is recited in the decree of sale that it appeared to the satisfaction of the court "from the papers and evidence" that the deeds from W. B. Stephenson were made to defraud his creditors. The present suit is a collateral proceeding to set aside the sale made by the Circuit Court, (*Ludlow* v. *Ramsey, supra,* p. 587,) a court of general jurisdiction; and the recitals in its decree, which import verity, cannot be drawn in question herein. *Ballard* v. *Hunter,* 204 U. S. 241, 265. Furthermore, as the court had acquired jurisdiction by the levy of the writ of attachment and a decree *nisi* had been entered upon the order of publication, a failure to hear proof before adjudging that the deeds were fraudulent and ordering the sale, would neither have deprived the court of its jurisdiction

nor constituted a denial of due process. The allegations of the complaint might be established either by the introduction of proof or by admission through the default; and error or irregularity in this respect would neither constitute ground for setting aside the decree which the court had acquired jurisdiction to render, nor take from it the attribute of due process. *Ballard* v. *Hunter, supra,* pp. 250, 258.

3. This disposes of all the grounds upon which the validity of the proceedings was challenged by the bill. We therefore neither consider other matters urged in the appellants' brief relating to the alleged invalidity of the order of publication, nor the defense of good faith purchase relied upon in the brief of appellees. We find no want of jurisdiction in the Circuit Court by reason of the matters alleged in the bill, nor want of due process invalidating the proceedings under the Fourteenth Amendment.

The decree of the District Court is

Affirmed.

BEAZELL *v.* OHIO ET AL.

CHATFIELD *v.* OHIO ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Nos. 247, 248. Motions to dismiss or affirm submitted October 5, 1925.—Decided November 16, 1925.

1. The constitutional provision (Art. I. Sec. 10) forbidding the States to pass *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. P. 171.
2. An Ohio law providing that when two or more persons were jointly indicted for a felony, on application to the court each should be tried separately, was amended so as to require a joint trial, unless the court should order otherwise for good cause shown. *Held* that the amendment was not an *ex post facto* law, within the constitutional restriction, as applied to persons who were indicted after,

for an offense alleged to have been committed before, the date of the amendment. P. 170.

111 Ohio St. 838; *Id.* 839, affirmed.

ERROR to judgments of the Supreme Court of Ohio affirming convictions of embezzlement. The cases are disposed of here on motions to dismiss or affirm.

Messrs. John Wilson Brown, Charles S. Bell, Nelson Schwab, and *Louis Schneider,* for the State of Ohio.

Messrs. Province M. Pogue, Harry M. Hoffheimer and *Thomas L. Pogue,* for Beazell.

Mr. Frank F. Dinsmore, for Chatfield.

The following authorities were cited and relied upon in the arguments for plaintiffs in error. *Bergin* v. *State,* 31 Oh. St. 113; 12 C. J. § 803; *Thompson* v. *Utah,* 170 U. S. 343; *Duncan* v. *Missouri,* 152 U. S. 378; *Ex parte Medley,* 134 U. S. 160; *Kring* v. *Missouri,* 107 U. S. 221; *Mallet* v. *North Carolina,* 181 U. S. 589; *Society* v. *Wheeler,* 2 Gall. 139; *State* v. *Morrow,* 90 Oh. St. 202; *Crain* v. *United States,* 162 U. S. 624; Cooley's Const. Lim'ns. 373; *Frisby* v. *United States,* 13 App. D. C. 22; *State* v. *Barlow,* 70 Oh. St. 363; *Hopt* v. *Utah,* 110 U. S. 574.

MR. JUSTICE STONE delivered the opinion of the Court.

Plaintiffs in error were jointly indicted in the Court of Common Pleas of Hamilton County, Ohio, for the crime of embezzlement, a felony. On February 13, 1923, the date of the offense as charged, Ohio General Code, § 13,677, provided: "When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be separately tried." In April of the same year, before the indictment, which was returned on October 25, this section was amended (110 Ohio Laws, 301) so as to provide:

"When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants order that one or more of said defendants shall be tried separately."

By another section, the amended Act was made applicable to trials for offenses committed before the amendment.

The defendants severally made motions for separate trials on the ground that their defenses would be different; that each would be prejudiced by the introduction of evidence admissible against his co-defendant, but inadmissible as to him; and that they were entitled to separate trials as a matter of right, specifically charging that, as applied to their own indictment and trial, "the amendment to the Statutes of Ohio making the granting of said application for a separate trial discretionary with the trial court, is an *ex post facto* law within the restrictions imposed by Article 1, Section 10 of the Constitution of the United States," which provides that "No State shall . . . pass any . . . ex post facto Law."

Both motions were denied; the joint trial and conviction of the defendants followed; and in proceedings duly had in which the constitutional question was raised, their conviction was sustained by the Supreme Court of Ohio. The case comes before this court on motions to dismiss the writs of error or to affirm the judgment below.

It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post*

facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See *Calder* v. *Bull,* 3 Dall. 386, 390; *Cummings* v. *State of Missouri,* 4 Wall. 277, 326; *Kring* v. *Missouri,* 107 U. S. 221, 228, 232. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring* v. *Missouri,* 107 U. S. 221; *Thompson* v. *Utah,* 170 U. S. 343. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges

the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an *ex post facto* law. *Hopt.* v. *Utah,* 110 U. S. 574. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible. *Thompson* v. *Missouri,* 171 U. S. 380; or which changes the place of trial, *Gut* v. *The State,* 9 Wall. 35; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See *Duncan* v. *Missouri,* 152 U. S. 377, 382.

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy* v. *South Carolina,* 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. See *Gibson* v. *Mississippi,* 162 U. S. 565, 590; *Thompson* v. *Missouri, supra,* 386; *Mallett* v. *North Carolina,* 181 U. S. 589, 597.

The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials. We do not regard it as harsh or oppressive as applied to the plaintiffs in error, or as affecting any right or immunity more substantial than did the statute which changed the qualification of jurors, upheld in *Gibson* v. *Mississippi, supra;* or the statute which granted to the State an appeal from an intermediate appellate court, upheld in *Mallett* v. *North Carolina, supra.* Obviously the statute here is less burdensome to the accused than those involved in *Hopt* v. *Utah, supra,* and *Thompson* v. *Missouri, supra.*

The judgment of the Supreme Court of Ohio is

Affirmed.

ARKANSAS EX REL. UTLEY, ATTORNEY GENERAL, FOR THE USE OF CRAIGHEAD COUNTY, *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 74. Argued October 22, 1925.—Decided November 16, 1925.

1. A mandamus issued by the federal District Court for the purpose of satisfying a judgment previously entered therein against a county, and commanding tax officials to assess all property in the county at its full value and continue so doing until the judgment shall be paid, but laying down no further details as to the manner of making assessments, is to be taken as requiring that they be made in accordance with the laws of the State, leaving the question whether an assessment, when made, complies with those laws to be determined, in appropriate proceedings, by that court or by the state courts. P. 174.
2. Hence, where, in purported compliance with such mandamus, the property in the county was assessed at full value for county taxes (out of which the federal court judgment was to be paid) but at one-half its value for state, municipal and school taxes, and the state Supreme Court, adjudging that the discrepancy was contrary to a uniformity requirement of the state constitution and not in accord with the direction of the federal court, refused to enforce collection of the county taxes for more than 50%,—*held*, that the judgment of the state court plainly did not deny the authority or question the validity of the mandamus of the federal court, and was not reviewable in this Court under § 237, Jud. Code. P. 176.

Writ of error to review 162 Ark. 443, dismissed.

ERROR to a judgment of the Supreme Court of Arkansas affirming judgments for less than the amounts sought in actions by a county to collect taxes assessed against the St. Louis-San Francisco Railroad Company and the Missouri Pacific Railway Company.

Mr. Horace Sloan, with whom *Messrs. J. S. Utley,* Attorney General of Arkansas, and *A. P. Patton* were on the brief, for petitioner.

Messrs. Thomas B. Pryor, Gordon Frierson, William J. Orr, Edward L. Westbrooke and *Edward T. Miller,* for the defendants in error, submitted.

Mr. Justice Stone delivered the opinion of the Court.

Two separate suits, consolidated in the trial court, were brought by plaintiff in error in the Chancery Court for the Western District of Craighead County, Arkansas, pursuant to statute (§ 10,204, *et seq.* of Crawford & Moses Digest) to recover from the defendants overdue county taxes assessed against them for the years 1921–1922.

The assessments in question purport to have been made in compliance with a peremptory writ of mandamus issued by the United States District Court for the Western District of Arkansas. The Maccabees, an incorporated fraternal order, relator in the mandamus proceeding, had previously recovered judgment against Craighead County on certain county warrants in the United States District Court, jurisdiction having been invoked on grounds of diversity of citizenship. The mandamus proceeding, which was brought in aid of the judgment, resulted in an order directing the tax officials having jurisdiction in the premises, "to assess, at its full value in money, all property in Craighead County and to continue said assessment at its full value in money until the judgment of the plaintiff . . . shall have been paid in full; and it appearing that the property in said County has heretofore been assessed at not exceeding 50% of its assessed value, it is ordered that said mandamus require that the total assessment made hereunder shall be at least double the amount of the total assessment heretofore made." The respondents, in what purported to be a compliance with the mandamus order, assessed all the property in Craighead County, for all taxes except the general county tax, at the old valuation of fifty per cent; but for the general county tax, out of which the judgment of the Maccabees

was to be paid, they made a separate assessment on all property at a valuation of one hundred per cent.

In the Chancery Court the defendants contested the validity of the assessment, and judgment was entered for only one-half of the tax assessed against them for general county purposes. On appeal, the Supreme Court of Arkansas held that no tax could be lawfully assessed for those purposes upon a valuation in excess of the fifty per cent. valuation on which the assessment for other taxing purposes was based, and affirmed the judgment below. 162 Ark. 443.

The plaintiff in error invokes the jurisdiction of this Court under Judicial Code, § 237, alleging that the Supreme Court of Arkansas has drawn in question the validity of an authority exercised under the United States and has decided against its validity, in refusing to enforce the collection of overdue taxes upon an assessment ordered by the federal court; and assigns as error that in so doing the state court has refused to give effect to the judgment and mandamus of the District Court, in contravention of the judicial power granted to the federal courts by Article 3 of the Constitution, and Acts of Congress pursuant to it, and in contravention of Clause 2 of Article 6 (making the Constitution and laws of the United States the supreme law of the land).

In holding invalid the assessment as made for general county purposes, the Supreme Court of Arkansas disclaimed any purpose to attack collaterally the judgment of the United States District Court, or to deny its full force and effect as rendered. It rested its decision on the narrow ground that the assessment upon the property of defendants in error was not made on a valuation uniform within Craighead County for all purposes of taxation, state, county, municipal and school, as required by the state constitution (Article 16, § 5; *Hays* v. *Missouri Pacific R. R. Co.,* 159 Ark. 101), and that as made the

assessment did not comply with the judgment of mandamus which specifically required the tax officials to assess at full value all property in Craighead County. Since the court deemed that the assessment complied neither with the requirements of the constitution nor with the directions of the judgment of the District Court, it held that there was no denial of the authority of the judgment in holding the assessment invalid under the state constitution.

If the mandamus order had in terms directed the assessment to be made as it was in fact made by the taxing officials, or if the assessment had been held to be invalid on the ground that, although made as directed, it was not uniform with the valuation employed in other counties of the State, questions would have been presented which are not raised by this record. We might then have had to consider whether the determination of the state court did not, in effect, attack collaterally the judgment of the District Court and deny its authority, even though that judgment rested on a different view of the state constitution than that adopted by the Supreme Court of Arkansas. See *United States ex rel.* v. *Jimmerson,* 222 Fed. 489, and *United States ex rel.* v. *Cargill,* 263 Fed. 856.

These are questions which we are not called upon to decide here; for we find no necessary conflict between the mandamus order of the District Court and the constitution of the State as interpreted and applied to the assessment by the state Supreme Court. The District Court undoubtedly had jurisdiction to compel the assessing officers of the county to levy a tax for the purpose of securing satisfaction of its judgment. *Memphis* v. *Brown,* 97 U. S. 300; *United States* v. *Fort Scott,* 99 U. S. 152. For that purpose it had jurisdiction to determine what form of assessment would accord with the laws and

the constitution of the State of Arkansas and to prescribe the manner in which the assessments should be levied. *Riggs* v. *Johnson County,* 6 Wall. 166; *Prout* v. *Starr,* 188 U. S. 537.

But in directing the assessment to be made within the county on the basis of a uniform valuation, the judgment did not specify the mode of assessment for different tax purposes; it did not direct that the assessment at an increased valuation should be made only for county taxation. Being silent with respect to these details, it must be taken to direct an assessment within the county at full valuation, in accordance with the laws of the State, leaving to be determined, by proceedings appropriately had in either the District Court or the state court, the question whether the assessment actually made complied with those laws. No proceedings were had to secure a modification of the judgment of the District Court so that it would direct the assessment to be made in the mode actually employed, or to compel an assessment on a uniform valuation for all tax purposes, on the theory that such uniformity was required by the state law, and in the view, which we adopt, that the judgment required an assessment to be made within the county according to that law.

In that situation we do not find any basis for the contention that the authority of the judgment of the District Court was denied or its validity questioned by the determination of the state court that the assessment as made within the county was invalid. The mandamus not having prescribed the particular method of assessing the tax, the state court was left free to determine whether the assessment was made according to law, and in so doing it did not determine any matter which had been adjudicated by the District Court or refuse to give full effect to its judgment.

The writ of error is

Dismissed for want of jurisdiction.

CONCRETE APPLIANCES COMPANY ET AL. *v.* GOMERY ET AL.

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

No. 44. Argued October 14, 15, 1925.—Decided November 16, 1925.

1. Concurrent findings of the District Court and Circuit Court of Appeals against the novelty of a patented device will be reviewed by this Court when a contrary conclusion in respect of the same patent claims has been reached by the Circuit Court of Appeals in another circuit. P. 180.
2. Judicial notice taken, that the principle of conveying and distributing mobile substances by gravity has found exemplification for centuries in apparatus for raising and distributing water. P. 180.
3. In view of the state of the art, patent No. 948,719, (as to claims 1, 2, 5 and 13,) for a combination of apparatus, designed for transferring wet concrete, or other plastic materials, from a source of supply to working points on a building or other structure in course of construction, is void for want of invention; the combination being no more than an application of mechanical skill to known elements, in the course of a natural development of the art. P. 184.
4. The combination comprised: (1) a tower; (2) a boom, oscillatory or swinging horizontally, adjustably connected with the tower and adapted to be arranged at various points in its height; (3) a conduit carried by the boom, extending laterally from the tower, connected to it and adjustable vertically at varying heights in the tower; (4) a means for raising plastic material to the height desired in the tower; and (5) a means for receiving the plastic material from the raising means and conducting it to the conduit, both the raising means and the receiving means being adjustable vertically at varying heights in the tower.

291 Fed. 486, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals for the Third Circuit which affirmed a decree of the District Court (see 284 Fed. 518) dismissing the bill in a suit to enjoin infringement of the petitioners' patent.

80048°—26——12

Mr. Stephen J. Cox, with whom *Messrs. Arthur M. Hood* and *Cyrus N. Anderson* were on the brief, for petitioners.

Mr. George Bayard Jones, with whom *Messrs. Thomas F. Sheridan* and *William Steell Jackson* were on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

In an earlier suit petitioners sought to enjoin an infringement of the Callahan patent, No. 948,719, and the Circuit Court of Appeals for the Sixth Circuit held the patent valid. *Concrete Appliance Co.* v. *Meinken,* 262 Fed. 958. Later the present suit was brought in the District Court for the Eastern District of Pennsylvania to enjoin an infringement of the same patent by the respondents. The District Court expressed the opinion that the claims of the patent did not involve invention, but in deference to the determination in the Sixth Circuit, dismissed the petitioners' bill on the ground of non-infringement. 284 Fed. 518. On appeal, the Circuit Court of Appeals for the Third Circuit held that the patent was invalid for want of invention. 291 Fed. 486. In view of the conflict of decision, the writ of certiorari was granted by this Court (264 U. S. 578) to review the determination in the Third Circuit. *Thomson Co.* v. *Ford Motor Co.,* 265 U. S. 445. Both suits involved claims numbered 1, 2, 5 and 13 of the Callahan Patent for "Material Transferring Apparatus" designed for use in transferring concrete or other plastic materials from a suitable source of supply to working points desired on a building or other structure, in the course of construction.

In principle, the device concerned calls into operation gravity, in conveying mobile substances from an elevated central point to varying working points in building operations. The claims made by the patentee, which relate

to a combination embraced in the apparatus described, when paraphrased and separated into their constituent elements, comprise: (1) a tower; (2) a boom oscillatory or swinging horizontally, adjustably connected with the tower and adapted to be arranged at various points in its height; (3) a conduit carried by the boom, extending laterally from the tower, connected to it and adjustable vertically at varying heights in the tower; (4) a means for raising plastic material to the height desired in the tower; and (5) a means for receiving the plastic material from the raising means and conducting it to the conduit, both the raising means and the receiving means being adjustable vertically at varying heights in the tower.

The apparatus described in the letters patent is capable of use in conveying " wet " or " mush " concrete from the point where it is prepared for use and distributing it to points where it is incorporated into a building in process of construction. When the mixed concrete is in readiness to be placed in the forms or moulds in which it is allowed to " set " or harden into an integral part of the structure, it is elevated by the " raising means," usually a bucket, skip or other suitable conveyor, to the " receiving means," a hopper, in which the concrete is deposited. From thence it flows by gravity into the conduit and through it to the form or mould, which may be in any part of the structure at a suitable level below the base of the hopper. As the building progresses, the conveyor, the hopper and the attached conduit may be progressively raised within the tower so that gravity may carry the flowing concrete to any desired point at lower levels in the structure.

The several elements in the petitioners' claims which we have enumerated embrace familiar devices long in common use, separately or in smaller groups, both in this and in kindred mechanical arts. It is not argued that there is any novelty in such units or groups; and the only serious question presented is whether, in combination

in the apparatus described, they constitute an invention. That the combination embodied in the described apparatus produces a useful result in the mechanical arts and in modified form is widely used in building operations, is established. Our inquiry, therefore, must be addressed to the question whether the combination is novel and whether it passes the line sometimes tenuous and difficult of ascertainment which separates mechanical skill from invention. The pursuit of this inquiry involves a consideration of the state of the art prior to Callahan's application, of which elaborate proof was made in the trial court.

Because of an evident difference in the state of the proof in the two cases, the adjudications of this patent by the two circuit courts are, we think, only apparently conflicting. It is clear from an examination of the two records, the earlier of which is an exhibit in this suit, as well as from the opinion of the court in the Sixth Circuit, that that court did not have before it the detailed history of the practical development of the art, which was elaborately proved in the present case and which convinced both the District Judge and the Circuit Court of Appeals in the Third Circuit that the plaintiff's appliance did not embody an invention. The question thus presented is one of fact; but notwithstanding the agreement of the two courts below, on this aspect of the case, the difference in result reached by the two circuit courts leads us to review the salient features of the state of the art, at about January, 1908, when, according to petitioners, Callahan conceived the combination covered by the claims in his patent. See *Thompson Co.* v. *Ford Motor Co., supra,* 447.

It is a fact of which we may take judicial notice (*King* v. *Gallun,* 109 U. S. 99) that the principle of conveying and distributing a mobile substance by gravity has found exemplification for centuries, in apparatus for lifting

water by power, in buckets or other convenient form of conveyor, to a central reservoir from which its flow is induced by gravity, through suitable conduits to fixed points or through movable pipes or hose to varying selected points. Long prior to the Callahan application the principle had been applied to other substances capable of flow under the action of gravity, such as grain, coal, crushed stone, sand and iron ore. The proof is abundant that by 1905 it was common practice in the erection and use of grain elevators to provide for raising the grain by endless belt or other conveyor to the top of the elevator; then to discharge it into a receptacle called a garner or hopper, from which it flowed by gravity through pipes or spouts having a swivel connection with the hopper and swinging laterally so that the lower end of the spout was movable in the arc of a circle. These spouts were capable of extension, variable at will, by attaching additional sections, appropriately swivelled, to the end of the section of the spout connecting with the hopper. The conduit or spout was supported, according to need and convenience, by an inclined cable attached at a suitable point above to the elevator tower, or by pivoted boom or gaff attached to the tower of the elevator and capable of being raised or lowered at its outer end. Apparatus of this type was commonly and successfully used for the unloading and storage of grain and for loading it from storage on to ships or cars in varying positions and distances from the elevator tower; sectional or telescopic spouts attached to the tower and to each other being used to secure the delivery of the grain in the desired direction, and at desired distances, the spout being raised or lowered and given direction by the use of boom and tackle. On occasion there was duplication of the apparatus on board ship by the use of a supplemental hopper and supplemental conduit or chute supported and controlled by boom and tackle located on the ship.

Similar apparatus was in use for the moving of coal by gravity through chutes so constructed as to be moved either vertically or horizontally and supported by cable or boom.

Before 1904–5 it was common practice for architects' specifications to require that concrete used in building operations be mixed "dry," that is, of a consistency which would not admit of its ready flow by gravity. This practice was resisted by engineers and contractors because it was cheaper and easier to use "wet" concrete, which could be conveniently distributed through chutes and conduits. For reasons which need not now be inquired into in detail, the use of "wet" concrete in various types of structural work had become a recognized practice by 1905. Co-temporaneously with its increasing use and, as the proofs show, an active agency in inducing it, was the practical adaptation of the apparatus, used in moving and distributing grain and other substances of simliar mobility, to all the requirements for the convenient handling and distribution of concrete by gravity in building operations. Without attempting to refer to all of the numerous instances of that adaptation it will be sufficient to indicate some of the more significant examples which mark its progress.

As early as 1902–3 in the construction of the Ingalls Building in Cincinnati, an apparatus was used for elevating concrete to a hopper from which it was discharged through movable metal chutes supported by horses, to varying required points on the floor area of a building in process of erection. This apparatus was described in The Engineering News of July 30, 1903.

In 1906 a like apparatus was used in the construction of a reinforced concrete building in Norfolk, Virginia. Concrete was elevated in a tower to a hopper which was capable of being elevated from story to story as the work progressed. The chute attached to the mouth of the

hopper by swivel was capable of lateral movement and supported by block and tackle attached to the top of the tower.

There is proof of the use at San Francisco harbor in 1906, in concrete construction, of substantially similar apparatus placed on a scow. It involved the use of a chute moved into different positions by a supporting boom.

In June, 1907, a similar apparatus was used in the construction of a steel framed concrete building in St. Louis, although sketches, prepared at the time, called for a swinging boom for the support of a conduit, the boom was in practice dispensed with, as the steel skeleton of the building afforded a means of supporting the conduit.

In the summer of 1908 an appliance of the same sort was used in the construction of a concrete building at St. Joseph, Mo., the hopper being capable of elevation within the tower as required and the movable chute being supported by cables radiating from the top of the tower.

In 1906 the Great Lakes Dredge & Dock Co. built at Gary, Indiana, a concrete cofferdam using a mixer placed on a car running on a trestle, with a wooden hopper beneath the mouth of the mixer and a movable steel chute extending from the hopper into the cofferdam, the chute being secured by ropes or wires extending to the bracing.

In 1907 in connection with this same construction the apparatus was modified by the addition of a mast to which was attached a swinging boom from which the movable steel chute was suspended. This was in successful operation several months and was constructed by a man who had never seen concrete handled in this manner but who was familiar with grain elevator practice.

In July, 1908, five months prior to the filing of the Callahan application, an apparatus comprising the elements enumerated in the claims in suit was used success-

fully in constructing a concrete building in St. Louis. The hopper was vertically adjustable, but the boom was mounted at the top of the tower, so that there was no necessity for change of its location vertically as the building progressed. The use of a swinging boom attached to a building in process of erection or to a construction tower, which boom was in practice raised from time to time as convenience of operation required, was then a well-known device.

In this state of the art, Callahan and several others, in 1906–1909, applied for patents on combinations for the conveying of wet concrete through spouts or chutes; their applications resulting in interferences.

Without more extensive examination of the record this state of the proof leads us irresistibly to the conclusion that the combination described in the Callahan application does not constitute an invention.

The observations of common experience in the mechanical arts would lead one to expect that once the feasibility of using " wet " concrete in building operations was established, the mechanical skill of those familiar with engineering and building problems would seek to make use of known methods and appliances for the convenient handling of this new building material.

To say nothing of the universally known methods and appliances for raising and distributing water, there were ready at hand widely used and generally understood appliances for the elevation and distribution of mobile substances, such as grain and coal, which involved, both in principle and in practical detail, all the elements described in the Callahan claims. Failure to make use of these obviously applicable methods and appliances in combination, suitable to the particular work in hand, in dealing with a new plastic material capable of similar treatment, would, we think, have evidenced a want of ordinary mechanical skill and of familiarity with con-

struction problems and methods. The adaptation independently made by engineers and builders of these familiar appliances to the movement and distribution of wet concrete in building operations and the independent patent applications, within a comparatively short space of time, for devices for that purpose are in themselves persuasive evidence that this use in combination of well known mechanical elements was the product only of ordinary mechanical or engineering skill and not of inventive genius. *Atlantic Works* v. *Brady,* 107 U. S. 192. It is but "the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal." *Hollister* v. *Benedict Manufacturing Co.,* 113 U. S. 59, 72. This progressive adaptation, much of which preceded and some of which was co-temporaneous with the Callahan adaptation, of well known devices to new but similar uses "is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." *Hollister* v. *Benedict Manufacturing Co., supra,* at page 73. No novel elements were used by Callahan in his device. We are unable to find that their use in combination in it was more than the application to them of mechanical skill in the course of a natural development and expansion of the art. The decree of the court below is

Affirmed.

SOUTHERN ELECTRIC COMPANY *v.* STODDARD, SUPERINTENDENT.[1]

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

No. 42. Submitted October 14, 1925.—Decided November 23, 1925.

In proceedings brought by the New York Superintendent of Insurance to liquidate the business of a New York insurance company, the claim of a creditor who had recovered judgment against the company in a federal court in another State, to payment out of existing assets, was disallowed by the Supreme Court of New York, Special Term, upon the ground that, under the New York insurance law, the claim, having arisen after the date when the property was taken over for liquidation, must be postponed to claims previously arisen. The order of disallowance was affirmed by the Appellate Division. The creditor throughout the proceedings invoked the full faith and credit clause, the contract clause, and the Fourteenth Amendment of the Federal Constitution. *Held,* in view of an interpretation by the New York Court of Appeals—

1. That the order of the Appellate Division was an order entered upon a decision which finally determined an action or special proceeding within § 588, paragraph 1, of the New York Civil Practice Act, and, under that paragraph, because of the constitutional questions involved, was appealable as of right to the Court of Appeals. P. 188.
2. Therefore, under § 237, Judicial Code, as amended September 6, 1916, the claimant not having applied to the Court of Appeals, a writ of error from this Court to the Appellate Division would not lie. *Id.*

Writ of Error to 207 App. Div. (N. Y.) 842, 893, dismissed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, which affirmed an order of the Special Term disallowing a judgment creditor's claim against an insurance company, in liquidation proceedings.

Messrs. Arthur F. Gotthold, Thomas M. Fields, Frank J. Hogan and *Walter W. Gross* were on the brief, for plaintiff in error.

[1] James A. Beha, Superintendent of Insurance, was substituted as defendant in error in this Court.

Messrs. Clarence C. Fowler, James A. Beha and *Alfred C. Bennett* were on the brief, for defendant in error.

Mr. Chief Justice Taft delivered the opinion of the Court.

Unkefer & Co., a Delaware corporation, on October 1, 1915, entered into a contract with the United States to erect a post office and court house building in Charlotte, North Carolina, and furnished a bond in accordance with the Act of February 24, 1905, c. 778, 33 St. 811. There were two sureties upon the bond, the Casualty Company of America, of New York, and the Southwestern Insurance Company, of Oklahoma, the former being liable under the terms of the bond for $50,000, and the latter for $46,000. Unkefer & Co. made various contracts for supplies and materials, including a contract with the Southern Electric Company for $201.23. The supplies were used in the post office building and were delivered before the middle of June, 1917. Unkefer & Co. became insolvent at that time and ceased work. Under the provisions of the bond, the Casualty Company became liable for 52 per cent. of the claim. Suit was brought by the Southern Electric Company against the Casualty Company in the United States District Court for the Western District of North Carolina, and a judgment in the sum of $105.50 was recovered August 4, 1921.

Meantime by order of the Supreme Court of the State of New York, dated May 4, 1917, the Superintendent of Insurance of that State took possession of the property of the Casualty Company of America and proceeded to liquidate its business in accordance with the statutes under which it was organized, and as liquidator made a report of the claims against the company to the Supreme Court of New York. A duly authenticated record of the judgment in favor of the Southern Electric Co. in the United States court for the Western District of North Carolina was filed as a claim with the liquidator against

the Casualty Company. He reported that it could not be allowed because it did not arise until after the date when the property of the Casualty Company had been taken over for liquidation and must therefore be classed under the New York statute as a contingent claim not to be paid out of the existing assets—until after the claims which had arisen before liquidation had been paid. An order of reference to consider the objections to the report of the liquidator was made in the Supreme Court, and they were sent to a referee to be heard. He sustained the report of the liquidator. The disallowance was approved by the Supreme Court and on appeal was taken to the Appellate Division, which affirmed the order of the special term. The claimant then moved for leave to appeal to the Court of Appeals, and that motion was denied by the Appellate Division. It is from the order of the Appellate Division affirming the report of the Superintendent of Insurance disallowing the claim that this writ of error is taken.

Both before the referee in the Supreme Court and the Appellate Division the claimant maintained that the refusal to allow the claim based on the judgment of the Western District of North Carolina was a denial of full faith and credit, in violation of Article IV, § 1 of the Federal Constitution; that § 63 of the insurance law of the State of New York, by which all the assets of the Insurance Company were appropriated to pay claims earlier than the North Carolina judgment here sought to be enforced, was in violation of the Fourteenth Amendment in requiring a classification so unreasonable as to take claimant's property without due process of law, and that the New York statute impaired the obligation of a contract, in violation of Article I, § 10, clause 1, of the Constitution.

A motion is made to dismiss this writ of error on the ground that it has not issued to the court of last resort

of the State of New York as required by § 237 of the Judicial Code, as amended by Act of September 6, 1916, 39 St. 726, c. 448. By the first paragraph of § 588 of the Civil Practice Act of New York, an appeal to the Court of Appeals may be taken as of right from a judgment or order entered upon the decision of the Appellate Division which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the State or of the United States. In this case there is directly involved the construction of the Constitution of the United States, and therefore it would seem that an appeal could have been taken from the Appellate Division as of right to the Court of Appeals, but this was not done. Instead, application was made to the Appellate Division to certify that a question of law was involved in the case which ought to be reviewed by the Court of Appeals, and that certificate the Appellate Division declined. Thereafter no application was made to the Court of Appeals to allow an appeal. Paragraph 4 of § 588 provides that an appeal may be taken to the Court of Appeals from a judgment or order entered upon the decision of the Appellate Division which finally determines an action or special proceeding, but which is not appealable as of right under sub-division 1 of the section, where the Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or where in case of the refusal so to certify an appeal is allowed by the Court of Appeals.

It is said that this order of disallowance could not have been appealed to the Court of Appeals, either under the first or fourth paragraph of § 588, because it is not an order entered upon the decision of the Appellate Division which finally determines an action or special proceeding, and that this was so held in the case of *The People* v. *American Trust Company,* 150 N. Y. 117. We find, however,

that on December 12, 1922, in the matter of a claim of one Badgley, in this same proceeding for the liquidation of the Casualty Company of America, the Court of Appeals (234 N. Y. 503) entertained an appeal from the Appellate Division of the first judicial department, which had reversed an order of the special term allowing the claim of the appellant therein and dismissed the claim. This was not by permission of the Appellate Division and must therefore have been found by the Court of Appeals to be within the 4th paragraph of § 588, an order upon a decision of the Appellate Division "finally determining an action or special proceeding." This clearly shows that in the view of the Court of Appeals of New York if the order of disallowance in this case involved a federal constitutional question as it did on this record, it was directly appealable to that court from the Appellate Division under the first paragraph of § 588. The claimant has failed to make proper application to the state court of final resort and for that reason the writ must be dismissed.

Motion granted.

CENTRAL UNION TELEPHONE CO. *v.* CITY OF EDWARDSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 37. Argued October 13, 1925.—Decided November 23, 1925.

1. A system of state appellate practice (as in Illinois) which allows review of constitutional questions, with any others involved in the case, by direct appeal to the Supreme Court of the State, but provides that if the appeal be taken to an intermediate court, empowered to review non-constitutional questions, the constitutional questions shall be waived, is reasonable and valid as applied to a suitor who lost his opportunity to have his claim under the Federal Constitution reviewed, in the state court or here, by appealing to the intermediate court. P. 194.
2. An Illinois statute providing that "cases . . . in which the validity of a statute or construction of the Constitution is in-

volved" shall be taken directly to the Supreme Court of the State, was construed by that court as including cases involving the federal as well as those involving the state constitution, with the result that a party asserting a federal right was adjudged by that court to have waived it by appealing in the first instance to the intermediate appellate court. *Held* that a writ of error from this court to the state Supreme Court must be dismissed, since the construction, even though not anticipated by any earlier decision, was not an unfair or unreasonable one amounting in its application to an obstruction of the federal right, and therefore this court was bound by it. P. 195.

Writ of error to review 309 Ill. 482, dismissed.

ERROR to review a judgment of the Supreme Court of Illinois, affirming a judgment of the Illinois Appellate Court, which sustained a recovery by the City in an action against the Telephone Company to collect taxes levied on its poles in the city streets. See also 302 Ill. 362; 227 Ill. App. 424.

Mr. William Dean Bangs, with whom *Mr. James Dwight Dickerson* was on the brief, for plaintiff in error.

This Court is not bound by the determination of a state court that a federal constitutional question has been waived. *Davis* v. *Wechsler,* 263 U. S. 22; *American Ry. Express* v. *Levee,* 263 U. S. 19; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530; *Union Pacific Ry.* v. *Public Service Commission,* 248 U. S. 67; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Davis* v. *O'Hara,* 266 U. S. 314; *Aetna Life Insurance Co.* v. *Dunken,* 266 U. S. 389.

Where there is a plain assertion of a federal constitutional right in a lower court, local rules as to how far it will be reviewed on appeal do not prevail. *Love* v. *Griffith,* 266 U. S. 32; *Davis* v. *Wechsler, supra; Ward* v. *Love County,* 253 U. S. 17, 22. The jurisdiction of this Court is determined by § 237 Judicial Code as amended. *Harrison* v. *St. L. & S. F. R. R.,* 232 U. S. 318, 328. The federal constitutional right was "drawn in ques-

tion" within the meaning of this section. *Spies* v. *Illinois,* 123 U. S. 131; *Leigh* v. *Green,* 193 U. S. 79; *Grannis* v. *Ordean,* 234 U. S. 385. An ordinance is a "statute" within the meaning of this section.

Waiver implies intentional relinquishment of a right. *Perrin* v. *Parker,* 126 Ill. 201; *Star Brewery Co.* v. *Primas,* 163 Ill. 652. The constant assertion of the federal right can not have the effect of a waiver. *Atlantic Coast Line* v. *Burnette,* 239 U. S. 199; *Davis* v. *Wechsler, supra.*

Messrs. Mark Lester Geers, George Allen Lytle and *John Frederick Eeck* were on the brief, for defendant in error.

Mr. Chief Justice Taft delivered the opinion of the Court.

The City of Edwardsville, in July 1882, by ordinance granted to the Central Union Telephone Company a right in its streets to erect and maintain the necessary poles and wires for the operation of a telephone system. The Central Telephone Company transferred its rights to the Central Union Telephone Company. Later the city council adopted a resolution requesting the Central Union Telephone Company to furnish to the city, free of charge, one telephone and such additional telephones as the city council might call for at a reduction of 25 per cent. from the regular rates, and the right to attach, without charge, fire and police alarm wires to the top cross-arm of each pole. The company filed its acceptance of this resolution as provided in the resolution. It maintains 1000 poles in the City of Edwardsville. The city in 1914 passed an ordinance which in effect imposes a tax of 50 cents a pole upon every person, firm or corporation owning, controlling or occupying any such poles in the streets of Edwardsville. The city brought

suit for the amount due under the tax law at 50 cents a pole. A jury was waived, and after a hearing the court entered judgment for $3,000 against the company. The Circuit Court held that neither the ordinance by which the Central Telephone Company was permitted to occupy the streets, nor the subsequent resolution accepted by the Central Union Telephone Company, constituted a contract, and that the tax law was not therefore a violation of the Constitution of the United States in impairing a contract, or in depriving the company of property without due process of law. Upon this record an appeal was taken to the Appellate Court of the State for the Fourth Circuit. That court transferred the case to the Supreme Court of Illinois, on the ground that the Appellate Court had no jurisdiction of it. *City of Edwardsville* v. *Central Union Telephone Co.,* 302 Ill. 362. The Supreme Court held that as the appeal had been taken to the Appellate Court and errors assigned which that court had jurisdiction to hear, the case was improperly transferred to the Supreme Court, and remanded it to the Appellate Court, which gave judgment affirming the Circuit Court. The plaintiff then obtained a certiorari from the Supreme Court to review the decision of the Appellate Court, and in that hearing the Supreme Court declined to hear the constitutional questions on the ground that they had been waived by the failure to carry the case from the Circuit Court directly to the Supreme Court to review those questions.

Paragraph 89, § 88, 3d Starr & Curtiss, Annotated Illinois Statutes, p. 3114, reads as follows:

" Par. 89. Appeal from trial court to appellate court—From trial court to supreme court. § 88. Appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts and city courts in all criminal cases, below the grade of felony, shall be taken directly to the appellate

court, and in all criminal cases above the grade of misdemeanors, and cases in which a franchise or freehold or the validity of a statute or construction of the Constitution is involved; and in all cases relating to revenue, or in which the State is interested as a party or otherwise, shall be taken directly to the supreme court."

The construction of this statute has been uniformly held to be, that where a question involves the Constitution, it must be taken on error or appeal to the Supreme Court, and that if it be taken to the Appellate Court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. *Indiana Millers Ins. Co.* v. *People,* 170 Ill. 474; *Robson* v. *Doyle,* 191 Ill. 566; *Case* v. *Sullivan,* 222 Ill. 56; *Poe* v. *Ulrey,* 233 Ill. 56; *Haas Co.* v. *Amusement Co.,* 236 Ill. 452; *Scott* v. *Artman,* 237 Ill. 394; *Comm'rs* v. *Shockey,* 238 Ill. 237. The city, therefore, moves to dismiss the writ of error.

It is objected on behalf of the plaintiff in error that the words " validity of a statute or construction of the Constitution " refer to the constitution of Illinois and not to the Federal Constitution. The Supreme Court of Illinois has held otherwise in this case. 309 Ill. 482, 483, 484.

But counsel for plaintiff in error insist that it is for this Court to determine finally whether a litigant in a state court has waived his federal right, citing *Davis* v. *O'Hara,* 266 U. S. 314; *Davis* v. *Wechsler,* 263 U. S. 22; *American Railway Co.* v. *Levee,* 263 U. S. 19; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Union Pacific Railway Company* v. *Public Service Commission,* 248 U. S. 67. But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a

reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John* v. *Paullin,* 231 U. S. 583, 585: "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law,"—and many cases are there cited.

It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court. There is some complaint that counsel could not infer that the constitutional questions referred to in the statute were federal questions, because the Supreme Court of Illinois had not so decided before this case. We have not been able to determine from the Illinois decisions cited above whether any of the constitutional questions held to be waived therein were federal until the present case. It is not, however, a forced or strained interpretation to hold that "cases . . . in which the validity of a statute or construction of the Constitution is involved" include validity under, or construction of, both constitutions. When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case.

The case of *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, is relied upon to sustain the writ in this case. In that case there was a trial by jury, resulting in a verdict in favor of the plaintiff. The defendant reserved its constitutional points and appealed from the resulting judgment to the state Supreme Court, which refused to take jurisdiction, on the ground that all constitutional questions had been decided by it on a former appeal, and because the verdict, being only for $1,500, was less than the jurisdictional amount required by the statute, transferred the cause to the St. Louis Court of Appeals for final disposition. The St. Louis Court of Appeals, in conformity to the former opinion of the Supreme Court on the constitutional questions, affirmed the judgment, and refused the application for certification of the case to the Supreme Court. A writ of error from this Court to the St. Louis Court of Appeals followed, and a motion to dismiss the writ was made on the ground that the judgment of the Court of Appeals was not that of the highest court of the State in which a decision in the suit could be had. The motion was denied and the case considered on its merits. There is nothing in that case which conflicts with granting the motion to dismiss in this. The plaintiff in error had exhausted every means to test the question in the Supreme Court of Missouri, and had lost; and on the second hearing a writ of error properly lay to the highest court to which the case could be taken, which was the intermediate court. Here, the law of the State under the statute, as many times construed, required the appeal on constitutional grounds to be taken directly from the Circuit Court to the Supreme Court of Illinois. It elected, instead, to go to the Appellate Court, with the consequences well understood, and thereby it waived the question which it now wishes to present here.

The motion to dismiss the writ of error is granted.

UNITED STATES v. BOSTON INSURANCE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 29. Argued October 9, 1925.—Decided November 23, 1925.

The Revenue Act of 1916, § 12, Par. "First," subdiv. (c), in defining deductions from gross income allowable in ascertaining the net income of domestic corporations, included, in the case of insurance companies, "the net addition, if any, required by law to reserve funds." *Held*, that "reserve funds" does not embrace funds held by a fire and marine insurance company, as required by the New York Superintendent of Insurance, to cover accrued but unsettled claims for losses. *McCoach* v. *Insurance Co.*, 244 U. S. 585, followed; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, explained and in part disapproved. P. 202.

58 Ct. Cls. 603, reversed.

APPEAL from a judgment of the Court of Claims allowing recovery of an amount exacted of the Insurance Company as income taxes.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. Abram R. Serven, with whom *Messrs. John G. Carter* and *John W. Smith* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellee, a domestic corporation, carries on the business of issuing fire and marine insurance policies in Massachusetts, New York and elsewhere. It sued to recover $8,755.92, exacted as income tax for 1916 (Act Sept. 8, 1916, 39 Stat. 756), and maintains that the addition made during the year to its reserve funds, "in the amount and on account of its liabilities for unsettled loss claims," as

required by the Superintendent of Insurance for New York, should have been deducted from gross income in order to determine the net sum subject to taxation. The amount of the deduction claimed was ascertained by subtracting $775,900.10, the reserve for loss claims on December 31, 1915, and required as condition precedent to doing business within New York during the following year, from $1,336,578.53, the amount necessary therefor during 1917.

The Revenue Act of 1916 levied an annual tax upon the net income received during the preceding year by domestic insurance companies, and provided—

"SEC. 12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

"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.

"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 or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computa-

tion are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury . . . and (c) *in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts.*"

During 1915, 1916 and 1917, as a condition precedent to the right to do insurance business in the State, the New York Superintendent of Insurance required the following reserves—

"*Stock, fire and marine insurance companies*

"A. Loss reserve, including all unpaid losses and estimated expense of investigations and adjustment thereof, less admitted reinsurance.

"B. Reserve for unearned premiums as required by statute and departmental regulations, i. e. (*a*) on fire insurance risks a sum equal to the actual unearned premium on the policies in force calculated on the gross sum without any deduction except for admitted reinsurance, and (*b*) on marine hull risks calculated in the same manner and on marine cargo risks 100 per cent. of the last month's gross premium writings.

"C. Reserve for all other outstanding liabilities due or accrued.

"*Stock, casualty, surety and credit insurance companies*

"A. Loss reserve, including all unpaid losses and estimated expense of investigation and adjustment thereof, whether on account of compensation and liability insurance or otherwise, less admitted reinsurance, and such additional contingent reserves for losses as may be required by the Superintendent of Insurance.

"B. Unearned premium or reinsurance reserve calculated as required by statute and all premiums paid in advance at 100 per cent.

"C. Reserve for all other outstanding liabilities due or accrued."

The Superintendent did not direct that funds to meet liabilities should be kept separate and distinct from other assets. They were specified by book entries as (1) reserves to meet liabilities for unearned premiums, (2) unpaid loss claims and (3) all other outstanding liabilities, due or accrued. He required all companies to keep on hand sufficient assets to meet every liability.

The opinion of the Court of Claims, 58 Ct. Cls. 603, states:

"The one question, and the only one properly raised, is whether, within the meaning and intent of the Federal revenue act, the net additions so made by the plaintiff to its reserve funds in pursuance of the requirements of the superintendent of insurance for New York, to cover accrued but unsettled loss claims, may be said to be such a fund as comes within the meaning of 'reserve funds,' as those terms appear in the revenue act.

"The defendant does not dispute that the sum involved was reserved, nor that it was required by the proper insurance authorities of New York to be reserved. Defendant's argument is predicated upon an assertion that Congress in exempting net additions to reserve funds, clearly intended 'to exempt only such funds as are technically known and universally understood in the insurance world as reserve funds, and as thus understood the terms have a well defined, limited, and certain status and meaning."

Following *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 350, that court held the "loss claims item" was a "net addition" required by law to be made to "reserve funds" within the meaning of the Act of 1916 and gave judgment for the appellee.

We think *McCoach* v. *Insurance Co. of North America,* 244 U. S. 585, 589, is conclusive of the issue here presented; and appellee's claim must be denied. There a fire

and marine insurance company sought to recover the tax assessed upon the addition during the year to "reserve funds" held against accrued but unpaid losses. Through Mr. Justice Pitney this court said:

The question is "whether, within the meaning of the Act of Congress, 'reserve funds,' with annual or occasional additions, are 'required by law,' in Pennsylvania, to be maintained by fire and marine insurance companies, other than the 'unearned premium' or 'reinsurance reserve,' known to the general law of insurance. . . .

"It appears that under this legislation, and under previous statutes in force since 1873, the insurance commissioner has required plaintiff and similar companies to return each year, as an item among their liabilities, the net amount of unpaid losses and claims, whether actually adjusted, in process of adjustment, or resisted. And, although this practice has not been sanctioned by any decision of the Supreme Court of the State, it is relied upon as an administrative interpretation of the law.

"Conceding full effect to this, it still does not answer the question whether the amounts required to be held against unpaid losses, in the case of fire and marine insurance companies, are held as 'reserves,' within the meaning of the Pennsylvania law or of the Act of Congress, however they may be designated upon the official forms. As already appears, the Pennsylvania Act specifically requires debts and claims of all kinds to be included in the statement of liabilities, and treats them as something distinct from reserves. The object is to exercise abundant caution to maintain the companies in a secure financial position.

"The Act of Congress, on the other hand, deals with reserves not particularly in their bearing upon the solvency of the company, but as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. There is a specific

provision for deducting 'all losses actually sustained within the year and not compensated by insurance or otherwise.' And this is a sufficient indication that losses in immediate contemplation, but not as yet actually sustained, were not intended to be treated as part of the reserve funds; that term rather having reference to the funds ordinarily held as against the contingent liability on outstanding policies.

"In our opinion the reserve against unpaid losses is not 'required by law,' in Pennsylvania, within the meaning of the Act of Congress."

It follows from *McCoach* v. *Insurance Co.* that the permitted deductions specified by § 12, Act 1916, do not necessarily include anything which may be denominated "reserve fund" by state statute or officer. We there distinctly ruled that the "reserve fund" of the Federal Act did not include something held by a fire and marine insurance company to cover accrued but unsettled claims for losses. We adhere to and reaffirm that doctrine. How far it must be modified, if at all, in respect of insurance companies which issue casualty, surety or liability policies or similar obligations is not now before us.

Our opinion in *Maryland Casualty Co.* v. *United States* contains the following passage [p. 348]: "Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the Government, in its amended returns, allowed these two items, but rejected the third, 'Loss claims reserve.' The Court of Claims, somewhat obscurely, held that the third item should also be allowed. This 'Loss claims reserve' was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the Insurance Department of Pennsylvania, pursuant to statute, has at all times

since and including 1909 required claimant to keep on hand, as a condition of doing business in that State, 'assets as reserves sufficient to cover outstanding losses,' justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved." Upon a re-examination of the record it becomes plain that we misapprehended the opinion and ruling of the lower court; also that the reason advanced to support our conclusion is insufficient. The Commissioner of Internal Revenue had refused to allow the deduction claimed because of addition to the reserve for unpaid loss claims (except liability claims—the net addition to which reserve was allowed). The Court of Claims, in a perplexing opinion, approved the Commissioner's action. The finding that the Insurance Department of Pennsylvania, pursuant to statute, had at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in the State, "assets as reserves sufficient to cover outstanding losses," without more, was not sufficient to justify the deduction of the reserve as one required by law to be maintained, within the meaning of the Act of Congress. This had been announced by *McCoach* v. *Insurance Co.*

The *Maryland Casualty Company's Case* involved many items of complicated returns and reassessments. The record is confused, but the findings supply no adequate ground for any holding contrary to the general doctrine which we had theretofore approved. The principal business of the company was employers' liability, accident and workmen's compensation insurance, and it may be that considering certain state statutes, practice and general understanding, the term "reserve fund" when used relative to the affairs of such a company should be given broader significance than when it refers only to fire and marine insurance. But if relied upon these things should be shown.

Appellee's claim is not well founded and the judgment of the Court of Claims must be

Reversed.

EDWARDS, COLLECTOR, *v.* DOUGLAS ET AL., EXECUTORS.

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

No. 129. Argued April 17, 1925.—Decided November 23, 1925.

Section 31 (b), added by the Revenue Act of 1917 to the Revenue Act of 1916, provides: "Any distribution made to the shareholders . . . of a corporation . . . in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, . . . but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen. . . ." Construing this, *Held:*

1. Where the net profits of a corporation, during the fiscal year in which dividends are paid, are sufficient to cover such dividends, the term "most recently accumulated undivided profits" applies to such current earnings, and the dividends must be deemed to have made from them and are subject to the income tax rates of that year, although, when the distribution was made, there were other funds, adequate to meet it, carried in the surplus account of the corporation, as made up to the end of the preceding fiscal year. Pp. 207, 215, 217.
2. The term "surplus" as employed in corporate finance and accounting, designates an account on the books, representing the net assets of the corporation in excess of all liabilities, including its capital stock. P. 214.
3. As used in § 31 (b) *supra*, "surplus" means that part of the surplus which was derived from profits, which, at the close of earlier annual accounting periods, were carried into the surplus account as undistributed profits. *Id.*

4. "Undivided profits" has not acquired a fixed meaning in corporate finance and accounting; in § 31 (b) *supra,* there is reason to conclude, it refers to profits which have neither been distributed as dividends nor carried to surplus account upon the closing of the books,—that is, to current undistributed earnings. P. 214.
5. The general aim of Congress, when enacting the above legislation, was to make the dividend, in whatever year paid, bear the tax rate of the year in which the profits of which it was a distribution had been earned, and for this purpose to treat as a unit the profits of the whole tax year; coupled with which was the special aim of making the war profits pay the high war taxes, to which end it was essential that the law, in determining the applicable tax rate, should neither accept any declaration of the corporation as to what year's profits were being distributed, nor adopt the earliest year (since March 1, 1913) of which there were accumulated profits available for distribution. P. 216.

298 Fed. 229, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court adverse to the plaintiffs, Douglas et al., in their action to recover from the defendant Edwards the amount of an income tax assessment which they paid to him, as Collector, under protest. See 287 Fed. 919.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Mr. Richard S. Holmes,* Special Assistant to the Attorney General, were on the brief, for petitioner.

Messrs. Matthew C. Fleming and *Paul Armitage,* with whom *Messrs. Archibald Douglas* and *Edward Holloway* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 31 (b), added by § 1211 of the Revenue Act of 1917, c. 63, Title XII, 40 Stat. 300, 338 to the Revenue Act of 1916, provides: "Any distribution made to the

shareholders . . . of a corporation . . . in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, . . . but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen. . . ."

James Douglas received from Phelps Dodge Corporation in September and December, 1917, two dividends, called at the time "depletion dividends," aggregating $328,400. He, and later his estate, claimed that these dividends were not taxable because they were a return of capital, not income. The Commissioner of Internal Revenue insisted that they were taxable, and assessed the tax at the 1917 rate. It amounted to $173,579.72. The estate paid the tax under protest, and brought, in the federal court for southern New York, this suit against the Collector to recover the full amount so paid. The contention was repeated that the dividends were not taxable because not constituting income. In addition, it was claimed that, if they were taxable at all, it was not at the 1917 rate, but at the rate for 1916. The income tax rate imposed upon individuals for the calendar year 1917 by the 1917 Revenue Act was much higher than that imposed for the year 1916 by the Act of September 8, 1916, c. 463, Part I, 39 Stat. 756. The District Court concluded that the dividends were income and that they were taxable at the 1917 rate. It entered judgment for the Collector. 287 Fed. 919.

This judgment was reversed by the Circuit Court of Appeals. It agreed with the District Court that the dividends were not a distribution of capital. But it found

that there was on hand on December 31, 1916, in the surplus account, a balance of profits earned in that year amply sufficient to enable the corporation to pay these dividends out of such surplus; held that by reason thereof the dividends received by Douglas should have been taxed under § 31 (b) at the 1916 rate; and ordered that a mandate issue directing the District Court, upon a new trial, to enter judgment for the Douglas estate in accordance with its conclusions. 298 Fed. 229. This Court granted a writ of certiorari. 266 U. S. 596. The assertion of the estate that the dividends were a distribution of capital was not renewed in this Court; and the character assigned to the dividends by the corporation was treated here as of no legal significance. The sole question requiring decision[1] is whether these dividends paid in 1917 shall be deemed to have been paid out of the earnings of that year or out of an accumulated surplus built up in 1916 and earlier years. The question does not concern the corporation. The stockholder is interested only because he is an income tax payer.

The Government contends that the phrase "most recently accumulated undivided profits or surplus" in § 31 (b) includes current earnings of the year in which the dividends are paid; and that, as the earnings of 1917 were ample to pay these dividends, the 1917 dividends are conclusively presumed to have been paid out of 1917 earnings. The fiscal year of Phelps Dodge Corporation coincides with the calendar year. The corporation earned in 1917 a net profit of $16,742,487.06. The two distributions here involved amounted to only $3,600,000. The corporation paid from time to time during 1917, in all, ten

[1] The estate had also contended that the word "deemed" merely "gave rise to a rebuttable presumption, subject to be rebutted by showing the fund out of which the corporation actually paid the dividend." This contention was denied by both lower courts and was not made in this Court.

dividends aggregating $14,400,000. A large excess remained, to be added to the surplus account on closing the books as of December 31, 1917. There was no suggestion by the Douglas estate that, when these dividends were paid, the current undistributed 1917 earnings of the corporation then accrued were in fact insufficient to pay the two dividends. The District Court found that, under a *pro rata* apportionment, they were " more than sufficient." It is not suggested that the approximate amount of the undivided current earnings of 1917 accrued and undivided at the times these dividends were paid was not in fact known to be sufficient for this purpose. Nor is it suggested by the Douglas estate that the exact facts, or the knowledge thereof by the corporation at the times when the dividends were declared or paid, are of legal significance.

The claim of the Douglas estate is that the current profits are not, within the meaning of the Act, the " most recently accumulated undivided profits or surplus," from which the distributions " shall be deemed to have been made;" and that what Congress intended was that a dividend should be deemed to have been paid from the most recent accumulation of profits which, before payment of the dividend, appeared on the books as having been added to the undivided profits or surplus account of a fiscal year. The argument is that the income tax is levied generally with reference to the period of a full year; that the net financial results of the full calendar and fiscal year of a corporation cannot be known until the expiration of the fiscal year; that the words used by Congress have in corporate accounting a well known technical meaning; that this meaning is earnings which have been determined by the taking of inventories and the balancing of books to constitute " undivided profits or surplus "; that it was after December 31, 1917, before the net financial results of the operations of that year were formally and

definitely determined by this corporation by the usual taking of the annual inventory, the balancing of the books, and the carrying of the "undivided profits or surplus" to the appropriate account; that the most recently accumulated undivided profits so appearing was the undistributed balance of the profits earned in the year 1916, which was shown on the books as closed under date of December 31, 1916, and appeared in the surplus account; that this balance was sufficient in amount to meet these two dividends; and that it must be deeemd to have been applied in paying them. In short, the claim of the Douglas estate is that Congress, in providing by § 31 (b) that dividends shall be deemed to have been paid "from the most recently accumulated undivided profits or surplus," meant from such balance as, at the time of the payment of the dividend, is shown by the undivided profits or surplus account of the preceding fiscal year.

The Douglas estate, apparently, does not contend that under the 1917 Act dividends are not to be taxed at all unless there was an existing balance of taxable profits in the surplus or undivided profits account from which they can be considered to have been paid. To have so contended would have been to impute to Congress the intention of exempting from taxation the dividends received in 1917 by those individuals who were stockholders in corporations which earned in 1917 large sums and paid them out in dividends during that year,[2] but which had no earned surplus at the close of their fiscal year on De-

[2] This, as a business matter, could easily be done, and is, in fact, done by many corporations. Nearly every business with a well developed accounting system can, at any time, without the formal periodic inventory or closing of its books usual at the end of a fiscal year, determine approximately the amount of its current earnings, the amount accrued since the beginning of its fiscal year, and the part thereof undistributed. Many corporations do make such approximate ascertainment of profits monthly, or oftener. And, relying upon their system of cost-accounting, they make distributions of current

cember 31, 1916, or whose earned surplus consisted wholly of profits earned prior to March 1, 1913. The Douglas estate grafts upon the section an implied condition or limitation. Its position seems to be that § 31 (b) applies if, and only if, at the time of the payment of the dividend, there was on hand an undistributed part of the taxable earnings of some prior fiscal year or years. In other words, it asserts that Congress, in providing that a distribution to shareholders should "be deemed to have been made from the most recently accumulated undivided profits or surplus," implied the condition—"if there are such accumulated profits or surplus not exempt from taxation"; that if there are available no such undivided profits or surplus, accrued subsequent to March 1, 1913, the distribution will be considered to have been made from current earnings; that such dividends, in that event, would be taxable as income under § 2 (a) of the Revenue Act of 1916, 39 Stat. 757, as amended by § 1200 of the 1917 Act, 40 Stat. 329; and that the 1917 rates would apply. Whether, at the time these 1917 dividends were paid, there was in the surplus account as of December 31, 1916, such funds sufficient for their payment, as the Court of Appeals appears to have found, we have no occasion to consider. For we are of the opinion that, in any event, the District Court was right in holding that these 1917 dividends must be deemed to have been paid out of the 1917 earnings, and that the stockholder was taxable thereon at the 1917 rate.

The legislative history of § 31 (b) is relied upon by the Douglas estate in support of its construction. On

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earnings without a closing of the books, as the Phelps Dodge Corporation did in 1917.

This is shown by the record to be true of the Phelps Dodge Corporation. It paid during 1917 regular and extra dividends on June 28, on September 28, and on December 28, aggregating $8,100,000, which were declared, in its report to stockholders, to have been paid by it "out of earnings for the year 1917."

the other hand, the Government relies upon the legislative history of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, passed by the same Congress which enacted the Revenue Act of 1917. Enquiries into the detail of legislative history are sometimes helpful in removing a doubt presented by the language used in a statute. *Penn Mutual Life Ins. Co.* v. *Lederer,* 252 U. S. 523, 537. But we have no occasion here to resort to that aid in construing the phrase in question. To ascertain its meaning, we need only bear in mind the general character of the income tax, the specific practices of corporations concerning profits and dividends, the prior income-tax legislation to which § 31 (b) is an amendment, and the time of the latter's enactment.

Ordinarily, an income tax is laid upon all taxable income actually received during the tax-year and the tax is payable at the tax-rate of the year in which it is received, although none of the income may have been earned by the taxpayer during that year, or, where the income consists of dividends, although the corporation may not have earned in that year any part of the profits of which the dividend is a distribution. The Act of October 3, 1913, c. 16, § II, 38 Stat. 114, 166, the first income-tax law enacted after the adoption of the Sixteenth Amendment, was construed by the Treasury Department as embodying this general rule without any exception. Consequently, the Treasury exacted such payment on account of all income received by the taxpayer after March 1, 1913, the effective date of the Amendment, although it appeared that all of the income had been earned before that date either by the taxpayer or by the corporation whose profits were distributed as a dividend. The correctness of the Treasury's construction was questioned; and before the second income tax law was enacted, September 8, 1916, c. 463, Title I, 39 Stat. 756, lower federal courts had in *Lynch* v. *Hornby,* 236 Fed. 661, held the Treasury

construction to be erroneous. There had also been serious contention that, as construed by the Treasury, the provision was, when applied to dividends, both unconstitutional and unjust.[3] These contentions apparently prevailed with Congress when, in framing the 1916 Act, it raised the normal tax-rate from 1 per cent. to 2 per cent. and the maximum additional tax (super-tax) from 6 per cent. to 13 per cent. The 1916 Act, by a proviso to § 2, limited the tax on dividends to distributions "made or ordered to be made by a corporation . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen . . ." Soon after came the War; the great need of the Government for large revenues; and the large war-profits. Congress enacted the 1917 War Income Tax law, which raised the normal tax rate to 4 per cent. and the maximum additional tax to 63 per cent.; and it made the provision retroactive, in the main, to January 1, of that year.

While the 1917 Act was under consideration, it was recognized that this rapid increase in the income tax rate might result in unjust discrimination if no change were made in the then existing rule governing the taxation of dividends. All profits earned by members of a partnership would be taxed at the rate prevailing in the year in which they were earned, although actually withdrawn in a later year when the tax rate was much higher. On the other hand, the tax upon the profits of a corporation earned in 1916 or earlier, would, if paid out in 1917 as dividends, be taxed at the high 1917 rates. There would be similar discrimination among the holders of stock in different corporations. The stockholders in those corporations which had deferred the distribution of profits

[3] The decision of this Court of *Lynch* v. *Hornby*, 247 U. S. 339, which sustained the Treasury's construction and held the act constitutional, was not rendered until June 3, 1918. See also *Peabody* v. *Eisner*, 247 U. S. 347.

earned prior to 1917, either generally from prudence or specifically with a view to stabilizing over a long period the rate of dividend, would be at a great disadvantage as compared with the stockholders in those corporations which had pursued the practice of distributing each year substantially all profits earned. On the other hand, if corporations were left free to determine out of what year's profits dividends paid in 1917 and subsequent years should be deemed to have been made, a corporation with a surplus derived from earnings made prior to 1917 could, while accumulating the profits of the war years, pay dividends on which its stockholders would escape the heavy war tax, by simply declaring that the dividends were payable out of the earnings of earlier years. And if there were still on hand such sufficient surplus earnings from the period prior to March 1, 1913, the dividends would be exempt from all tax. It was apparently to obviate such inequalities that Congress provided by § 31 (b) for an objective consideration of the date when the corporation earned the profits, as well as the date when the taxpayer received his share of them in the form of the dividend. By implying the condition stated above, the Douglas estate escapes from a position which would otherwise impute to Congress the intention of enabling the war profits of 1917 and subsequent years, actually distributed as dividends, to escape from the war taxes. But in implying the condition it imputes to Congress, which was seeking to prevent discrimination against stockholders in those corporations which had on January 1, 1917, surplus profits earned since March 1, 1913, the intention of grossly discriminating in their favor. For if this condition is read into the Act, stockholders in corporations which had no such surplus on December 31, 1917, are taxable on 1917 dividends at the high 1917 rates; while those in corporations which had such surplus are taxable on 1917 dividends at the lower rates of 1916 or earlier years.

Congress did not use the words "surplus account" or "undivided profits account." Its language is "undivided profits or surplus." The word "surplus" is a term commonly employed in corporate finance and accounting to designate an account on corporate books. But this is not true of the words "undivided profits." The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be "paid-in surplus," as where the stock is issued at a price above par. It may be "earned surplus," as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property. See *La Belle Iron Works v. United States*, 256 U. S. 377, 385. As used in § 31 (b) the term undoubtedly means that part of the surplus which was derived from profits which, at the close of earlier annual accounting periods, were carried into the surplus account as undistributed profits. On the other hand, the term "undivided profits" has not acquired in corporate finance and accounting a like fixed meaning. It is not known as designating generally in business an account on the corporation's books, as distinguished from profits actually earned but not yet distributed.[4] Few business corporations establish an "undivided profits" account.[5] By most corporations the term "undivided profits" is employed to describe profits which have

[4] The Committee on Accounting Terminology of the American Association of Public Accountants was for years engaged in preparing a list of definitions. That contained in the Year Book of 1913, pp. 176–227, gives at p. 226 this definition: "Undivided Profits—Earnings or profits which have not been divided among the partners in a firm or the stockholders in a corporation."

[5] The Interstate Commerce Commission prescribes for the various classes of corporations subject to its supervision about 13 different forms of accounts, all of which include a general balance sheet. The number of items on the liability side of this balance sheet varies in

neither been distributed as dividends nor carried to surplus account upon the closing of the books; that is, current undistributed earnings.

That this is the natural meaning of the term "undivided profits" is indicated by the action of both Douglas and his estate.[6] That this is the meaning in which it was used by Congress is confirmed by the use of the expression "earnings and profits" later in the same paragraph,[7] and, also, by the use of the term "undivided profits" in § 207.[8] If it be accepted as the meaning in which Con-

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these several forms from 8 to 33. There is no item "undivided profits" in any form.

By incorporated banks the term is commonly employed to designate the account in which profits are carried more or less temporarily, in contradistinction to the account called surplus in which are carried amounts treated as permanent capital, and which may have been derived from payments for stock in excess of par, or from profits which have been definitely devoted to use as capital. See *Fidelity Title & Trust Co.* v. *United States*, 259 U. S. 304, 308.

[6] Douglas received (see note 2, *supra*) from Phelps Dodge Corporation during 1917 six other dividends, aggregating $738,900, which were confessedly paid out of the 1917 profits—and which were reported by him as taxable in his return to the Commissioner of Internal Revenue. The two dividends here in question were reported by him in his return as not taxable solely on the ground that they were "depletion dividends." It was on this ground only that the estate, in its applications to the Treasury, sought recovery of the amount in suit.

[7] § 31 (b) " . . but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen."

[8] In § 207 of the same Act, which deals with the War Excess Profits Tax on corporations and makes the tax dependent on the amount of the invested capital, the term "undivided profits" is likewise used.

gress used the words, the course to be pursued under § 31 (b) becomes consistent with the general purpose evidenced by other parts of the Act. Its general aim was clearly to make the dividend, in whatever year paid, bear the tax rate of the year in which the profits of which it was a distribution had been earned; and for this purpose to treat as a unit the profits of the whole tax year. In providing measures for the attainment of that aim, it could be of no practical significance whether, at the time of the payment of the dividend, these profits appeared in a surplus or undivided profits account (as the profits earned within part of a year would, where a corporation closed its books monthly, quarterly, or semi-annually) or whether they still rested as current earnings without formal determination or specific allocation.

Besides this general aim, Congress had the special aim of making the war profits pay the high war taxes.[9] To this end it was essential that the law should, in determining the applicable tax rate, disregard any declaration of the corporation as to what year's profits were being distributed. Not only was it essential that every such declaration of the corporation should be disregarded, but also that the dividend should not thereupon be deemed to have been paid from the profits of the earliest year (since March 1, 1913) of which there remained accumulated

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That section, in paragraph (a) 3 defines invested capital as including "paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year."

[9] To discourage the hoarding of profits in order to avoid the tax, two supplemental provisions were incorporated in the Act. By § 3, incorporating § 3 of the Revenue Act of 1916, Congress taxed as income received by the stockholder his proportion of profits earned by the corporation and fraudulently hoarded by it to avoid payment of the tax. By § 1206 (2), adding § 10 (b) to the Revenue Act of 1916, it subjected the corporation to an additional tax of 10 per cent. on undistributed income not employed in the business, unless invested in obligations of the United States.

profits available for distribution. To accomplish the purpose of Congress it was necessary that the dividend be deemed to have been paid out of the available profits or earnings of the most recent year or years. Its intention so to provide was adequately expressed by the use of the phrase "most recently accumulated" in connection with the words "undivided profits or surplus." As, in the case at bar, there were profits of the year 1917 ample to cover all dividends, those here in suit must be deemed to have been paid therefrom.

Reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER, dissent.

LOUISVILLE & NASHVILLE RAILROAD CO. v. SLOSS-SHEFFIELD STEEL & IRON COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 25. Argued April 23, 1925.—Decided November 23, 1925.

1. The case is properly here on writ of error; therefore certiorari is denied. P. 223.
2. Upon review of a judgment enforcing a reparation order made by the Interstate Commerce Commission in lieu of an earlier one, the carrier contended that the later order, though less in amount, was nevertheless void, because by it the commission not merely eliminated items inadvertently included in the earlier order but, without notice to the carrier, or opportunity to be heard, added others which had been inadvertently omitted. *Held* that, assuming it otherwise void, the later order, having been made on petition of the shipper, could be treated as effecting a remittitur of part of the award, and the action would stand as one upon the original order (which was annexed to the complaint and introduced in evidence); appropriate amendments of the pleadings, in that regard, being considered as made in this Court, and alleged errors of the trial court, in ruling on evidence concerning the scope of the later order,

being disregarded as not affecting the substantial rights of the parties. P. 223.

3. A prayer for reparation, though lacking in details of specific claims, will invoke the jurisdiction of the Commission and stop the running of the two year statute of limitations, if such that under ordinary legal procedure the details could be supplied by amendment or bill of particulars. P. 226.
4. Where a claim for reparation, incidental to a proceeding to reduce rates, was first denied by the Commission, but later granted on a petition for rehearing, *held*, that neither the delay of a year and upwards in filing such petition nor the subsequent delay in deciding it deprived the Commission of jurisdiction of the claim and let in the two year statute of limitations, there being then no rule limiting the time for filing the petition, and its entertainment under the circumstances being in accordance with the practice of the Commission. P. 228.
5. A prayer for reparation in a proceeding to reduce future rates should not be limited by a narrow construction to losses suffered by the complaining shipper before the proceeding was begun, thus excluding those to be suffered while it is pending. P. 229.
6. A complaint for reparation which is sufficiently broad to cover relief as to rates over connecting lines, will stop the two year statute of limitations from running for the initial carrier proceeded against, though not for the connecting carriers, until they are made parties. P. 230.
7. The carriers participating in forming an excessive joint through rate are jointly and severally liable for resulting damages to shippers, without regard to the division of the rate among the carriers. P. 231.
8. A manufacturer sold and shipped pig iron f. o. b. destination, to buyers named as consignees in straight bills of lading; the iron was invoiced and charged on the seller's books at the full delivered price, and the consignees physically paid the freight upon acceptance of delivery; the sales contracts, unknown to the carrier, declared the price to be based on the existing freight rate (specifying it) and provided: that the buyers should have the benefit of any decline, but must pay any advance, in the freight rate, that the freight should be paid in cash and the balance (of the price) 30 days from average date of monthly deliveries, and that the seller would not be liable for any overcharge in freight when correct rate was expressed in the bill of lading. The freight rates proving excessive, *Held*, that reparation, in the amount of the excess, was properly

awarded (Interstate Commerce Act § 16,) to the consignor. As a seller in a competitive market, the consignor was directly affected by the rate; the burden of the published rate rested on the consignor under the bill of lading; the consignee, in paying the freight, acted solely as the consignor's agent; and the equities between them were no concern of the carrier. *So. Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, distinguished. P. 234.

9. In an order of reparation for payment of excessive freight charges, interest may be allowed by the Commission from time of such payment. P. 238.

10. A judgment enforcing a reparation order may include interest on the amount of the order from its date, even though that amount be itself in part made up of interest. P. 240.

295 Fed. 53, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed, with a modification, a judgment of the District Court on an order of reparation made by the Interstate Commerce Commission. Certiorari was applied for and denied.

Messrs. E. Perry Thomas and *Charles J. Rixey,* with whom *Messrs. W. A. Northcutt, John S. Stone* and *S. P. Smith* were on the brief, for plaintiff in error.

The plaintiff sustained no damage as the result of the rates being unreasonable; it did not pay and bear the freight charges. *Ramsey & G. Mfg. Co.* v. *Kelser,* 55 N. J. L. 320; *United States* v. *R. P. Andrews & Co.,* 207 U. S. 228; Dissenting Opinion, 40 I. C. C. 738; *Barnett & Record Co.* v. *Fall,* 62 Tex. Civ. App. 391; *Cobbs* v. *Joyce-Watkins Co.,* 287 Mo. 39. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, distinguished. See also *Jennison Bros.* v. *Chicago & N. W. Ry.,* 133 Minn. 268.

In awarding reparation the Commission misconstrued the *Darnell-Taenzer Case, supra.* It appears from the opinions of the Circuit Court of Appeals in that case (221 Fed. 890, 229 Fed. 1022, see also 190 Fed. 659), that, although the shipments were sold by the Darnell-Taenzer

Company f. o. b. destination, the purchaser or consignee in fact paid the freight to the carrier at point of destination. Terms of the contract here, which did not exist there, providing that the consignee is to have the benefit of any decline and bear the burden of any advance in the freight rate, rebut the implication that the seller is to bear the freight and show conclusively that the purchaser or consignee in paying it to the carrier acts for himself and not as the agent of the seller. The seller in effect assigned to and vested in the purchaser in this case whatever right of action might arise in favor of the seller against the carrier for excessive or unreasonable charges. See *Spiller* v. *Atchison, T. & S. F. Ry.,* 253 U. S. 117. Subsequent cases conflict with the construction and interpretation placed by the Commission upon the decision in the *Darnell-Taenzer Case. Pittsburgh, etc. Ry.* v. *Fink,* 250 U. S. 577; *New York Central* v. *York & Whitney Co.,* 256 U. S. 406; *L. & N. R. R.* v. *Central Iron Co.,* 265 U. S. 57. See also 4 Ruling Case Law, p. 857, par. 310; 6 Cyc., p. 500; Elliott on Railroads, Vol. 4 (3d ed.), p. 872, par. 2361; *Great Northern R. R.* v. *Hyde,* 279 Fed. 783; *Taylor* v. *Iron Works,* 124 Fed. 826; *Gates* v. *Ryan,* 37 Fed. 154.

There is such relationship of contract between the carrier and the consignee who accepts from the carrier a shipment of goods under a bill of lading imposing on the consignee the burden of paying the freight, that the carrier can maintain an action against the consignee for the lawful freight if not paid, or for an undercharge when not paid in full. Clearly then, there is such privity between the two that, when the consignee pays the carrier an excessive freight rate, the consignee can maintain an action against the carrier for recovery of the excess. If we look only to the bills of lading, under which, presumptively, the title to the shipments passed to the consignee at the point of origin upon the delivery there to

the carrier, the consignee is the only person that could maintain an action against the carrier for any excessive charges paid by him. For, since the consignee, who actually accepted the shipments and paid the freight under bills of lading, is presumptively, so far as the carrier is concerned, the owner of the shipment and became legally liable to the carrier for the lawful freight charges, he is, presumptively, the only person damaged as a result of having paid excessive charges.

The order of reparation is void, because invoked by supplemental petition, or application for rehearing, of which the defendant had no notice and no opportunity to be heard. The order is void to the extent of the inclusion therein of reparation on shipments transported during the period from April 17, 1910, to April 16, 1912. The original petition of April 16, 1912, was not sufficient under §§ 13 and 16 of the Interstate Commerce Act and under the rules of the Commission to invoke the jurisdiction to award reparation, or to toll the statute of limitations of two years as provided in the Act. Even if the original petition of April 16, 1912, was sufficient to invoke the jurisdiction to award reparation, in the first instance, yet since it was denied by the Commission in its order of June 1, 1914, and since no application for rehearing was filed until July 22, 1915, the Commission had lost whatever jurisdiction it originally acquired before such application was filed. Although the supplemental petition of July 22, 1915 was filed on the date last mentioned, nevertheless, upon the filing of the same no action was taken to stay or reverse the original finding and decision and order denying reparation. Not until four years thereafter did the Commission undertake to reconsider its first decision denying reparation, and not until six years thereafter did it undertake to make the award of reparation upon which this suit is based. The order of the Commission is void to the extent that it included

reparation on shipments that were transported during the period from April 16, 1912, to July 22, 1913.

Mr. Challen B. Ellis, with whom *Messrs. O. E. Harrison, Woodson P. Houghton, Wade H. Ellis* and *Hugh Morrow* were on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under § 16 of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, was brought against the Louisville & Nashville Railroad in the federal district court for northern Alabama. By it the Sloss-Sheffield Company sought to recover $63,982.80 with interest, being the amount of a reparation order entered by the Interstate Commerce Commission for excessive freight charges exacted in violation of § 1 of the Act. 60 I. C. C. 595; 62 I. C. C. 646. The charges here in question were paid between April 17, 1910 and September 15, 1915, on shipments of pig iron from the company's furnaces in Alabama, over lines of the Louisville & Nashville as initial carrier, to purchasers at Ohio River crossings and points beyond in central freight association territory.[1] The reparation directed was an incident of proceedings commenced April 16, 1912, to secure a reduction of the tariff rates. On June 1, 1914, an order was entered reducing rates for the future 35 cents a ton. Later, a finding was made that to this extent the existing tariff rates had exceeded what was reasonable throughout the whole period, commencing two years prior to the filing of the original complaint before the Commission. The order sued on, which was entered July 12, 1921, accompanied

[1] Reparation was awarded also to other furnace companies similarly situated. They joined as plaintiffs in this suit pursuant to § 16 of the Act; but, by reason of stipulations between the parties, these claims do not require consideration here. The stipulations cover also like claims against other carriers.

what is known as the Seventh Supplemental Report. See 30 I. C. C. 597; 35 I. C. C. 460; 40 I. C. C. 738; 46 I. C. C. 558; 51 I. C. C. 635; 52 I. C. C. 576.

The District Court, which heard the case without a jury, entered judgment in accordance with the Commission's order, except that it disallowed damages for the period between April 16, 1912 and July 22, 1913. Writs of error from the Circuit Court of Appeals were sued out by both the plaintiff and the defendant. That court entered judgment for $103,367.47, being the full amount awarded by the Commission with interest; and thus affirmed as modified the judgment of the District Court. 295 Fed. 53. The carrier then sued out a writ of error from this Court. It also filed a petition for a writ of certiorari, consideration of which was postponed to the hearing on the writ of error. Compare *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 535. As the case is properly here on writ of error, the petition for certiorari is denied. Seventy-seven errors are formally assigned. Only seven distinct contentions require separate consideration. Some of these relate to matters of procedure, others to substantive rights. Some assert that complete defenses to the suit were erroneously overruled, others that the amount of the recovery should have been reduced. Those which deal with matters of procedure will be considered first.

First. It is claimed that the order of reparation dated July 12, 1921, on which the suit rests, is void, because entered without notice to the Louisville & Nashville or opportunity to be heard thereon in violation both of the rules of the Commission and of the due process clause of the Fifth Amendment. The essential facts are these: The order sued on differed from an earlier one entered March 8, 1921, accompanying the so-called Sixth Supplemental Report, only in this. It reduced the amount payable from

$68,728.80 to $63,982.80. It deferred the final date for payment from June 1, 1921, as prescribed by the earlier order, to September 1, 1921. And it declared in terms that the order of "March 8, 1921, be, and the same is hereby, vacated and set aside." These modifications were made in response to a petition filed by the Sloss-Sheffield Company on June 30, 1921, which recited, among other things, that certain items of excess charges had been inadvertently included in earlier computations and prayed that the order theretofore entered be modified by making the reduction stated. The Louisville & Nashville had no notice of this application, but it had had notice and opportunity to be heard, and was fully heard, on all proceedings leading up to the entry of the Sixth Supplemental Report and accompanying order. Neither of the two reports, and neither of the accompanying orders, recited the items of excess charges of which the sums named therein were the aggregates. The District Court found that, by the order of July 12, 1921, the Commission merely corrected its Sixth Supplemental Report and award through striking out and deducting a certain part of the amount theretofore awarded; that the substituted order did not award the Sloss-Sheffield Company reparation on any shipment that was not included and allowed for in its order of March 8, 1921; that the award of July 12, 1921, was based entirely upon evidence furnished the Commission prior to entering the March 8 order; and that the company did not, in connection with its petition of June 30, 1921, submit to the Commission any new or additional evidence. The Louisville & Nashville did not, after learning of the entry of the substitute order, take any proceedings before the Commission to have it set aside or corrected; nor was other objection made thereto until it raised the point in this suit.

The Louisville & Nashville concedes that this claim of invalidity is unfounded if the order of July 12, 1921 did

nothing except reduce the amount required to be paid. The contention is that the Commission did more than reduce the amount payable; that the order not only eliminated certain items of excess charges inadvertently included, but added certain items inadvertently omitted; that this fact is established by recitals in the petition of June 30, 1921, by a passage in the Seventh Supplemental Report, and by evidence introduced by the carrier in the District Court; that the evidence to the contrary introduced by the shipper and on which that court relied was incompetent, was duly objected to, and should have been excluded; and that the finding made thereon is in direct conflict with matter of record in the Commission.

The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control without notice to a party who cannot possibly suffer by the modification made. Compare *Pennsylvania R. R. Co.* v. *United States,* 288 Fed. 88. This power of the Commission is, in adversary proceedings, narrowly circumscribed; and its exercise is not to be encouraged. Whether in this instance these narrow limits were transcended by the Commission, we have no occasion to enquire. The original order was sufficient to sustain the findings and the judgments of the District Court as modified and affirmed by the Circuit Court of Appeals. A copy of it was annexed to the petition in the District Court, and was introduced in evidence there. If lack of notice to the Louisville & Nashville rendered the later order void, the original order remained in full force. Compare *Chicago, M. & St. P. Ry. Co.* v. *Hormel & Co.,* 240 Fed. 381, 383–384. The petition of the Sloss-Sheffield Company of June 30 for a modification may be treated as a remittitur by that company of a part of the amount originally awarded, *Pacific Postal Telegraph Cable Co.* v. *O'Connor,* 128 U. S. 394; the order of July 12 operates as the entry of the remittitur; and appropriate amend-

ments in the pleadings may be deemed to have been made here. The insistence of the Louisville & Nashville that the order of July 12 should be deemed valid and of full force and effect in so far as it sets aside, vacates and annuls the prior order of March 8, but void in so far as it directs a payment to be made, is without support in reason or authority. Thus, the alleged errors in ruling on the admissibility of evidence do not appear to have affected the substantial rights of the parties. Act of February 26, 1919, c. 48, 40 Stat. 1181.

Second. It is claimed that the order of reparation sued on is void to the extent that it includes damages on account of shipments made between April 17, 1910 and April 16, 1912, because the cause of action for this period was barred by the special two-year statute of limitations contained in § 16 of the Interstate Commerce Act. In the original petition filed April 16, 1912, reparation for this period was specifically prayed for in these words:

"That the rates and charges herein complained of be found and declared to have been unjust, unreasonable and discriminatory for a period of at least two years preceding the filing of this complaint; and that the complainants . . . may have reparation to the extent of the difference between the rates and charges actually paid by them severally and the rates and charges that may herein be found and declared the just and reasonable maximum rates to be charged in the future."

This claim rests primarily upon the assertion that the prayer is so general as to be, under §§ 13 and 16 of the Act and the rules of the Commission, insufficient to invoke its jurisdiction to award reparation.[2] The argument is

[2] The proceedings had were these. After the Commission ordered that, for the future, the rates complained of be reduced because unreasonable, it found that throughout the period beginning two years prior to the filing of the complaint the existing rates had also been unreasonable and excessive to the extent of 35 cents a ton, 52 I. C. C.

that a petition before the Commission for reparation must give not only the names of the parties complainant and of the carrier against which the claim is asserted, but also a detailed description of the specific claims arising out of the several shipments involved; that this detail is indispensable, because under § 13 the carrier has, after the presentation of the claim to the Commission, a *locus penitentiae* in which to determine whether he will satisfy the claim or contest it; and that a later specification of the claim is of no avail, because the filing of such a definite description of the claim with the Commission within the two years is a jurisdictional requirement. It is true that the two-year requirement is jurisdictional. *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638. But no statute or rule imposes upon the Commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars. As was clearly shown by Judge Knapp in *Arcadia Mills* v. *Carolina, Clinchfield & Ohio Ry. Co.,* 293 Fed. 639, the contention of the Louisville & Nashville would involve the adoption of procedure contrary to the long established practice of the Commission and would defeat the convenient and effective administration of the Act.[3]

576; held that the Sloss-Sheffield Company was entitled to reparation on account of shipments made during that period; directed that the parties prepare statements showing the details of shipments in accordance with Rule V of its Rules of Practice; ordered, upon the filing of the Sixth Supplemental Report, 60 I. C. C. 595, the payment therein specified; and ultimately substituted the order of July 12, 1921 for that of March 8. 62 I. C. C. 646.

[3] See *Mountain Ice Co.* v. *Delaware, L. & W. R. R. Co.,* 21 I. C. C. 45; *Michigan Hardwood Mfrs. Assn.* v. *Transcontinental Freight Bureau,* 27 I. C. C. 32, 34, 36; *Marian Coal Co.* v. *Delaware, L. & W. R. R. Co.,* 27 I. C. C. 441, 442; *Commercial Club of Omaha* v. *Ander-*

The Louisville & Nashville also contends that the order, in so far as it awards reparation for the two-year period, is void upon another ground. The main contention is that, if the Commission acquired jurisdiction, it was later lost, because the order of June 1, 1914 denied reparation, and not having been suspended, became irrevocable at the expiration of one year thereafter, although the main proceeding was then being actively prosecuted and a petition for rehearing of the application for reparation was later filed.[4] The earliest order fixing the amount of the reparation was that entered March 8, 1921. The argument is that, although the rules of the Commission then in force fixed no time for filing petitions for rehearing, a one-year limit must be implied as to the rehearing of orders denying reparation, because § 16 provides that suit on orders granting reparation can be brought only if commenced within one year after entry of the order. This

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son & S. R. Ry. Co., 41 I. C. C. 480, 482; *Buffalo Union Furnace Co.* v. *Lake Shore & M. S. Ry. Co.*, 44 I. C. C. 267, 269; *National Petroleum Assn.* v. *Missouri, K. & T. Ry. Co.*, 58 I. C. C. 415, 418; *Coakley* v. *Director General*, 59 I. C. C. 141, 144; *National Preservers, etc. Assn.* v. *Southern Ry. Co.*, 74 I. C. C. 179, 183.

[4] The original order of June 1, 1914, which reduced rates for the future, did not grant any reparation. The Commission did not then decide whether the rates had been unreasonable at any time prior to the entry of the order, and the report stated merely: "Reparation is prayed for, but under the circumstances of this case, we do not believe that it may fairly be awarded." The Sloss-Sheffield Company petitioned for a rehearing in respect to reparation for the period prior to the filing of the original complaint; but it did not do so until July 22, 1915. The application so made was not acted upon until December 9, 1918. The Commission then decided that the Sloss-Sheffield Company was entitled to a finding as to the reasonableness of the rates during the two years immediately preceding the filing of the original complaint and authorized the parties to introduce additional evidence on this issue. 51 I. C. C. 635. On April 7, 1919, the Commission decided that the rates had been unreasonable during the two-year period; that reparation should be made, 52 I. C. C. 576; but that, upon the then record, it was unable to fix the amount.

argument, which seeks to reverse a settled practice of the Commission as to the time within which petitions for rehearing could then be filed, is not persuasive. The further contention that the delay of the Commission in disposing of the application for rehearing deprived it of jurisdiction is obviously unfounded.

Third. It is claimed that the order sued on is void to the extent that it includes damages on account of shipments made between April 16, 1912 and July 22, 1913. The contention is that the prayers of the original complaint, filed April 16, 1912, asked for reparation only on account of shipments made within two years theretofore; that a prayer for reparation on account of shipments to be made thereafter was first introduced by the supplemental petition filed July 22, 1915; and that, therefore, the special two-year statute of limitations barred recovery on account of shipments made during this fifteen months' period. We think the Court of Appeals was right in refusing to limit the prayer in the original petition. The language used does not require a construction which would so narrow its scope. A reading of the prayer as seeking damages for losses suffered in the past through the exaction of existing rates, but not for losses which will result while the proceeding to reduce them is pending, would deny to the words used their natural meaning and impute to the complainant a strange eccentricity of desire. The action of the Commission was in harmony with its own long settled practice and with the practice of courts in analogous cases.[5]

[5] *Buffalo Union Furnace Co.* v. *Lake Shore & M. S. Ry. Co.*, 44 I. C. C. 267, 269; *Plymouth Coal Co.* v. *Pennsylvania R. R. Co*, 56 I. C. C. 699, 706–707; *G. B. Markle Co.* v. *Lehigh Valley R. R. Co.*, 57 I. C. C. 375, 376; *National Petroleum Assn.* v. *Missouri, K. & T. Ry.* Co., 58 I. C. C. 415, 417–418. See also *Freight Bureau* v. *New York, N. H & H. R. R. Co.*, 63 I. C. C. 327, 334; *Indian Packing Corp.* v. *Director General*, 64 I. C. C. 205, 210; *American Fork & Hoe Co.* v. *St. Louis & S. F. R. R. Co.*, 69 I. C. C. 173; *Globe Elevator Co.* v.

Fourth. It is claimed that the order of reparation sued on is void to the extent that it includes damages on account of shipments made between April 17, 1910 and July 22, 1913, over lines of the Louisville & Nashville, the initial carrier, to points on the lines of certain connecting carriers operating in central freight association territory. The contention is that the cause of action against the Louisville & Nashville was barred as to such shipments by the special two-year statute of limitations, because these connecting carriers were not made parties to the proceeding before the Commission until the scope of the enquiry was widened by its order of November 3, 1914. This contention rests primarily upon the assertion that the original complaint was not broad enough to justify any relief as to rates over connecting lines and that the claim for reparation arising out of shipment over these was not made until the filing of the supplemental complaint on July 22, 1915. We are of the opinion that, in this respect also, the prayer for reparation in the original complaint (which includes a prayer for general relief) should not be so narrowly construed. The delay in joining these connecting carriers did preclude an award of reparation as against them for the period without the statutory limit; and this was recognized by the Commission in the order entered. But the delay in making these connecting carriers parties to the proceeding before the Commission did not afford a defense to the Louisville & Nashville; because, for reasons about to be stated in dis-

Director General, 74 I. C. C. 591; *Bradford Rig & Reel Co.* v. *Director General,* 80 I. C. C. 335, 338; *Lissberger & Co.* v. *Pennsylvania R. R. Co.,* 81 I. C. C. 645, 648; *Boren-Stewart Co.* v. *Baltimore & O. R. R. Co.,* 83 I. C. C. 215, 216–217; *Beaumont Chamber of Commerce* v. *Director General,* 85 I. C. C. 139, 145; *Utah Gilsonite Co.* v. *Atchison, T. & S. F. Ry. Co.,* 85 I. C. C. 557, 570; *Cohen* v. *Atchison, T. & S. F. Ry. Co.,* 88 I. C. C. 143, 146.

Compare *Lehigh Valley R. R. Co.* v. *American Hay Co.,* 219 Fed. 539; *Lehigh Valley R. R. Co.* v. *Markle Co.,* 279 Fed. 261.

cussing another objection, the liability for exacting unlawful charges is joint and several. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 118 Fed. 613.

Fifth. It is claimed that the order of reparation is void to the extent that it includes damages payable by the Louisville & Nashville in excess of 23 cents a ton on shipments transported, under joint through rates, over lines of connecting carriers to points beyond the Ohio River crossings. The contention is that the liability of the connecting carriers is not joint and several; that each is liable individually only for the part which it received of the excess unlawfully exacted; and that the Louisville & Nashville must be deemed to have received only 23 cents of the excess, because the Commission, when requested by the carriers to decide under § 15 in what proportions the future reduction of 35 cents in the joint through rates already ordered should be borne, decided that the Louisville & Nashville should bear a shrinkage of 23 cents in the existing division and the lines north of the River a shrinkage of the remaining 12 cents. The argument is that the joint through rate, although in fact established by the voluntary act of the carriers, should be deemed to have been compelled by law, since § 1(4) made it the duty of carriers to establish through routes and § 15(3) empowered the Commission to enforce that duty; that the joint through rates should be treated as if they were merely a combination of the full individual rates of the several carriers, because the rates in question were in fact constructed by combining as factors the existing published proportional rates of the several carriers; that carriers necessarily exercise a fallible judgment as to reasonableness when initiating and in agreeing upon a joint rate; that a later decision by the Commission that the joint rate is excessive does not involve a finding that the carriers acted either arbitrarily or from bad motives in establish-

ing it; that the excess charge for which a carrier should be made liable is only that which results from its own error in judgment; that the court should assume that no carrier had any control over any factor in the joint rate except the proportion attributable to its own line; and that consequently the Louisville & Nashville should be held to have contributed to the injury of this shipper only to the extent of 23 cents a ton.[6] The argument is unsound.

The cause of action sued on is of statutory origin. It rests primarily upon § 8 which declares that if "any common carrier . . . shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful . . . such common carrier shall be liable . . . for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." The Commission held early, and has consistently held since, that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all the damage sustained.[7] It is true that participation in joint rates does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. *Central R. R. Co.* v. *United States,*

[6] For the characteristics of through routes, of joint rates, of proportional rates, of combinations of locals, and of divisions of joint rates, see *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Co.,* 223 U. S. 573, 586–8; *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136; *Central R. R. Co.* v. *United States,* 257 U. S. 247, 255; *Baltimore & Ohio Southwestern R. R. Co.* v. *Settle,* 260 U. S. 166; *New England Divisions Case,* 261 U. S. 184; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274; *United States* v. *American Ry. Express Co.,* 265 U. S. 425.

[7] *Independent Refiners' Assn.* v. *Western N. Y. & P. R. R. Co.,* 6 I. C. C. 376, 383–385; *Morti* v. *Chicago, M. & St. P. Ry. Co.,* 13 I. C. C. 513, 515; *Nicola, Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.,* 14 I. C. C. 199, 209; *Black Horse Tobacco Co.* v. *Illinois Central R. R. Co.,* 17 I. C. C. 588, 590, 593; *Sondheimer Co.* v. *Illinois*

257 U. S. 247, 259. Each connecting carrier is liable only for its own act. But the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement. The case at bar is not like *Insurance Co.* v. *Railroad Co.*, 104 U. S. 146, on which the Louisville & Nashville relies.

The fact that the joint rate had been constructed out of existing proportional rates is not of legal significance. The rates complained of were not merely the aggregate of individual local or proportional rates customarily charged by the respective lines for the transportation included in the through routes. The rates in question were strictly joint through rates. Each through rate was complained of as a unit. Compare *Parsons* v. *Chicago & Northwestern Ry. Co.*, 167 U. S. 447, 455–6. A single charge was made for the transportation from point of origin to point of destination.

Nor does the fact that the connecting carriers may have been induced to enter into these agreements for joint through rates because the Interstate Commerce Act had declared this to be the general duty of all carriers, prevent the agreement actually entered into from being the joint

Central R. R. Co., 20 I. C. C. 606, 610; *Webster Grocer Company* v. *Chicago & Northwestern Ry. Co.*, 21 I. C. C. 20; *International Agricultural Corp.* v. *Danville & Nashville R. R. Co.*, 29 I. C. C. 391; *Best Co.* v. *Great Northern Ry. Co.*, 33 I. C. C. 1, 3; *Orgill Bros. Co.* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 39 I. C. C. 513, 514; *Heinz* v. *Pere Marquette R. R. Co.*, 39 I. C. C. 622, 624; *Riverside Mills* v. *A. & S. Steamboat Co.*, 40 I. C. C. 501, 502; *Squire & Co.* v. *A. S. R. Co.*, 44 I. C. C. 509; *Swift & Co.* v. *Missouri Pac. Ry. Co.*, 49 I. C. C. 336, 337; *International Nickel Co.* v. *Director General*, 66 I. C. C. 627, 628; *United States Graphite Co.* v. *Director General*, 88 I. C. C. 157, 160. This course of action was not affected by the decision in *Western New York & Pennsylvania R. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 357–8; affirmed in 208 U. S. 208. Compare *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 205.

act of these carriers. Every local or individual rate is likewise established pursuant to a duty. Whether a rate be individual or joint the Commission may enforce performance if the duty to establish it is neglected. The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint tort feasor. The tariff rate, although unlawful because excessive, was as between shipper and carrier the only legal rate. Neither would have been at liberty to avail itself of more favorable rates for any part of the through carriage. Compare *Baltimore & Ohio Southwestern R. R. Co.* v. *Seattle,* 260 U. S. 166, 171. The Louisville & Nashville, the initial carrier, exacted the excessive joint rates on behalf of itself and of all of the connecting carriers who with it were parties to the joint through rates.

The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. It may be reasonable although some of the factors, or of the divisions of the participants, were unreasonable. Moreover, there is no finding that the excess received by the Louisville & Nashville was only 23 cents a ton. The Commission did not fix or determine the rights of the several carriers as against each other in respect to the reparation awarded; nor had it, so far as appears, fixed the divisions of the joint rate theretofore existing. Awarding reparation for excessive charges in the past and regulating rates for the future involve the determination of matters essentially different. *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. R. Co.,* 233 U. S. 479.

Sixth. It is claimed that the Sloss-Sheffield Company cannot recover, because it was not damaged by the ex-

cessive freight charges. The Commission and the District Court found that the Sloss-Sheffield Company bore the transportation charges and was damaged to the extent of the difference between the charges paid and those that would have accrued at the rates found reasonable. Both tribunals found further that all the iron was sold f. o. b. destination; that it was shipped to purchasers named as consignees on straight bills of lading; that it was invoiced and charged on the seller's books at the full delivered price; that, pursuant to arrangement between seller and purchaser, the consignee physically paid the freight upon acceptance of the delivery; and that he was credited with this at the rate specified in the sales contract as a part payment of the purchase price, and remitted only the balance of the purchase price.

The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in *Pennsylvania R. R. Co.* v. *International Coal Mining Company,* 230 U. S. 184, 206, to be fatal in a suit under § 2 for unjust discrimination, and in *Davis* v. *Portland Seed Co.,* 264 U. S. 403, to be fatal in a suit under § 4 for violation of the long-and-short-haul clause. The carrier concedes, as it must under *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, that a recovery for excessive freight charges can be had under § 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted. It was likewise settled by *Southern Pacific* v. *Darnell-Taenzer Lumber Co.* (see 190 Fed. 659; 221 Fed. 890), that where goods are sold f. o. b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who consequently is entitled to sue.[8] The

[8] Such had been the uniform decision of the Commission. *Hayden & Westcott Lumber Co.* v. *Gulf & Ship Island R. R. Co.,* 14 I. C. C. 537, 538; *Mountain Ice Co.* v. *Delaware, Lackawanna & Western R. R. Co.,* 21 I. C. C. 45, 51; *Lamb, McGregor & Co.* v. *Chicago & Northwestern R. R. Co.,* 22 I. C. C. 346; *Central Commercial Co.* v.

contention is that facts specifically found differentiate the case at bar and overcome the *prima facie* effect of the Commission's finding as to damages; that because of these specific facts it was not the Sloss-Sheffield Company, but the purchasers of the iron from it, who paid and bore these freight charges; and that it was these purchasers alone who were entitled to reparation.

The additional facts relied upon to support this objection to recovery are these: All the shipments were made under a standard form of contract which was applicable to sales for future delivery in installments and which contained a provision substantially as follows:

"Price. Fourteen dollars and eighty five cents ($14.85) per ton of 2240 lbs. delivered at Chicago, Illinois.

"This price is based on present tariff freight rate of $4.35 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance.

"Freight, cash; balance, cash 30 days from average date of monthly deliveries (Invoice date). . . . The seller not will be liable for any overcharge in freight when correct rate is expressed in bill of lading."

The provision in question is a common one in contracts of sale. Its effect upon the consignor's right to recover

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Atchison, Topeka & Santa Fe Ry. Co., 26 I. C. C. 373, 376; *Michigan Hardwood Mfrs. Assn.* v. *Freight Bureau*, 27 I. C. C. 32, 38–40; *Ballou & Wright* v. *New York, New Haven & Hartford R. R. Co.*, 34 I. C. C. 120; *Bascom-French Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 34 I. C. C. 388, 389; *Louisiana Central Lumber Co.* v. *Chicago, Burlington & Quincy R. R. Co.*, 35 I. C. C. 38, 39; *Traffic Bureau, Sioux City Commercial Club.* v. *A. & S. R. R. Co.*, 37 I. C. C. 353; *Advance Bedding Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 38 I. C. C. 31, 32; *Charles Bolt Co.* v. *Baltimore & Ohio R. R. Co.*, 42 I. C. C. 175, 176; *Federal Oil & Supply Co.* v. *Director General*, 60 I. C. C. 185, 187; *Iola Cement Mills Traffic Ass'n* v. *Director General*, 66 I. C. C. 495, 500; *Central Wisconsin Supply Co.* v. *Director General*, 68 I. C. C. 409, 411; *Wyoming Sugar Co.* v. *Director General*, 77 I. C. C. 470, 471–472; 88 I. C. C. 213, 216.

overcharges was carefully considered by the Commission in 1911 in *Baker Mfg. Co.* v. *Chicago & Northwestern Ry. Co.*, 21 I. C. C. 605. It was then held that the consignor must sue if goods were sold f. o. b. destination. This case has been consistently followed by the Commission since;[9] and it was cited in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534. In the case at bar, both the consignor and the consignees claimed reparation; and the Commission's decision denying relief to the consignees seems to have been acquiesced in before that tribunal by all parties.

The Louisville & Nashville argues now that a sale at the delivered price of $14.85 is, by reason of this provision, the legal equivalent of a sale at $10.50 plus freight; that under a contract of sale at a fixed price plus freight the purchaser would be entitled "in case the tariff rate declines" to the benefit of "the decline"; that a decision that a published rate exacted was excessive is the legal equivalent of a decline in rates; that under the provision quoted the purchaser would be entitled, as against the seller, to any damages payable by the carrier for having established and collected the higher tariff rate thereafter found to be unlawful because excessive; and that, since the refund to be made by the carrier would ultimately enure to the purchaser's benefit, no damage was suffered by the seller by reason of the excessive freight charge.

The construction urged ignores the commercial significance of selling at a delivered price. When a seller

[9] *Commercial Club of Omaha* v. *Anderson & S. R. Ry. Co.*, 27 I. C. C. 302, 322; *Rapier Sugar Feed Co.* v. *Louisville & N. R. R. Co.*, 47 I. C. C. 222, 223; *Hubinger Bros. Co.* v. *Director General*, 58 I C. C. 53, 57; *Keokuk Electric Co.* v. *Director General*, 68 I. C. C. 517, 520; *Davenport Commercial Club* v. *Director General*, 73 I. C. C. 251, 258; *Roxana Petroleum Corp.* v. *Director General*, 74 I. C. C. 605, 607. Compare *Standard Oil Co.* v. *Director General*, 89 I. C. C. 7, 9–10; *Dolese Bros. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 89 I. C. C. 110, 122.

enters a competitive market with a standard article he must meet offerings from other sources. On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the consignor under the bill of lading, *Louisville & Nashville R. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 67, as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them.

Seventh. It is claimed that the order of reparation is void to the extent that it included as damages interest amounting to $25,979.49 accrued prior to the entry of the final order on July 12, 1921; and that the judgment is erroneous for the further reason that it included interest upon interest to the extent of $1,363.93, as it allowed interest generally from the date of the award. The main contention is that no interest is allowable prior to the date of the final award because until then there was no obligation to pay the claim in suit. The argument is that until entry of the award, it was uncertain whether any amount was payable by way of reparation, since the Commission might reduce rates for the future without awarding any damages for the past; that, moreover, the claim was unliquidated; that the claim was, in its nature, one which the parties could never voluntarily have liquidated, since a shipper must, in any event, pay freight rates in accordance with the tariff as published and the carrier must retain the amount received; that failure by the carriers to observe this rule would have been a criminal

violation of the Elkins Act, 32 Stat. 847; 34 Stat. 584; that repayment by the carrier could, therefore, not have been made legally until after the final award, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 197; that, for this reason, there could be no culpable delay in failing to repay the excess earlier; and that consequently there was lacking the only legal basis for allowing interest.

It has been the uniform practice of the Commission to recognize as an element of the damages loss of interest on charges unlawfully exacted; and, in ordering reparation, it has usually included as a part of the damages such interest from the date of the payment.[10] In *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 420, in *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 434, 437, and in *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473, 477–8, in each of which cases a judgment enforcing such an order was affirmed by this Court, the opinions show that interest had been allowed in accordance with this practice.[11] The practice of the Commission conforms to

[10] In *International, etc. Corp.* v. *Louisville & Nashville R. R. Co.*, 29 I. C. C. 391, 395, it is stated: "The Commission has uniformly allowed interest on claims for reparation." See *E. I. Du Pont, etc. Co.* v. *Director General*, 55 I. C. C. 246, 247; *National Petroleum Ass'n.* v. *Missouri, Kansas & Texas Ry. Co.*, 58 I. C. C. 415; *Shreveport Creosoting Co.* v. *Louisiana & Pacific Ry. Co.*, 92 I. C. C. 519. The Commission has said that interest will not be allowed where the record does not show the date of the payment. *Morris & Co.* v. *Director General*, 74 I. C. C. 242, 244.

[11] In *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288, 291, the damages recoverable under §§ 8, 9 and 16 of the Act were said to include loss due to "the keeping of the plaintiff out of its money." In *Pennsylvania R. R. Co.* v. *Minds*, 250 U. S. 368, 370–1, the Court declared that "unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute." Compare *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 147.

the general rules governing the allowance of interest. The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate, not the withholding of the excess unlawfully exacted. The mere fact that the validity of the claim is disputed and that the amount recoverable is uncertain obviously does not bar the recovery of interest. The Commission properly determined not only whether interest should be included, but also the date from which it shall be included. Compare *Arkadelphia Co.* v. *St. Louis, S. W. Ry. Co.,* 249 U. S. 134, 147; *Eddy* v. *LaFayette,* 163 U. S. 456, 467; *The Scotland,* 118 U. S. 507, 519. On the findings made we cannot say that the conclusion of the Commission that interest should be paid from the date of the illegal exaction was unwarranted.

The further contention is that by allowing interest from September 12, 1921, the effective date of the Commission's order, on the whole amount then payable, compound interest to the extent of $1,363.93 was allowed. It is true that the judgment entered involves such payment; but it does not follow that this was error. Payment of some compound interest often results when a judgment of affirmance is entered by an appellate court. It results, likewise, whenever a trial court enters judgment in an action upon a judgment or upon an award. An order of reparation may be likened to an award in this respect.

Affirmed on writ of error.
Writ of certiorari denied.

The separate opinion of Mr. Justice McReynolds.

When this matter was before the Interstate Commerce Commission, July, 1916, Commissioner McChord, member since 1910, wrote a well-considered dissenting opinion pointing out that defendant in error had suffered no proximate damage and therefore ought not to recover. 40 I. C. C. 738. I think he was right.

Apparently for some years the Commission has generally accepted the view that the consignee who pays freight charges under an f. o. b. destination contract of sale acts as agent for the consignor and the latter may recover when these are found to be excessive. Of course, the decisions deserve attention, but if they support the reparation order here questioned (where the consignee had clear right to demand reasonable rates) they should be disapproved, not followed. Reiteration did not cure the fundamental error. The facts are not in dispute; the function of this Court is to declare the law. Nothing heretofore said by us precludes the defense of no damage.

At Birmingham, Ala., defendant in error accepted a written proposition made by the Chicago Foundry & Machine Company to purchase fifty tons of pig iron at "fourteen dollars and eighty-five cents per ton of 2240 lbs., delivered at Chicago, Illinois," which recited:

"This price is based on present tariff freight rate of $4.35 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance. Freight, cash; balance, cash 30 days from average date of monthly deliveries. . . . The seller will not be liable for any overcharge in freight when correct rate is expressed in bill of lading."

From time to time the iron was consigned to the purchaser at Chicago under straight bills of lading issued by plaintiff in error; the weight and rate were stated on each bill. The carrier had no knowledge of the sale agreement; upon receipt of the goods the consignee paid the freight charges. The consignor rendered uniform bills which contained charge items for weights shipped at $14.85 per ton less freight at $4.35 per ton, always with a balance equivalent to $10.50 per ton. Entries on the consignee's books are not disclosed. In substance, as shown by the writing and practice, the consignor agreed to re-

ceive from the consignee at the end of thirty days $10.50 per ton and the latter agreed to pay the carrier's lawful charges, whatever they might be. In no event could the consignor receive more than the $10.50; it sold for future delivery at a definite price payable thirty days thereafter. As intended, the consignee accepted the goods, actually paid the charges and was thus in relation with the carrier. It was peculiarly interested in the amount so paid and certainly had the right to demand reasonable rates. The consignor had no immediate interest therein; whether they were more or less could not affect its receipts or profits under the contract.

The provision that, "The seller will not be liable for any overcharge in freight when correct rate is expressed in bill of lading," indicates that the parties did not regard the consignee as mere agent of the seller when paying transportation charges. By disavowing its interest in an overcharge the seller at least recognized the consignee's right to seek redress from the carrier.

Under settled doctrine the right to reparation for violations of the Interstate Commerce Act depends upon proximate damage. This was distinctly affirmed in *Pennsylvania R. R.* v. *International Coal Co.*, 230 U. S. 184; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Davis* v. *Portland Seed Co.*, 264 U. S. 403. In the case last cited respondent sought, without success, "to secure something for itself without proof of pecuniary loss consequent upon the unlawful act." Here, no better result should follow like effort. In the same case we said: "*Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, presents no conflict with *Pennsylvania R. R.* v. *International Coal Co.* There the shipper paid a published rate which the Commission afterwards found to be unreasonable. This court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable. The opinion went no further."

The following from *Southern Pacific Co.* v. *Darnell-Taenzer Co.* points out plainly enough that there can be no recovery without proximate damage: "The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events . . . If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

It affirmatively appears that defendant in error suffered no appreciable damage. The consignee upon its own account, as agreed and obligated by law, paid freight charges upon receipt of the goods. These were too high; it was unlawfully required to pay too much and suffered proximate loss.

It is vain to speculate whether the seller might have obtained better prices if the freight rate had been lower. It might not have gotten the business at all. Certainly it suffered no more than any competitor who failed to sell because of the exorbitant rate but sustained no proximate loss and therefore had no right to reparation. Every member of the public may be said to be damnified by excessive freight rates; but unless proximate damage exists there can be no recovery from the carrier. Here the consignee paid charges unlawfully demanded of it and is actually out of pocket more than it should be. The consignor paid nothing, lost nothing; but under the ruling below it alone may seek reparation—reparation for money unlawfully exacted of another.

MR. JUSTICE STONE dissenting.

I dissent from the opinion of the majority of the Court on the ground that the consignees who paid the freight to procure goods, the title to which was in them when shipped, were within the protection of the statute prohibiting unreasonable freight rates, and upon payment of the illegally exacted freight from their own funds they were the persons suffering proximate damage and were therefore entitled to recover the excess freight within the meaning of the statute and the reasoning of the opinion in *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531.

NEW YORK EX REL. WOODHAVEN GAS LIGHT COMPANY *v.* PUBLIC SERVICE COMMISSION.

ERROR TO THE SUPREME COURT OF NEW YORK.

No. 33. Argued October 12, 1925.—Decided November 23, 1925.

1. A case involving the validity of an order requiring a gas company to extend its mains did not become moot through the act of the

company in making part of the specified extensions since suing out its writ of error. P. 246.

2. In determining whether an order of a state commission requiring a gas company to extend its main pipes is repugnant to the due process clause of the Fourteenth Amendment, the court will not substitute its own judgment for the determination of the Commission as to what extensions are reasonable; but it will consider the advantages to result to the public, the investment required for the necessary additions, the cost of furnishing gas to the added territory and the effect of the new service on the company's income as a whole, and decide whether the power to regulate was so used as to exceed the exercise of reasonable judgment and amount to an infringement of the right of ownership. P. 248.
3. Upon the facts in this case, it reasonably may be held that the location, present development and prospects of growth of the communities ordered to be served justify the extension to them of gas service if a non-confiscatory rate can be obtained. P. 248.
4. The reasonableness and validity of an order requiring a gas company to extend its service, are not dependent upon whether the maximum price which the company is permitted by statute to charge for its gas is or is not compensatory, where the order does not deal with rates and no reason appears why the company may not protect itself against inadequate rates by appropriate proceedings in that regard. P. 249.

203 App. Div. (N. Y.) 369; 236 N. Y. 530, affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, after affirmance by the Court of Appeals, confirming an order of the Public Service Commission directing the Gas Company to extend its mains to furnish gas to designated communities.

Mr. Jackson A. Dykman, with whom *Mr. William N. Dykman* was on the brief, for plaintiff in error.

Mr. Edward M. Deegan, with whom *Mr. Charles G. Blakeslee* was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The gas company challenges the validity of an order of the Public Service Commission on the ground that it

confiscates the company's property, is arbitrary and capricious, and therefore repugnant to the due process clause of the Fourteenth Amendment.

The order was made April 20, 1920, and directed the company to extend its mains to furnish gas to the residents of five communities—Locust Manor, Locust Lawn, South Jamaica Place, Springfield, and Laurelton,—in the Borough of Queens, New York City; and that the extensions be completed and put in service by November 1, 1920. On the petition of the company the proceedings were taken on writ of certiorari to the Appellate Division of the Supreme Court of the State, and were there confirmed. 203 App. Div. 369. The order of that court was affirmed by the Court of Appeals. 236 N. Y. 530. The case is here under § 237 of the Judicial Code.

At the argument in this court, October 12, 1925, the commission suggested that no real controversy exists; and, upon leave granted, filed a motion to dismiss. The grounds asserted are that, since the writ of error issued June 5, 1923, the company has laid mains to serve two of the communities and, as a part of its present plan to furnish gas to the other places named in the order, has laid mains in adjacent territory. Affidavits were filed by the commission in support of the motion, and by the company in opposition. Taken together they show that the order has not been complied with; that a part of the extensions ordered has been laid, but that the company has not planned, and does not intend, presently to lay the mains necessary to furnish gas to all the communities directly to be served. The company is unwilling fully to comply with the order and maintains that it is invalid. If the judgment of the state court is not reversed, summary proceedings to compel the company to obey the order may be brought by the commission in the state court. § 74, Public Service Commission Law, c. 48, Consolidated Laws New York. And this court cannot say

that the facts shown would constitute a defense. The case is not moot. The motion to dismiss will be denied. Cf. *Brownlow* v. *Schwartz,* 261 U. S. 216, 217; *Levinson* v. *United States,* 258 U. S. 198, 202.

The company has long had the privilege of laying gas mains in the streets and other public ways of the town of Jamaica (now the Fourth Ward of the Borough of Queens) to distribute gas for street lighting and other purposes. It does not appear that any other utility is authorized to furnish gas there, and it is to be assumed that these communities are dependent upon this company for service. When reasonably required, the company is in duty bound to furnish gas to inhabitants of the territory covered by its franchise. *People ex rel. Woodhaven Gas Co.* v. *Deehan,* 153 N. Y. 528, 533. And the commission is empowered by statute to require reasonable extensions of the mains and service. § 66 (2), Public Service Commission Law, *supra.* In the territory already served by the company there are 150 consumers per mile of main. The sections for which service is ordered are residential communities. They have had water and electric service for many years. The houses already there, and those being built, are of a kind to indicate that, if brought within reach, gas will be used by the larger part of the inhabitants. There are good prospects of growth in the immediate future. The facts justify reasonable anticipation of a substantial and increasing demand for gas in the territory to be reached by the extensions.

Compliance with the order requires the addition of about 16 miles of main. The affidavits filed on the motion to dismiss show that, in two of the communities directed to be served, and in the adjacent territory, the company has laid about 30 miles of main since June 5, 1923. The state law fixes one dollar per 1000 cubic feet as the maximum rate, Laws of 1906, c. 125, § 1(2); and that rate was in force when the order was made. The

commission is without power to fix a higher rate. § 72, Public Service Commission Law, *supra*. The company's income applicable as a return on property was only $1,799.93 for the year in which the order was made. Without an increase of rate, the service ordered will further decrease net earnings. It is stated in the company's brief that, in a suit brought by it in the United States District Court, it was found that the cost to the company per 1000 cubic feet for 1919 was $.9992; for 1920 was $1.095; and for three months of 1921 was $1.3042, and that, September 25, 1922, the court decreed the maximum rate to be confiscatory.

The court will not substitute its own judgment as to what extensions are reasonable for the determination of the commission. *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 348. But it will consider the advantages to result to the public from the extensions ordered; it will also consider the investment required to make the necessary additions to property, the cost of furnishing gas in the added territory, the effect of the new service upon the company's income as a whole; and, if it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership, the order will be held invalid as repugnant to the due process clause. Under the guise of regulation, the State may not require the company to make large expenditures for the extension of its mains and service into new territory when the necessary result will be to compel the company to use its property for the public convenience without just compensation. *Atlantic Coast Line* v. *North Carolina Corp. Com'n,* 206 U. S. 1, 20, 23, *et seq.; Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 276; *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416, 421; *Norfolk Ry.* v. *Public Service Commission,* 265 U. S. 70, 74.

It reasonably may be held that the location, present development and prospects of growth of the communities

ordered to be served justify the extension to them of gas service if a non-confiscatory rate can be obtained.

But the company construes the order to require it to sell gas in the added communities at the existing rate; and it insists that, as the rate is so low that present consumers must be served at a loss, the addition of new territory will increase the loss. Even assuming that one dollar, fixed as the maximum rate, is non-compensatory, it does not follow that the order in question is unreasonable or invalid. This case is to be distinguished from a suit to restrain the enforcement of legislation prescribing a confiscatory rate. Here, the rate is not involved. The order directs the extension; it does not deal with compensation. The commission reasonably might assume that the company will take appropriate steps to save its property from confiscation. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 174, 177. Indeed, it is said that the prescribed maximum already has been adjudged too low and confiscatory. The company's voluntary extension of mains to increase sales greatly impairs the weight of the contention that, because the cost of service exceeds the rate, the order is arbitrary. There is nothing to show that just compensation for the service ordered may not be had, or that compliance with the order will necessarily so reduce the company's income from its operations as a whole as to be in effect a confiscation of its property, or that, at rates not unreasonable or prohibitive, consumption of gas in the communities directed to be served will not be sufficient to yield a just return on the necessary additions. The company's contention cannot be sustained.

Motion to dismiss denied.
Judgment affirmed.

WORK, SECRETARY OF THE INTERIOR, *v.* LOUISIANA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 5. Argued October 6, 1925.—Decided November 23, 1925.

1. A suit by a State to restrain the Secretary of the Interior from rejecting the State's claim under the Swamp Land Acts upon an unauthorized ruling of law illegally requiring the State, as a condition precedent, to show that the lands are not mineral in character, is not objectionable as being premature and as invading the Secretary's function to adjudicate the title. P. 254.
2. In such a suit, the United States, and homestead entrymen claiming the lands, are not indispensable parties defendant. *Id.*
3. The grants of the Swamp Land Acts of 1849 and 1850, were *in praesenti*, and gave the grantee States an inchoate title that became perfect, as of the dates of the Acts, when the granted lands had been identified as required and the legal title had passed by approval of the Secretary under the Act of 1849 or the issuing of a patent under the Act of 1850. P. 255.
4. Neither of these acts contains any exception or reservation of mineral lands and none is to be implied, since at the time of their enactment the public policy of withholding mineral lands for disposition only under laws specially including them, was not established. *Id.*
5. The Secretary of the Interior can not be required by injunction to recognize a State's title under the Swamp Land Acts when he has not as yet determined whether the lands claimed were "swamp or overflowed." P. 260.

53 App. D. C. 22, 287 Fed. 999, modified and affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming an injunction awarded by the Supreme Court of the District of Columbia against the Secretary of the Interior.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney General Wells* were on the brief, for appellant.

Mr. S. L. Herold, with whom *Messrs. Percy Saint,* Attorney General of Louisiana, and *F. W. Clements* were on the brief, for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is a suit in equity brought by the State of Louisiana against the Secretary of the Interior in the Supreme Court of the District of Columbia, seeking a restraining order and mandatory injunction relating to its prosecution of a swamp land claim under the Acts of March 2, 1849, c. 87, 9 Stat. 352, and September 28, 1850, c. 84, 9 Stat. 519. A motion by the Secretary to dismiss the bill was overruled; and upon his election to plead no further, a decree was entered awarding an injunction. This was affirmed by the Court of Appeals of the District. *Fall* v. *Louisiana,* 287 Fed. 999.[1] This appeal was allowed in April, 1923.

By the Act of 1849, there was "granted" to the State of Louisiana, to aid it in the reclamation of the swamp and overflowed lands therein, "the whole of those swamp and overflowed lands,[2] which may be or are found unfit for cultivation"; and it was provided that, upon the request of the Governor, the Secretary of the Treasury [afterwards the Secretary of the Interior[3]] should cause an examination of all such lands to be made by deputies of the surveyor-general; "a list of the same to be made out, and certified by the deputies and surveyor-general to the Secretary . . . , who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State."

[1] In the Court of Appeals the present appellant was substituted for his predecessor against whom the suit had been brought.

[2] Except those fronting on rivers, etc., previously surveyed under an Act of 1824.

[3] Act of March 3, 1849, c. 108, 9 Stat. 395, creating the Department of the Interior.

By the Act of 1850 there was "granted" to the State of Arkansas, for a like purpose, "the whole of those swamp and overflowed lands, made unfit thereby for cultivation," which then remained unsold; and it was provided that the Secretary of the Interior should make out and transmit to the Governor accurate lists and plats of such lands "and at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State." It was further provided that "the provisions of this Act be extended to, and their benefits conferred upon, each of the other States of the Union in which such swamp and overflowed lands . . . may be situated." The general provisions of this Act were carried into § 2479, *et seq.*, of the Revised Statutes.

We assume, without deciding, that, in accordance with the practice of the Land Department, the claims of Louisiana to the swamp and overflowed lands may be allowed under either the special Act of 1849 or the general Act of 1850. See *Louisiana* v. *Garfield*, 211 U. S. 70, 76; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 635.

The material facts shown by the bill and exhibits are: The lands in question, with others, were surveyed in 1871 by a deputy surveyor. They were identified and returned as swamp and overflowed lands by his plat of survey, which was filed and approved by the Surveyor General. At that time they were not known to contain minerals of any character. In 1901 the register of the state land office requested that they be listed and approved to the State as swamp lands. Various homestead entries were thereafter made in the local Land Office; some, if not all, of which were allowed, subject to the swamp land claim of the State. In 1910 they were included in a Petroleum Withdrawal made by a Presidential order under the Pickett Act.[4] Finally, in 1919, after

[4] Act of June 25, 1910, c. 421, 36 Stat. 847.

various intermediate proceedings, the Commissioner of the General Land Office, in an administrative decision, "found from the field notes of the survey of 1871 that the lands . . . are swamp or overflowed, and, *if nonmineral in character,* inure to the State under its grant, and may be patented pursuant thereto when the record has been cleared of adverse claims." And he thereupon ruled that unless the State should, within a specified time, apply for a hearing—in which the homestead entrymen might participate—and show that the lands were non-oil and non-gas in character, its claim would be rejected and the lands held for disposition under the public land laws. On an appeal by the State, the Secretary affirmed this decision; and he later denied a motion by the State for a rehearing, the grounds of his decision being that mineral lands did not inure to the State under the swamp land grants; that the mineral character of land claimed as swamp and overflowed was open to investigation until the inchoate title of the State had been perfected by the Secretary's approval under the Act of 1849 or the issue of a patent under the Act of 1850; that these lands had been impressed with a *prima facie* mineral character by the petroleum withdrawal; and that the State had been accorded due opportunity to show that they were not mineral bearing, failing in which its claim must stand rejected. 48 Land Dec. 201, 203.

The bill, which was then filed, alleged that the Secretary had exceeded his authority and jurisdiction in making the unlawful requirement imposing upon the State the burden of showing that the lands had no minerals and denying its right to them because it had not undertaken to discharge the burden thus illegally put upon it; and prayed that he be enjoined from taking further action in enforcement of this ruling and be required to vacate and set it aside.

1. It is urged that the trial court was without jurisdiction to entertain the bill, upon the grounds that it was

prematurely brought, before the Secretary had exercised his jurisdiction to determine the character of the lands and while the claim was still in the process of administration; and that both the United States and the homestead entrymen were necessary and indispensable parties. These objections are based upon a misconception of the purpose of the suit. It is not one to establish the title of the State, as in *Louisiana* v. *Garfield, supra,* and *New Mexico* v. *Lane,* 243 U. S. 52, nor one to quiet its title, as in *Minnesota* v. *Lane,* 247 U. S. 243. The bill does not seek an adjudication that the lands were swamp and overflowed lands or to restrain the Secretary from hearing and determining this question, but merely seeks an adjudication of the right of the State to have this question determined without reference to their mineral character, and to require the Secretary to set aside the order requiring it to establish their non-mineral character or suffer the rejection of its claim. In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.

It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. *Noble* v. *Union River Railroad,* 147 U. S. 165, 171, 172; *Garfield* v. *Goldsby,* 211 U. S. 249, 261, 262; *Lane* v. *Watts,* 234 U. S. 525, 540; *Payne* v. *Central Pacific Railway,* 255 U. S. 228, 238; *Santa Fe Pacific Railroad* v. *Fall,* 259 U. S. 197, 199; *Colorado* v. *Toll,* 268 U. S. 228, 230. A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party. *Garfield* v. *Goldsby, supra,* pp. 260, 262; *Lane* v. *Watts, supra,* p. 540. Neither are the homestead entrymen indispensable parties. *Lane* v. *Watts, supra,* pp. 537, 540.

In this latter respect the cases of *Litchfield* v. *Register,* 9 Wall. 575, in which it was sought to enjoin the Department from acting upon pending applications to prove preëmption rights to the land, *New Mexico* v. *Lane, supra,* in which it was sought to set aside an entry made by one who had purchased and paid for the land and to enjoin the issuing of a patent to him, and *Brady* v. *Work,* 263 U. S. 435, in which it was sought to enjoin the issuing of a patent to a person to whom the Department had adjudged the right to the land, are clearly distinguishable.

2. This brings us, on the merits, to the consideration of the question whether the order exceeded the authority conferred upon the Secretary, and attached to the prosecution of the claim of the State, without warrant of law, the condition that it must show that the lands are not mineral in character.

The grants of swamp lands made by the Acts of 1849 and 1850 were *in praesenti* and gave the States an inchoate title to such lands that became perfect, as of the dates of the Acts, when they had been identified as required and the legal title had passed by the approval of the Secretary under the Act of 1849 or the issuing of a patent under the Act of 1850. This has long been the settled construction of the Act of 1850. *Rogers Locomotive Works* v. *Emigrant Co.,* 164 U. S. 559, 570; *Little* v. *Williams,* 231 U. S. 335, 339.

Each of these Acts made a broad and unrestricted grant of the swamp lands. Neither contained any exception or reservation of mineral lands.

It is urged that such a reservation should be read into the grants by reason of a settled policy of the United States of withholding mineral lands from disposal save under laws specially including them. There was, however, no such settled policy in 1849 and 1850 when the swamp land grants were made. Prior to that time, it is

true, it had been the policy in providing for the sale of the public lands, to reserve lands containing "lead mines" and "salt springs." *United States* v. *Gratiot,* 14 Pet. 526, 538; *United States* v. *Gear,* 3 How. 120, 131; and *Morton* v. *Nebraska,* 21 Wall. 660, 668. Such mines and springs appeared upon the surface of the land, and were peculiarly essential to the public needs of the early communities. But there was, at that time, no established public policy of reserving mineral lands generally. This is emphasized by the fact that the general Act of 1841,[5] which gave preëmption rights to settlers on the public lands, merely excepted lands "on which are situated any *known salines or mines.*" And while the Act of September 27, 1850,[6] providing for the disposal of public lands in the Territory of Oregon to settlers, expressly excepted "mineral lands," it is manifest that this one local Act, approved the day before the swamp land Act of 1850, was insufficient to establish a settled public policy in reference to the reservation of mineral lands prior to the latter Act. And the fact that immediately after the subject of mineral lands had been thus brought to the attention of Congress, it did not except mineral lands from the grant of swamp lands to the several States, indicates that no reservation of such lands was intended.

It is clear that, as there was no settled public policy in reference to the reservation of mineral lands prior to the acts of 1849 and 1850, there is no substantial ground for reading such a reservation into the broad and unrestricted grants of swamp and overflowed lands made to the States, *in praesenti,* by these Acts, especially since such lands were not then generally known to contain valuable minerals, and when unfit for cultivation were commonly regarded as having value only after reclamation—the purpose for which both of these grants were made—the

[5] Act of September 4, 1841, c. 16, 5 Stat. 453.

[6] 9 Stat. 496, c. 76.

discovery of their oil and gas having been made at a much later date.

This conclusion, even apart from the peculiar character of swamp and overflowed lands, is fortified by the decision in *Cooper* v. *Roberts,* 18 How. 173, 179, 180, in which it was held that a provision in the Michigan Enabling Act of 1836,[7] that certain sections of the public land should be granted to the State for the use of schools, became a legal title to such sections when they were surveyed and marked out; and that, no statute prior to the Enabling Act having contained any reservation of mineral lands other than those containing salt springs or lead mines, the later Act of 1847 [8] providing for the sale of the mineral lands in the State should be construed as not withdrawing such lands within the school sections from the compact with the State.

The same conclusion was also reached in an unreported opinion given by the Acting Attorney General (the then Solicitor General) to the Secretary of the Interior in September, 1916, in which, citing *Cooper* v. *Roberts* in support of his views, he said: "There was no exception of mineral land from the swamp land grant made to the State of Louisiana and prior to that time . . . the only reservation of minerals made by the Federal Government in any of its legislation affecting the public lands related to lands containing salt springs, lead mines and contiguous tracts. The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana."

This conclusion is not in conflict with the later decisions relating to school lands in *Mining Co.* v. *Consolidated Mining Co.,* 102 U. S. 167—followed in *Mullan* v. *United States,* 118 U. S. 271— and *United States* v. *Sweet,* 245 U. S. 563. In the *Mining Co. Case,* in which it was

[7] Act of June 23, 1836, c. 121, 5 Stat. 59.

[8] Act of March 1, 1847, c. 32, 9 Stat. 146.

held that a provision in the Act of 1853 [9] for the sale of public lands in California, granting certain sections to the State for school purposes, was not intended to cover mineral lands, the decision was not based upon the ground that there was at that time any settled and general policy of reserving mineral lands, but, on the contrary, on the ground that the discovery in 1849 that California was rich in precious metals, bringing its mineral lands to the attention of Congress, had led to the adoption in reference to that State of a local policy, plainly manifested in other provisions of the Act making specific exceptions of mineral lands, by which, unlike the ordinary laws for disposing of public lands in agricultural States, the mineral lands in that State were uniformly reserved from sale, preëmption and grants for public purposes (pp. 172–175). In the *Sweet Case* it was held that the provision of the Utah Enabling Act of 1894,[10] granting to the State certain sections of the public lands for the support of common schools, with no mention of mineral lands, was not intended to embrace land known to be valuable for coal. The grounds of this decision were that long prior to the Act there had been established a settled policy in respect of mineral lands, evidenced by the mining laws and other statutes, by which they were withheld from disposal save under laws especially including them; and that read in the light of such laws and settled public policy the Act did not disclose a purpose to include such lands in the school grant, since, although couched in general terms adequate to embrace them if there were no statute or settled policy to the contrary, it contained no language explicitly withdrawing the school sections, where known to be mineral in character, from the operation of the mining laws, or certainly showing that Congress intended to depart from its long prevailing policy of dispos-

[9] Act of March 3, 1853, c. 145, 10 Stat. 244.

[10] Act of July 16, 1894, c. 138, 28 Stat. 107.

ing of mineral lands only under laws specially including them: this conclusion being fortified by the further considerations, that, when the grant was made, Utah was known to be rich in minerals and salines; that, while some of the other grants contained in the Act expressly included saline lands, none included mineral lands; that the Committees of Congress, upon whose recommendation the Act was passed, construed it as not embracing mineral lands; that the Land Department had uniformly placed the same construction upon it; and that Congress had, by a later act of 1902, acted upon that construction (pp. 567, 572, 573). Obviously, this decision does not apply to the construction of the swamp land grants made at a time when there was no settled policy as to the reservation of mineral lands, and where the other circumstances upon which the decision was based are lacking.

There is here no such uniform and long settled departmental construction of the swamp land Acts. It is not claimed that the Land Department construed them as excluding mineral lands or considered the question of the mineral character of swamp lands until quite recently. As late as October 1, 1903, the Secretary instructed the Commissioner that all pending selections under the swamp land grants to the State of Louisiana would be approved or patented to the State under the grants of 1849 or 1850, in all cases where the lands were shown by the field notes of survey or by affidavits filed at the time of selection, to have been swamp lands at the date of the grant. 32 Land Dec. 270, 276, 278. The first holding by the Department that mineral lands did not pass under the swamp land grants appears to have been made in 1917, more than sixty years after the passage of the Acts, in an unreported ruling.[11] This was followed by like departmental decisions in 1918, 46 Land Dec. 92, and 46 Land Dec. 389, 396—in

[11] Cited in 46 Land Dec. 389, 396.

which the contrary view expressed by the Attorney General was put aside as being *obiter*—and in 1920, 47 Land Dec. 366, shortly before the decision involved in the present case. We cannot regard these recent decisions of the Department—apparently departing from its previous well established practice, and rendered, except in one instance, in connection with the long delayed adjustment of the claims of Louisiana—as establishing a settled and uniform course of departmental construction that is persuasive as an aid in the construction of the Acts.

We conclude that the swamp land Acts granted to the States the swamp and overflowed lands, rendered unfit for cultivation, without reference to their mineral character; and that in requiring the State to establish the non-mineral character of the lands in question the Secretary exceeded the authority conferred upon him by the Acts and attached this condition to the prosecution of the claim of the State without warrant of law.

3. A question remains as to the effect of the decree awarding the injunction. This, after commanding the Secretary to vacate the ruling operating to withhold title from the State for any reason dependent upon the mineral character of the lands or to require that their non-mineral character be shown, contained the following supplemental clause: "and further restraining him, and them[12] from making any disposition of said described lands or from taking any action affecting the same save such immediate steps as are necessary to the further and final recognition of plaintiff's rights under the acts of March 2, 1849 (9 Stat. 352) and September 28, 1850 (9 Stat. 519), to the end that evidence of title may be given to plaintiff as by said acts provided and required." If, as urged, the effect of this supplemental clause is to divest the United States of title to the lands and leave the Secretary to do nothing

[12] His successors and agents.

but furnish the State evidence of title in final recognition of its asserted rights, the decree in this respect is plainly erroneous, aside from any question as to the scope of the bill or the necessary presence of the United States as a party. The State has not as yet finally established its right to the lands, and the administrative processes necessary thereto are not complete. The Secretary, it appears, has not as yet determined that they were swamp and overflowed lands. The finding of the Commissioner that they were "swamp or overflowed" was not brought in question before the Secretary, and his decision involved no approval of such finding, but related merely to the ruling of the Commissioner requiring the State, independently of this finding, to establish the non-mineral character of the lands. The Secretary, in the exercise of the administrative duty imposed upon him, is necessarily required, before furnishing evidence of title under either of the Acts, to determine whether the lands claimed were in fact swamp lands; and he may not be restrained from investigating and determining this in any appropriate manner.

The decree is inartificially framed. We think that the supplemental clause which we have quoted, in effect requires the Secretary to recognize that the State has already established its right to the lands and to do nothing further in reference to them except to furnish it evidence of title in final recognition of such established right, and restrains him from investigating and determining, without reference to the mineral character of the lands, whether they were in fact swamp and overflowed lands, before giving final recognition to such right as the State may establish under either of the Acts and issuing to it any evidence of title. The decree is accordingly modified by striking out this supplemental clause. Thus modified it should stand.

Decree modified and affirmed.

MARIANNA MATTHEWS *v.* HUWE, TREASURER.

MORTIMOR MATTHEWS *v.* HUWE, TREASURER.

ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF OHIO.

Nos. 39, 40. Submitted October 12, 1925.—Decided November 30, 1925.

1. A decision of a state supreme court dismissing a petition in error to review a judgment of an intermediate court, upon the ground that the constitutional question raised, and upon which the jurisdiction of the higher court depended, was not debtatable (i. e., was frivolous,) is a decision of the merits, so that a writ of error from this Court must go to the Supreme Court and not to the intermediate court. P. 263.
2. A writ of error from this Court will not lie to the judgment of an intermediate state court when the Supreme Court of the State, though lacking jurisdiction through writ of error taken as of right, had discretionary power to review the judgment by certiorari, and the plaintiff in error failed to apply for that remedy. P. 265.

Writs of error dismissed.

ERROR to decrees of the Court of Appeals of the State of Ohio in suits to enjoin the collection of special tax assessments. The cases were disposed of here on motions to dismiss the writs of error.

Mr. Mortimor Matthews, for plaintiff in error Marianna Matthews and *pro se.*

Mr. Chas S. Bell, with whom *Mr. Chester S. Durr* was on the brief, for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Marianna Matthews owns one tract of land, and Mortimer Matthews five others, in Hamilton County, Ohio. They lie within half a mile of Section X of the Glendale

and Milford Road. The plaintiffs brought suits under § 12075 of the General Code of Ohio, providing that Common Pleas Courts may enjoin the illegal levy or collection of taxes and assessments, to enjoin the county treasurer, the defendant in error, from collecting assessments made and levied on these lands for the cost of the improvement of Section X. Among other grounds for the petitions were allegations that the proceedings to assess were in violation of the Fourteenth Amendment of the Federal Constitution, in that they took away property from the plaintiffs without due process of law. In the Common Pleas Court the injunctions were sustained to the extent of some interest found to be excessive, but were denied in other respects. An appeal was taken to the Court of Appeals of Hamilton County, which affirmed the decrees of the Common Pleas Court. Petitions in error as of right were then prosecuted to the Supreme Court of the State, based on the ground that the cases involved constitutional questions. The Supreme Court made the following order in each case:

"Dec. 27, 1923. . . . This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right, and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed."

"It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $....."

Thereupon writs of error were applied for and allowed, not to the Supreme Court of Ohio, but to the Court of Appeals. Motions are now made to dismiss the writs.

We think the motions must be granted. In *Hetrick* v. *Village of Lindsay,* 265 U. S. 384, Hetrick brought suit

under the same section of the Ohio Code to enjoin the illegal collection of a special assessment. The injunction was denied in the Common Pleas Court and in the Court of Appeals, on appeal. The plaintiff filed a petition in error in the Supreme Court of the State. The defendant moved to dismiss on the ground that no leave to file it had been granted. The plaintiff claimed that no leave was necessary under the Ohio practice, because the case involved a question under the Constitution of the United States, and the appeal was of right. The Court sustained the motion to dismiss, on the ground that the statute whose validity was attacked had been so long held constitutional by the courts of the State that it could no longer be questioned. A writ of error to bring the case here was allowed by the Chief Justice of the Ohio Supreme Court and entertained by this Court. That case is exactly like this except as to the court to which the writ of error was directed.

The plaintiffs in error rely on the case of *Norfolk and Suburban Turnpike Company* v. *Commonwealth of Virginia,* 225 U. S. 264, and the rule laid down by Chief Justice White, in which he said (at p. 269):

"For the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future, we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case,* and shall therefore, by not departing from

the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

Western Union Telegraph Company v. *Crovo,* 220 U. S. 364, 366, was a Virginia case, in which a writ of error was denied by the Supreme Court of Appeals under a local practice, because the Court thought "the judgment was plainly right." The law and equity court, that is the lower court, was held to be the highest court of the State to which the case could be carried, and the writ of error from this Court to that court was sustained, a federal question being properly saved.

We think, however, that in these cases, as in the *Hetrick Case,* on the face of the record the state Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable. It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider.

Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made.

In *Stratton* v. *Stratton,* 239 U. S. 55, another Ohio case, a writ of error was directed to the Court of Appeals to

reverse a judgment of that court, on the ground that it was the highest court in which a decision in the suit could be had. It was held, however, that as the Supreme Court by the constitution of the State had authority to review the judgments and decrees of the Court of Appeals by certiorari and no application had been made therefor, the Court of Appeals could not be considered the court of last resort and a writ of error from this Court to that would not lie. The same view was taken in *Andrews* v. *The Virginian Railway Company,* 248 U. S. 272. The plaintiffs in error are thus in a dilemma from which they cannot escape. If the Supreme Court by final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the Supreme Court. If it did not, then the decree of the Court of Appeals did not become that of the highest court to which a writ of error would lie from this Court for lack of application for certiorari.

Writs of error dismissed.

ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* UNITED STATES.

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

No. 273. Argued Nov. 19, 20, 1925.—Decided November 30, 1925.

The provision of the Hours of Service Act, "that no operator, train dispatcher or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours," etc., does not apply to a yardmaster, under circumstances described in the opinion. P. 267.

3 Fed. (2d) 138, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment for penalties, recovered

from the Railroad by the United States in a prosecution under the Hours of Service Act. See 298 Fed. 549.

Mr. Edward C. Craig, with whom *Messrs. Homer W. Davis, John G. Drennan, Nelson J. Wilcox* and *J. A. Connell* were on the brief, for petitioner.

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

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought by the United States to recover penalties for alleged violation of the Hours of Service Act of March 4, 1907, c. 2939, § 2; 34 Stat. 1415. The case was tried by a Judge under a stipulation waiving a jury. Rev. Stats. §§ 649, 700. He found the defendant railroad company liable, subject to an exception to his refusal to rule that there was no evidence to warrant a recovery. The facts were not in dispute and the decision turned on the Judge's view of the law. 298 Fed. 549. His judgment was sustained by the Circuit Court of Appeals. 3 Fed. (2d) 138. The material part of the statute is: "that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day." Two yardmasters were kept on duty for twelve hours each, by the railroad company in its Corwith Yard, Chicago, and the question is whether upon the statement of their duties they fell within the Act, bearing in mind that "The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physicial strain which usually results from remaining too

long at an exacting task." *Chicago & Alton R. R. Co.* v. *United States,* 247 U. S. 197, 199, 200.

The Corwith Yard lies to the South of the defendant's road, which runs East and West. Between the Yard and the road, and parallel to the latter, runs the road of the Chicago & Alton Railroad, which must be crossed by cars coming from or going to the defendant's tracks to or from the Yard. These crossings are controlled from a tower on the Chicago & Alton's line. When cars of either road seek to enter the Yard the tower man generally telephones to the yardmaster to find out whether he is in condition to receive them, and when cars are to go out the yardmaster telephones to the tower man to know if they can pass; but the yardmaster has no authority over the tower man and his telephone either way is not conclusive of the tower man's action. Conversely the tower man has no authority over him.

The yardmaster's duties extend to the breaking up and making up of trains, the prompt movement of cars, and general charge of the Yard. The telephoning, although a part of them, was an incidental part only, and a small one. Twenty-four calls a day seems a too liberal estimate. The messages were not orders, although they generally would govern the decision of the tower man. His decision was not obedience to any authority of or represented by the yardmaster. The movements that the messages affected were not of the kind that require the greatest solicitude, even when they were train movements, which, of course, was not always the case. The office hardly could be described as 'continuously operated', when the yardmaster was not in it much more than half the time, but was about the Yard attending to other things. Taking all the facts into account we are of opinion that the employment of the yardmaster for more than nine hours was not within the evil at which the statute was aimed and that the ruling to the contrary was wrong.

Judgment reversed.

PACIFIC AMERICAN FISHERIES *v.* ALASKA.

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

No. 246. Argued November 24, 1925.—Decided December 7, 1925.

1. A graduated surtax on salmon canneries of five cents per case of the product packed on all cases in excess of 10,000 and not more than 25,000; ten cents per case on all from 25,000 to 40,000; fifteen cents per case on all from 40,000 to 50,000; and twenty-five cents per case on all in excess of 50,000, is within the taxing power conferred on the Alaska legislature by the Organic Act of August 24, 1912. P. 276.
2. This tax is not inconsistent with the provision of the Organic Act that the authority therein granted to the legislature to alter, modify and repeal laws in force in Alaska shall not extend to the game, fish and fur seal laws; which is coupled with the proviso that the restriction shall not operate to prevent the legislature from imposing other and additional taxes and licenses. P. 277.
3. *Semble* that the purpose of this restriction was to prevent the Territory from doing away with fish protection. *Id.*
4. In exercising its taxing power on canneries the legislature may consider collateral advantages of fish protection. *Id.*
5. The tax, by discriminating against large canneries in favor of small ones, does not contravene the Fifth Amendment; since classification of taxes by the amount of the corpus taxed is valid when, as here, the inequalities are based on intelligible grounds of policy. P. 278.

2 Fed. (2d) 9, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the United States District Court in Alaska, in favor of the Territory, in an action to collect license taxes.

Mr. Warren Gregory, with whom *Messrs. E. S. McCord, A. E. Robertson, H. L. Faulkner* and *Blair S. Shuman* were on the brief, for petitioner.

The additional tax is a regulation of the catching of salmon, and therefore violative of the proviso in § 3 of

the Organic Act of Alaska. By this proviso Congress made it clear that it intended to retain jurisdiction over the excepted matters among which are the laws relating to fish. The Act of June 26, 1906, for the protection and regulation of the salmon fisheries of Alaska, (34 Stat. 478), was in full force when the Legislature passed the law now attacked. *Auk Bay Salmon Canning Co.* v. *United States,* 300 Fed. 907.

The regulatory character of the Act is shown by the following characteristics:

(a) A tax which is imposed in good faith as a revenue measure is never graduated upward as is this tax, and furthermore is based upon profits or income net or gross as is the Federal Income Tax. The tax, of course, does not fall upon a fishery, saltery, etc., simply as property or as an *ad valorem* tax, nor could it do so, nor would such a tax be valid, since it would not be based upon any valuation of such properties. It falls upon the person who conducts these plants. Assuming that the tax may properly differentiate as between these general classes, it must nevertheless bear equally upon all within a particular class. In the case of the fisheries alone is a second classification attempted; based, not upon the character or amount of the business done, but upon the number of canneries where the business is carried on. The inequality which bears upon salmon canners packing the same character of fish is demonstrable from the terms of the Act. This portion of the Act attempts to discriminate between a large cannery and a small one through the method of a graduated volume tax. The larger the pack in any one cannery, the higher the additional tax. Only one conclusion can be reached from this change in the legislative method. The Legislature was not by this additional tax trying to raise money; it was trying to stop the industry, or at least to regulate it.

(b) The tax on fish traps, found in subdivision h, had the same effect.

(c) At the same session, and on the preceding day, the Legislature passed a law attempting to establish a closed season for salmon in Alaska for a period of approximately twenty days during each summer. This act was considered in the *Auk Bay Case,* 300 Fed. 907, and declared invalid.

(d) The exemption of chums (subd. f) from the surtax is also significant. It is clear that the Legislature regarded chums as being a less valuable fish than the varieties subjected to the surtax, and less subject to extermination, and that therefore no additional restrictions upon their catch were necessary.

(e) The act requires each cannery to pay 1% of its net annual income, no allowance being made for income derived from activities of the company without Alaska. It is significant that no industry other than mining is required by the statute to pay any sort of an income tax directly or indirectly.

(f) The revenue raised by this statute alone is grossly in excess of the needs of the Territory. As this case comes up upon demurrer to the answer, all of the allegations of the answer in that regard must be taken as true. That the excessiveness of revenue obtained from the operation of a statute is to be considered in determining its constitutionality was held in *Commonwealth* v. *Alden Coal Co.,* 251 Pa. 134.

(g) All of the circumstances connected with this case tend to show that the Legislature intended to prohibit and to penalize rather than to tax for revenue. *Elmer* v. *Wallace,* 275 Fed. 86. *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, is distinguishable; and any intimations contained in it with regard to the unimportance of the intent of the Legislature in passing an act must be regarded as having been overruled by *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; distinguishing *Veazie Bank* v. *Fenno,* 8 Wall. 533, and *McCray* v. *United States,* 195 U. S. 27. See *Alaska Pacific*

Fisheries v. *Territory of Alaska,* 236 Fed. 52. That the court must look behind the form and language of tax statutes when deciding as to their validity see further: *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350; *Collins* v. *New Hampshire,* 171 U. S. 30.

The question involved herein has not been decided either expressly or impliedly by previous decisions. *Alaska Pacific Fisheries* v. *Territory of Alaska, supra; Alaska Salmon Co.* v. *Territory of Alaska,* 236 Fed. 62; *Alaska Fish Co.* v. *Smith, supra; Haavik* v. *Alaska Packers Assn.,* 263 U. S. 510; *Auk Bay Salmon Canning Co.* v. *United States,* 300 Fed. 907.

The classification upon which the surtax is based is arbitrary and unreasonable and opposed to the due process clauses of the Fifth and Fourteenth Amendments. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540. It does not bear equally upon all members of the same class, viz., "fisheries." Police control over the industry having been expressly withheld, tax classification must rest upon some reasonable basis of distinction. This distinction must be grounded upon revenue. From a revenue standpoint it is immaterial whether salmon be packed in one cannery or in twenty. On the right to create inequalities in taxation by artificial classification, see: *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *Truax* v. *Raich,* 239 U. S. 33; *State ex rel. Wyatt* v. *Ashbrook,* 154 Mo. 375; *City of Los Angeles* v. *Lankershim,* 160 Cal. 800; *In re Dees,* 46 Cal. App. 656, 660, 661; *Fiscal Court* v. *F. & A. Cox Co.,* 132 Ky. 738; *Ex parte Franks,* 52 Cal. 606; *Ex parte Richardson,* 170 Cal. 68; *City of Seattle* v. *Dencker,* 58 Wash. 501.

In *Rast* v. *Van Deman,* 240 U. S. 342, and *Tanner* v. *Little,* 240 U. S. 369, the classification was sustained upon the power of regulation vested in the state legislature.

Mr. John Rustgard, Attorney General of Alaska, for respondent.

The limitation imposed by § 3 of the Organic Act is one of several affecting the broad legislative power conferred by § 9. The federal fish laws in question, being in their nature purely restrictive, can be "modified, altered or amended," or otherwise interfered with, only by relaxing them, or hampering their enforcement. No attempt has been made to do so. Additional restrictions cannot be said to relax, or conflict with, prior restrictions. *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, is a clear pronouncement that the Legislature of Alaska has authority to use its taxing power not only to limit fishing but to stop it. Why, then, may not the same power be employed in the same manner to limit or regulate canning? In a still more recent case (*Haavik* v. *Alaska Packers Assn.,* 263 U. S. 510), this Court held that in the exercise of its taxing power the Legislature had authority to discriminate against non-resident fishermen and in favor of resident fishermen.

Conservation of the fisheries was the sole purpose of Congress in withholding from the Legislature the right to repeal or modify the fishing restrictions in force at the time the Organic Act was passed. The federal fish laws merely represent the most liberal terms on which Congress would permit fishing in Alaska waters; the local Legislature was at liberty to enact as many more restrictions as it found necessary for the perpetuation of the Territory's main industry. If the language employed be insufficient to dispel all doubt on this subject, the debate on the floor of the House, when the clause in § 3 of the Organic Act was under discussion, is surely ample for that purpose. This dual authority is no novelty in our system of government. It permeates nearly all of our institutions and has become recognized as salutary wherever practically available. The principle is seen in the mining

laws; the use and occupancy of public lands, *McKelvey* v. *United States,* 260 U. S. 353; in interstate commerce regulations, *Carey* v. *South Dakota,* 250 U. S. 118; *Savage* v. *James,* 225 U. S. 501; regulations of migratory birds, *Carey* v. *South Dakota, supra;* inspection laws, *Savage* v. *James, supra.* See *Northern P. R. Co.* v. *North Dakota,* 250 U. S. 135. So, under the Eighteenth Amendment, *Vigliotti* v. *Pennsylvania,* 258 U. S. 403; *Kennedy* v. *United States,* 265 U S. 344; *Hixson* v. *Oakes,* 265 U. S. 254.

Section 9 of the Organic Act also, by reference, incorporates the Act of July 30, 1886 (24 Stat. 170, c. 818), into the limitations imposed upon the legislative powers. That act provides, *inter alia,* that the Legislature "shall not pass local or special laws in any of the following cases, that is to say: . . . The protection of game and fish." Ordinarily no one would deny that this is a recognition of the authority to protect game and fish so long as the laws enacted for that purpose are general and not local.

The Act of June 6, 1924, was a reasonably clear recognition by Congress that the Legislature had some regulatory authority over fisheries, that a dual authority over the subject did exist, and that this dual authority was designed to be continued in the future. The new fish law for Alaska is not essentially different in principle from the Migratory Bird Law of Congress. Both place the authority to prescribe regulations in the Department of Commerce and neither denies to States or Territory power to add further restrictions.

Regulation of canning is not regulation of fishing. There is certainly nothing in the statutes to indicate that it was the intent of Congress to deny to the Territory full police authority over the shore industries, whether the same be dependent upon the fish in the ocean, or otherwise.

If the police jurisdiction exists, the objection to the present excise tax on the ground that it is regulatory

must fall; for the police power may be exercised through the taxing power. *Hammond Packg. Co.* v. *Montana,* 233 U. S. 331. The classification by amount is not repugnant to the Fifth Amendment. *Brushaber* v. *Union P. R. Co.,* 240 U. S. 1; *McCray* v. *United States,* 195 U. S. 27; *Spreckles Sugar Ref. Co.* v. *McClain,* 192 U. S. 397; *Clark* v. *Titusville,* 184 U. S. 329; *Knowlton* v. *Moore,* 178 U. S. 82; *Stebbins* v. *Riley,* 268 U. S. 137; *Flint* v. *Stone Tracy Co.,* 220 U. S. 108; *Patten* v. *Brady,* 184 U. S. 608; *Magoun* v. *Ill. Trust & Sav. Bank,* 170 U. S. 283; *Maxwell* v. *Bugbee,* 250 U. S. 525. The purpose of the tax is not a matter for the courts. *Alaska Fish Co.* v. *Smith,* 255 U. S. 44; *Rast* v. *Van Deman & L. Co.,* 240 U. S. 342; *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra; Flint* v. *Stone Tracy Co., supra; United States* v. *Doremus,* 249 U. S. 86.

The purpose of the members of the Legislature in enacting a statute is not a question of fact which, upon issues joined, must be tried before and passed upon by a jury. A demurrer to an immaterial or frivolous allegation does not render it either material or pertinent. The statute must be left to speak for itself.

The grading of the tax so as apparently to fall heavier upon the owner of a cannery producing a large pack than upon the owner of one producing a small pack is just, and fair, and reasonable.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Territory of Alaska to recover from the petitioner, Pacific American Fisheries, license taxes alleged to be due upon cases of salmon packed by the defendant at four canneries named. The defendant in its answer set up that the territorial taxing act was contrary to the Act of Congress of August 24, 1912, c. 387, (§ 3,) 37 Stat. 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United

States. The Territory demurred; there was a judgment for the plaintiff and this was affirmed by the Circuit Court of Appeals. 2 Fed. (2d) 9. A writ of certiorari was granted by this Court. 267 U. S. 589.

The taxes in question were imposed by c. 101, § 2, subdivision 8th, Laws of Alaska, 1923, amending c. 31 of the Laws of 1921. By (*c*) of that subdivision salmon canneries, after a tax by (*b*) of ten cents per case, are charged an additional tax on a pack of kings, reds and sockeyes, counted together, at any one cannery, as follows: On all cases in excess of ten thousand and not more than twenty-five thousand, five cents per case; in excess of twenty-five thousand and not more than forty thousand, ten cents per case; in excess of forty thousand and not more than fifty thousand, fifteen cents per case; and on all in excess of fifty thousand, twenty cents per case. Similarly in (*d*) and (*e*) a tax of four and one-half cents per case is imposed on medium reds, cohoes, and pinks; with additional taxes for each increase of numbers as in the previous subdivision. By (*f*) chums are taxed three cents per case. The petitioner says that this graduated tax is inconsistent with the Act of Congress mentioned, which provides that the authority therein granted to alter, amend, modify and repeal laws in force in Alaska should not extend to the game, fish and fur seal laws, and presses this contention nothwithstanding the further proviso that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. The petitioner also says that the classification upon which the surtax is based is unreasonable and a denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States. No question is raised about the uniform tax of ten cents per case imposed by (*b*). That has been paid.

The petitioner offers various reasons to show that this tax is not what it purports to be but is an attempt to regu-

late fisheries, which, the petitioner believes, Congress has not given the Territory power to regulate. The answer alleges that it was known that the revenue from these taxes would exceed the appropriations and needs of the Territory, and from this and other things the conclusion is drawn that the taxes were levied with the intent of driving the defendant out of its business. But the premise could not be known, it only could be prophesied. If known the conclusion as to legislative intent would not follow; and if the intent were entertained, in the only sense in which it rationally could be imputed, that is, to discourage canning the larger amounts, the legislature lawfully might act with that intent. Fisheries were not the direct object of attack, but canneries. It would require a strong case in any event to invalidate a tax on things that the legislature had power to regulate because of its collateral reaction on something else. But here even as to fisheries the legislature is given power to tax. Any tax is a discouragement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a shortsighted rush for fish. At least we must take it to be clear that the unlimited power expressly given may be exercised with consideration of collateral advantages and disadvantages. *Alaska Fish, Etc. Co.* v. *Smith,* 255 U. S. 44, 48. It could not be exercised, intelligently otherwise. The extent of the power is a question of specific interpretation not of general principle; and therefore we leave the many familiar cases that were cited, on one side.

It is not unworthy of notice that in § 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, c. 818, § 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of

game and fish is recognized, and also that the latest revision of the fish law by Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction with the way in which those powers had been used. Act of June 6, 1924, c. 272, § 8; 43 Stat. 464, 467.

It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially as contravening the Fifth Amendment and denying due process of law. Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its full capacity; that there always will be an irreducible minimum of expense to be borne whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law justly may attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights.

Judgment affirmed.

HENDERSON WATER COMPANY *v.* CORPORATION COMMISSION OF NORTH CAROLINA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 249. Argued November 18, 1925.—Decided December 14, 1925.

Where a water company, bound to maximum rates by its contract with a city, applied to a state commission and secured an order

allowing an increase, but only one-half of that asked for, with the right, however, to apply for further relief at the end of a test period, the company, after making the test, must exhaust its remedy with the commission before suing in the District Court to enjoin enforcement of the rates as confiscatory. P. 280.

Affirmed.

APPEAL from a decree of the District Court refusing a temporary injunction in a suit to restrain water rates, on the ground of confiscation.

Mr. J. H. Bridgers, for appellant.

Messrs. Bennett Hester Perry and *T. T. Hicks,* for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from an order refusing a temporary injunction heard before three judges. The Henderson Water Company is the owner by assignment of a franchise to furnish to Henderson, North Carolina, a supply of water. The franchise, with a term of forty years, was granted in 1892 by the city, when it was a town, to certain grantees, from whom it came in 1894 to the Water Company, which was complainant below, and is appellant here. The ordinance provided a schedule of prices for water to be furnished beyond which the grantee could not go. Later the State of North Carolina created a Corporation Commission, having power to fix rates for public utilities of the State. 1919 Consol. Stats. of North Carolina, §§ 1066, 1097–1103, 2783, 1037.

On September 27, 1922, the complainant filed with the Corporation Commission a petition setting forth the original cost of construction of its plant, the amount expended in permanent improvements, and the earning capacity of the same under the schedule of rates provided in the fran-

chise, and, because of the alleged inadequate return from them, asked the Corporation Commission to grant to it the right to charge rates higher by 10 per cent. The Commission heard the complaint, and March 29, 1923, ordered an increase of about one-half that asked for, to take effect July 27, 1923, with the direction that after the corporation had tried the rates fixed for six months, it might apply again for such relief as the results would justify.

The end of the six months' test proposed was January 27, 1924. Without applying again to the Commission, the Water Company, on February 22, 1924, filed this bill to enjoin the Commission from continuing to enforce the rates fixed by the order made in the spring of 1923. on the ground that they were confiscatory.

Meantime, the city of Henderson had brought suit against the Commission, to which the Water Company was not a party, to enjoin the Commission from fixing rates different from the rates stipulated in the franchise, on the ground that its contract rights were being violated. In that action the city of Henderson was defeated in the court of first instance, and in the Supreme Court of North Carolina on appeal. *Corporation Commission* v. *Henderson Water Co.,* 190 N. C. 70. See also *Corporation Commission* v. *Cannon Mfg. Co.,* 185 N. C. 17, 25; *Southern Public Utilities Co.* v. *City of Charlotte,* 179 N. C. 151.

The District Court puts refusal to grant the injunction in the present case on the ground that the complainant had not sufficiently exhausted its remedies before the Corporation Commission. We think the District Court was entirely right in this.

It is urged on behalf of the Company that it has a constitutional right to try the question whether it is suffering confiscation and should not be denied that right, even during such a test as six months. It relies on *Oklahoma Natural Gas Company* v. *Russell,* 261 U. S. 290. In that

case a public utility corporation sought an injunction to prevent the enforcement of an alleged confiscatory rate, pending an appeal from the court of first instance in Oklahoma to the state Supreme Court, in a proceeding in which both the court of first instance and the Supreme Court were exercising the legislative function of fixing rates. The complaint was that plaintiffs were suffering daily from confiscation under the rate to which they were limited by the state commission, and that even if the state Supreme Court changed the rate thereafter on appeal they would have no adequate remedy for their losses before the court acted. They had applied to the Supreme Court for a supersedeas, but it had been denied. This Court held that comity must give way to constitutional right, and that the Gas Company was entitled to a hearing on its application for an injunction without awaiting the action of the state court. In the case of *Prentis* v. *The Atlantic Coast Line Company,* 211 U. S. 210, 231, on the other hand, a state commission of Virginia fixed rates for a railway and an appeal was taken under the statute to the Supreme Court of the State which had power legislatively to fix or change rates. A bill was filed by the Railway to restrain the rates fixed by the commission before the appeal had been perfected and passed on. The company had made no effort to secure a revision and there had been no present invasion of its rights under the order of the state commission but only the taking of preliminary steps toward cutting the rates down. So this Court directed the bill in that case to be retained until the result of the appeal to the Supreme Court if the company saw fit to take it.

The present case differs from the cases cited, in that when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed

therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. *Columbus Railway Company* v. *Columbus,* 249 U. S. 399; *Public Service Company* v. *St. Cloud,* 265 U. S. 352. Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. *Trenton* v. *New Jersey,* 262 U. S. 182. It was, therefore, plainly within the power and discretion of the Commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go. No constitutional rights of the Water Company to be protected against confiscation would be infringed by such reasonable delay.

We concur with the District Court in the view that the Water Company should have applied for a resumption of the hearing after the test and exhausted its remedy there before a resort to this suit.

Affirmed.

WHITE, TREASURER, ET AL. *v.* MECHANICS SECURITIES CORPORATION.

UNITED STATES *v.* SECURITIES CORPORATION GENERAL.

WHITE, TREASURER, ET AL. *v.* SECURITIES CORPORATION GENERAL.

UNITED STATES *v.* EQUITABLE TRUST COMPANY OF NEW YORK.

HICKS, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* EQUITABLE TRUST COMPANY OF NEW YORK.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

HICKS, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* MERCANTILE TRUST COMPANY.

UNITED STATES *v.* MERCANTILE TRUST COMPANY.

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

Nos. 423, 424,[1] 425,[1] 430, 431, 809, 810. Argued December 1, 2, 1925.—Decided December 14, 1925.

1. Under Jud. Code § 240, as amended by the Act of Feb. 13, 1925, a case pending undecided in the Circuit Court of Appeals on appeal from a decree of the District Court may be brought to this Court by certiorari. P. 299.

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[1] By stipulation of counsel it was agreed that the disposition of the following cases: No. 427, *White, Treasurer, et al.* v. *Borland, Trustee;* No. 429, *White, Treasurer, et al.* v. *Stralem et al.;* No. 433; *White, Treasurer, et al.* v. *American National Bank of St. Paul;* No. 435, *White, Treasurer, et al.* v. *Hilken;* No. 437, *White, Treasurer, et al.* v. *Garbat;* No. 439, *White, Treasurer, et al.* v. *Thalman;* No.

2. Under § 9 of the Trading with the Enemy Act, a suit may be maintained by private parties against the Alien Property Custodian and the Treasurer of the United States to collect notes of the late Imperial German Government out of its funds seized by the Custodian, without making the present German Government a party. P. 300.
3. The disposition made of such enemy funds by the Trading with the Enemy Act was within the powers of Congress, recognized by our Treaty with Germany ending the war. *Id.*
4. By the Trading with the Enemy Act the United States with respect to funds of an enemy government seized by the Alien Property Custodian assumed the position of trustee for the benefit of claimants, and renounced its power to assert a claim of its own, except on the same footing and in the same way as others, if at all. P. 301.
5. Admissions made under oath by the Alien Property Custodian and the Treasurer of the United States in their answer in a suit against them under the Trading with the Enemy Act, to the effect that funds seized by the former and deposited with the latter belonged to the Imperial German Government, are evidence against them in that and in other like cases. P. 301.
6. Such admissions are conclusive in the case in which made, in the absence of other evidence to the contrary; and their force as evidence does not depend upon the authority of the Custodian to determine the fact admitted. *Id.*

4 Fed. (2d) 619, 624, affirmed.

Of the above entitled causes, Nos. 423, 425 and 431 were appeals from decrees of the Court of Appeals of the

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441, *White, Treasurer, et al.* v. *Republic Trading Company;* No. 443, *White, Treasurer, et al.* v. *Kaufman,* and No. 445, *White, Treasurer, et al.* v. *Hecksher* should abide the decision announced by the Court in No. 425, *White, Treasurer, et al.* v. *Securities Corporation General,* and that the disposition of the following cases: No. 426, *United States* v. *Borland, Trustee;* No. 428, *United States* v. *Stralem et al.;* No. 432, *United States* v. *American National Bank of St. Paul;* No. 434, *United States* v. *Hilken;* No. 436, *United States* v. *Garbat,* No. 438, *United States* v. *Thalman;* No. 440, *United States* v. *Republic Trading Company;* No. 442, *United States* v. *Kaufman;* and No. 444, *United States* v. *Hecksher,* should abide the decision announced by the Court in No. 424, *United States* v. *Securities Corporation General.*

District of Columbia affirming decrees rendered by the Supreme Court of the District in three suits brought under § 9 of the Trading with the Enemy Act, sustaining the plaintiffs' claims and directing the Treasurer of the United States to pay the respective amounts found due, with interest; Nos. 424 and 430 were appeals from decrees of the Court of Appeals of the District dismissing appeals taken by the United States from orders entered by the Supreme Court of the District striking out suggestions filed on behalf of the United States in causes Nos. 425 and 431; Nos. 809 and 810 were writs of certiorari issued for the purpose of reviewing a decree of the District Court for the Eastern District of Missouri, awarding like relief to another claimant under the Act, and overruling suggestions filed on behalf of the United States. The certiorari was directed to the Circuit Court of Appeals before which appeals from the last mentioned decree were awaiting argument.

Mr. Dean Hill Stanley, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Letts* were on the briefs, for appellants and petitioners.

Appeal lies to this Court from the Court of Appeals of the District of Columbia in suits under the Trading with the Enemy Act. *Behn, Meyer & Co., Ltd.* v. *Miller,* 266 U. S. 457; *Banco Mexicano* v. *Miller,* 263 U. S. 591; *Swiss National Ins. Co. Ltd.* v. *Miller,* 267 U. S. 42; *Compagnie Internationale de Produits, etc.* v. *Miller,* 266 U. S. 473.

The Supreme Court of the District of Columbia, and the District Court in Missouri, were without jurisdiction, because the suits involved adjudication as to the conduct and obligations of a foreign sovereign. A sovereign can not be sued in its own courts or in the courts of any other sovereign without its consent. *Beers* v. *State of Arkansas,* 20 How. 527. Nor can an affirmative judgment be

awarded by the courts of the United States against a foreign sovereign in a case where the sovereign has instituted a suit in its own name in courts in the United States. *French Republic* v. *Inland Navigation Co.,* 263 Fed. 410. Nor are the funds of a foreign sovereign on deposit in the United States subject to attachment, *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341; *Hassard* v. *United States of Mexico,* 29 Misc. 511; 46 App. Div. 623 and 173 N. Y. 645. Nor will a process in admiralty issue against a vessel which is the property of a foreign sovereign, even though the sovereign is engaging in commerce. *The Maipo,* 252 Fed. 627; *The Adriatic,* 258 Fed. 902; *Molina* v. *Comision Reguladora del Necardo de Henequen,* 92 N. J. L. 38; *Underhill* v. *Hernandez,* 168 U. S. 250; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347; *Ricaud* v. *American Metal Co.,* 246 U. S. 304.

The suits provided for under § 9 of the Trading with the Enemy Act are suits of individuals against individual debtors, and Congress did not contemplate when § 9 was passed that it should apply to suits upon the debts of a government. But even assuming that Congress intended to permit suit against an enemy government, to that extent § 9 is unconstitutional. Claims against a foreign sovereign by a citizen of the United States are subject only to diplomatic negotiations even though the United States may be at war with the foreign state. Congress can not invest the courts with authority to pass judicially upon political questions. See *Hayburn's case,* 2 Dall. 410, and note on 409; *United States* v. *Ferreira,* 13 How. 39; *United States* v. *Todd,* 13 How. 51, note; *Gordon* v. *United States,* 117 U. S. 697; *Ex parte Riebeling,* 70 Fed. 310; *Ex parte Gans,* 17 Fed. 471; *United States* v. *Queen,* 105 Fed. 269; *United States* v. *Hay,* 20 App. D. C. 576. The act of the sovereign in these cases was essentially an act by the sovereign in its sovereign character. See

Twycross v. *Dreyfus,* 36 L. T. R. 752; *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 234 N. Y. 372.

There is no evidence to prove that there is in the Treasury any money which, at the time of seizure, belonged to the Imperial German Government, or that the Alien Property Custodian has in his possession property out of which the claims of the appellees may be paid. The Custodian is the official, by delegation from the President, who seizes both money and property. Whenever he seized money he was under a mandatory duty to deposit it in the Treasury. This relieved him of all duty and authority with respect to such money. Not only is the money removed from the control of the Custodian, but he has nothing to say with respect to the manner of investment of the funds. This investment is to be made by the Secretary of the Treasury, who in turn is to be controlled by rules and regulations made by the President. Furthermore, the time of the sale of these securities after the end of the war is to be decided by the President, for the Act provides that as soon after the end of the war as the President shall deem practicable such securities shall be sold and the proceeds deposited in the Treasury. It is difficult to understand how Congress could have more completely removed the control and handling of money from the jurisdiction of the Custodian. See *Max Henkels* v. *Miller, as Alien Property Custodian,* 4 Fed. (2d) 988.

A determination by the Custodian as to any money deposited in the Treasury pursuant to the Act is of no greater effect than a determination by a private citizen and has no evidentiary value with respect to the ownership of the money at the time of seizure. Once having secured possession of the money his right to make determinations with respect to it ceased, and all he could do was to deposit it in the Treasury. Thereafter any determination as to title could be made only by the President

acting under § 9 of the Act, or by a court acting under the same Act, or by Congress, which reserved to itself under § 12 of the Act the right to settle claims of enemies to the money. The determination by the Custodian of ownership is merely made for the purpose of securing possession of the property to the Custodian. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554. See also *Stoehr* v. *Wallace,* 255 U. S. 239, and *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, and numerous other cases.

There was no evidence to show the actual ownership of the money by the Imperial German Government at the time of seizure. To prove ownership the claimants relied entirely upon the allegations in an answer in another suit against the same defendants, to the effect that the Custodian, after he had seized the money as that of an "Unknown Enemy" and deposited it in the Treasury of the United States in accordance with the provisions of § 12, attempted to determine the money to be the money of the Imperial German Government.

The United States may assert its rights by means of a suggestion to the court by the Attorney General. *In re Debs,* 158 U. S. 564; *United States* v. *Beebe,* 127 U. S. 338, *Heckman* v. *United States,* 224 U. S. 413; *The Exchange,* 7 Cranch 116; *United States* v. *Lee,* 106 U. S. 196; *Stanley* v. *Schwalby,* 147 U. S. 508.

The United States is a "person" within the meaning of § 9 of the Trading with the Enemy Act, and is therefore a proper claimant under that section. The United States is both a body politic and a corporation. See *United States* v. *Maurice,* 26 Fed. Cas. 1211; *United States* v. *Tingey,* 5 Pet. 115; *Dixon* v. *United States,* 1 Brock. 177; *Res Publica* v. *Sweers,* 1 Dall. 41. The suggestion alleges an indebtedness owing to the United States from Germany prior to October 6, 1917. It also alleges the filing of a notice of claim as provided by the Act. The United States is, therefore, entitled to have its claims

adjudicated in these proceedings, since it is the holder of the money. A suit against the Custodian under § 9 for the collection of a debt is in substance a suit against the United States. *Banco Mexicano* v. *Miller,* 263 U. S. 591. The United States being in substance, therefore, the possessor of the money out of which plaintiffs seek to secure the payment of the debt, may properly assert its claim against the money by means of a suggestion. Assuming that the United States is not a claimant under § 9, it is nevertheless entitled in this proceeding to assert its rights and to have them passed upon. It is a general principle that the United States is not affected by any provision of a statute with respect to its claims, unless it is specifically mentioned in the statute. *Dollar Savings Bank* v. *United States,* 18 Wall. 227; *Guaranty Co.* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *Lewis, Trustee* v. *United States,* 92 U. S. 618.

The Custodian and the Treasurer, as officers of the United States, may assert the claims of the United States against funds in the Treasury, out of which the claimant in a suit under § 9 of the Trading with the Enemy Act, also seeks to recover. *Banco Mexicano* v. *Miller,* 263 U. S. 591; *Miller* v. *Robertson,* 266 U. S. 243.

Mr. M. Carter Hall, with whom *Mr. C. C. Carlin* was on the brief, for appellee, in Nos. 423, 424 and 425.

The Supreme Court of the District of Columbia was expressly given jurisdiction of these suits by § 9 of the Trading with the Enemy Act, as amended, and the decrees complained of do not infringe upon the sovereign rights of the Imperial German Government, or its successor.

Under its constitutional war power, Congress has the full and unrestricted right to seize and confiscate enemy property. *Brown* v. *United States,* 8 Cranch 110; *Miller* v. *United States,* 11 Wall. 268; *Herrera* v. *United States,* 222 U. S. 558. Having the greater power to confiscate

this money, it also had the lesser power to appropriate it for the payment of debts due by the German Government to American citizens.

The primary purpose of the Trading with the Enemy Act was to seize enemy property in order to prevent its use against the United States. One of its secondary purposes was to provide for the payment of debts due from enemies to American citizens, before the termination of the war. *Miller* v. *Robertson,* 266 U. S. 243; *Koscinski* v. *White, Treas.,* 286 Fed. 215. The Trading with the Enemy Act makes no distinction between enemy governments and enemy individuals. It does not make any difference between the German Government and the German nationals. In fact, in order that there should be no doubt upon the subject, in § 2, subsec. (b), Congress specifically defined the word "enemy" as including "the government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, or agent thereof." In arguing that this Court should read into § 9 an exception as to debts due American citizens by enemy governments, which finds no support in the language of or reasons for the Act, appellants are questioning the propriety of the enactment. *Oetjen* v. *Central Leather Co.,* 246 U. S. 302.

These suits are not in any real sense suits against the Imperial German Government, and do not involve an adjudication of rights or obligations of a foreign sovereign in contravention of established principles of international law. Neither the German Government nor German nationals have any rights in the property or money seized under the war power, except such as may be granted by Congress. The belligerent determines how far it will exercise the right of confiscation. *Rose* v. *Himely,* 4 Cranch 272; *Brown* v. *United States,* 8 Cranch 111; *United States* v. *Alexander,* 2 Wall. 404; *United States* v. *Padelford,* 9 Wall. 531; *Sprott* v. *United States,* 20 Wall. 459; *Haycraft*

v. *United States,* 22 Wall. 81; *Lamar* v. *Browne,* 92 U. S. 187; *Young* v. *United States,* 97 U. S. 39; *Hijo Case,* 194 U. S. 315; *Herrera Case,* 222 U. S. 558. The German Government itself, which has not intervened to assert its rights, is the only party that would be in a position to take advantage of the alleged unconstitutionality. Not only has it failed to do this, but, by the terms of the Treaty of Peace with the United States it has expressly consented that all of its property in the hands of the Alien Property Custodian may be disposed of in accordance with the laws of the United States in effect on November 11, 1921, the date of the ratification of the Treaty.

The solemn admissions of the sworn answer of the appellant, Miller, as Custodian, of the facts found by him and his resulting determination of enemy ownership in the Imperial German Government and of the appellant, White, as Treasurer, of the facts with respect to the record entries on the books of the Treasury in the name of the Imperial German Government, all as set forth in the answer in the Mechanics Securities Corporation case, are conclusive.

The determination of enemy ownership by the Custodian is an "exercise of governmental power." Such a determination, after investigation, has all the force and effect of an executive order of the President. No one other than a person filing claims under § 9, and certainly no enemy or ally of enemy, can dispute his determination. Subject to the will of Congress, and subject to the rights of claimants under § 9, the Custodian holds absolute title to the money and property seized by him. It will be noted that § 7 (c), as amended, authorizes the seizure of enemy property "which the President, after investigation, shall determine is so owing or is so held." Section 9 (a) authorizes the restoration of property or payment of money upon application to the President "to which the President shall determine said claimant is entitled." By Executive Orders the President delegated his power under

§ 7 (c) and § 9 (a). The determination by the President, through the Attorney General, of the interest of a claimant under § 9 (a), is an act of no greater formality than his determination of enemy ownership through the Alien Property Custodian under § 7 (c), and yet his power to order the payment of debts without proof of enemy ownership by any of the claimants has never been questioned. The determination of the President, as well as the determination of the court, is binding on all enemies, or allies of enemies, whose money or property has been seized, regardless of the fact of ultimate ownership as between enemies. The determination of enemy ownership by the President, acting through the Custodian, operates to vest absolute title in the Custodian, and is final as against every one, except claimants under § 9. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Munich Reinsurance Co.* v. *First Reinsurance Co.* 300 Fed. 345; *Siggfehr* v. *Miller,* 285 Fed. 953; *Garvan* v. *Bonds,* 265 Fed. 477.

Any person having any claim against property or funds in the hands of the Custodian must pursue his rights under § 9 of the Act, which is the only section providing for recovery of property or payment of debts. *Central Union Trust Co.* v. *Garvan, supra; Commercial Trust Co.* v. *Miller,* 262 U. S. 51; *Ahrenfeldt* v. *Miller,* 262 U. S. 60; *United States Trust Co.* v. *Miller,* 262 U. S. 58. Unless it can be fairly said that Congress intended the United States to be a claimant under the Trading with the Enemy Act, it follows that it can assert no claim to these funds. While it may be conceded that the United States is a "body politic" in a limited sense, only by the most artificial process of reasoning can the conclusion be reached that Congress intended the United States to be a "person" within the meaning of § 9 of the Act. When Congress passed the Trading with the Enemy Act, it waived the sovereign privilege of taking this enemy prop-

erty absolutely. After having declined to take it for itself as it had the power to do, to say that the United States can or should file claims against German Government property in the same manner as individual creditors, makes the entire Act meaningless. Had our Government intended to confiscate this fund, it would never have enacted that part of § 9 of the Act relevant to this proceeding, because the effect of this section is to give to individual creditors, complying with the requirements of § 9, rights against the funds belonging to Germany prior to any rights of the United States.

As to the Government's contention that § 9, if construed to apply to the payment of debts due American citizens out of property of the Imperial German Government, would be unconstitutional, the Court's attention is directed to the provisions of the Treaty of Peace between the United States and Germany, which appear to conclusively dispose of this question, as well as of the claims of the United States as made herein. By the terms of the Treaty of Peace between Germany and the United States, but also by the terms of the Treaty of Versailles adopted and incorporated therein by reference, Germany expressly relinquished the right to raise any question with respect to the disposition of any property of the German Government which had been seized by the United States during the War.

Mr. Samuel W. Fordyce, with whom *Messrs. John H. Holliday* and *Thomas W. White* were on the brief, for respondent, in Nos. 809 and 810.

The District Court had jurisdiction by the express terms of § 9 of the Trading with the Enemy Act. The act is not unconstitutional, and the decree does not infringe on the sovereign rights of the German Imperial Government or its successor.

The District Court found as a fact that there are now in the Treasury of the United States funds which, at the time

of seizure by the Alien Property Custodian, belonged to the Imperial German Government. This finding of fact, being based on evidence, should not be disturbed by this Court, especially so because the Supreme Court of the District of Columbia and the Court of Appeals for said District have found the same fact, and under the two-court rule adopted by this Court such finding is binding upon this Court. The United States and its officers are bound and estopped by the sworn statement in the suggestion of the United States that the funds belonged to Germany; the suggestion and exhibits attached not only claimed the fund as having belonged to Germany, but also stated, under oath, that the funds actually had belonged to Germany. This suggestion was sworn to only a few days before the trial and is sufficient evidence in itself, without all the other evidence, upon which to base the judgment below. The evidence as to the fact of former German ownership of the funds was competent and conclusive, and there was no evidence to the contrary. The motion to dismiss and the original answer are both competent evidence against the defendants on the authority of *Pope* v. *Allis,* 115 U. S. 363, and *C. & N. R. R.* v. *Ohle,* 117 U. S. 123. The United States is bound by the admissions of its attorneys with like effect, as other litigants, *Kaelin and Sons* v. *United States,* 290 Fed. 242. Admissions of attorneys are grounds for the court's procedure equally as if established by the clearest proof. Under this principle, the briefs of counsel are admissible not only as admissions, but as explanations of the clients' admission in the pleadings and to show knowledge of the facts admitted. *Tevis* v. *Ryan,* 13 Ariz. 120, affd. 233 U. S. 273; *A. T. & S. F. Ry.* v. *Sullivan,* 173 Fed. 456 (C. C. A.); *James* v. *Railway Co.,* 201 Mass. 203; *Scaife* v. *Land Co.,* 90 Fed. 238; *Hilliard* v. *Lyons,* 180 Fed. 685; *Lyster* v. *Stickney,* 12 Fed. 609. Even though it is contended that the Alien Property Custodian had no authority to make

a specific determination of ownership pleaded in the original answer, his conclusions and determination amount to beliefs or statements of a party on information and belief, and are, therefore, binding upon the defendants. *C. & N. R. R.* v. *Ohle,* 117 U. S. 123; 2 Foster Fed. Practice, 6th Ed. § 330.

The funds in question have been *in custodia legis* since the actual filing of this suit, and their status cannot be changed except by court action. *Heidritter* v. *Elizabeth Co.,* 112 U. S. 294; *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *Taylor* v. *Carryl,* 20 How. 583; *Farmers Loan & Trust Co.* v. *Railroad Co.,* 177 U. S. 51; *Koscinski* v. *White,* 286 Fed. 211; *Sigg-Fehr* v. *White,* 285 Fed. 949, 32 Op. A. G. 57.

Upon the seizure of the funds, title passed to the United States, subject to the provisions of the Trading with the Enemy Act, as amended; and by that Act the United States, as a belligerent, is not authorized to set up any claim to the funds, nor has the United States as a creditor of Germany a right to set up any claim as a defense to this suit.

Mr. Frederic D. McKenney, with whom *Messrs. Winthrop W. Aldrich, John Spalding Flannery* and *G. Bowdoin Craighill* were on the brief, for appellee, in Nos. 430 and 431.

The Supreme Court of the District clearly had jurisdiction, but the jurisdiction of the Court of Appeals to review the decrees may seriously be doubted. The cases did not come within the general powers of the Supreme Court defined in § 61 of the District Code of Law, but were special and peculiar. Section 226 of that Code, as to appeals, though broadly couched, does not apply in such special cases. There must be special statutory warrant for an appeal, *District of Columbia* v. *Prospect Hill Cemetery,* 5 App. D. C. 497; *Brightwood Railway* v.

O'Neal, 10 App. D. C. 205; *Bankers Surety Co.* v. *Security Trust Co.,* 39 App. D. C. 354. Again, the statutory right of appeal to that court vouchsafed by § 226 of the District Code is limited to "Any party aggrieved by any final . . . decree of the Supreme Court of the District of Columbia." Thus the very words of the statute would seem quite clearly to make an end of the so-called appeal by the United States in case 430 and other similar cases, for the United States was not a party in any sense or aspect of the case in the court below, and it never at any time sought to have itself made a party by intervention or otherwise. And neither Miller nor White was a party "aggrieved" by the payment to or seizure by the Alien Property Custodian, that officer having acquired no interest in the money or property itself other than as a simple bailee, subject to the order of the President or of the Supreme Court of the District of Columbia, it being provided in the statute itself that upon the establishment by claimant of the interest, title or debt claimed by him "the court shall order the payment . . . or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or the interest therein to which the court shall determine said claimant is entitled." When the court, acting within the sphere of its jurisdiction as prescribed by the statute, has spoken, the Custodian and the Treasurer have no option but to submit to its decree. See *Barksdale* v. *Morgan,* 34 App. D. C. 549.

If appeals from the orders and decrees of the Supreme Court of the District of Columbia to the Court of Appeals were intended, why did the Congress deem it necessary to make special provision for appeals in cases instituted in the District Courts of the United States while maintaining silence with regard to similar cases instituted in the Supreme Court of the District? Again, it is to be noted that in cases of application by claimant for allowance

made to the President and in event of order for payment being made by him, no provision for appeal by the Custodian or Treasurer to any other authority or power is even hinted at, either in the Trading with the Enemy Act or elsewhere. Section 9 (a), as we think, neither requires nor contemplates an appeal from or review of action by the Chief Executive, nor of the judicial proceedings had in the Supreme Court of the District of Columbia in connection with any such claims.

To establish the existence of jurisdiction in the Court of Appeals and this Court to hear and determine the case, it is hardly sufficient to recite the fact that, in the absence of protest or objection, other similar cases have been adjudicated by the same and other tribunals. *Fritch, Inc.* v. *United States,* 248 U. S. 458; *Baldwin Co.* v. *Howard Co.,* 256 U. S. 36; *Estate of Beckwith* v. *Commissioner of Patents,* 252 U. S. 538.

Rather than to make that full, frank and perfect disclosure which the statute evidently contemplates on the part of its administrative officers charged with the duties of sequestering and preserving enemy property, these defendants have preferred to mask their own superior knowledge with silence and to obstruct the courts in their endeavors to administer the law as written by demanding "strict proof" from plaintiffs less fully informed than they themselves presumably must be. In such circumstances, plaintiffs have met the burden as best they could and to the entire satisfaction of the trial and intermediate appellate courts, which have concurred in their findings respecting the facts and in their decree as to where the right of the matter lies. In such circumstances, and in the absence of a scintilla of evidence to the contrary, what true ground is or was there for contending, either here or in the court below, that the moneys in question were other than the former property of the sometime Imperial German Government? For purposes of seizure, the de-

termination of the Alien Property Custodian, after investigation, was final, in the absence of suit brought under § 9 for its return, and that whether "right or wrong." If such decision be final for purposes of the seizure and sequestration, why does it not remain final, acting as an estoppel against the Custodian when relied upon by a creditor of the detected and mulcted enemy, seeking, under express provisions of § 9, to establish his claim against such enemy, and to secure its satisfaction out of the sequestered property? It would seem to be strange that an Attorney General should be either expected or empowered to assert rights on the part of the United States in properties sequestered under the terms and in conformity with the provisions of a federal statute, contrary to the dispensatory terms of the statute itself. Neither originally nor since has § 9 contained any provision for joining the enemy debtor as a party defendant in any suit brought to establish any interest or claim in or to an enemy debtor's property which had been seized by the Custodian. *Spiegelberg* v. *Garvan,* 260 Fed. 302; *Koscinski* v. *White, Treasurer,* 286 Fed. 211; *Munich Reissuance Co.* v. *First Reissuance Co.* (*No. 2*), 300 Fed. 345.

As to the suggestion of the United States that it should be permitted to share *pro rata* with its citizen claimants: The procedure demanded by the statute could not be applied to the United States. The supposed rights of the United States do not constitute "debts" in any sense known to our jurisprudence. The Trading with the Enemy Act does not purport to deal with reparations. That has been dealt with partly by treaties and is still the subject of exchanges between the two nations.

Mr. Justice Holmes delivered the opinion of the Court.

The cases numbered from 423 to 445 inclusive are appeals from decrees of the Court of Appeals of the District

of Columbia. They were decided under an opinion reported in 4 Fed. (2d) 619; No. 423 being disposed of *per curiam,* on the authority of that decision, in 4 Fed. (2d) 624. The other two cases, numbers 809 and 810, come here on writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted last month by this Court after a decree for the plaintiff in the District Court, but before a decision by the Circuit Court of Appeals, in view of the fact that the questions raised had been presented to it by the above mentioned appeals. Judicial Code, § 240, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

The suits are bills in equity brought under the Trading with the Enemy Act of October 6, 1917, c. 106, § 9, 40 Stat. 411, 419; as amended by the Acts of June 5, 1920. c. 241, 41 Stat. 977, and March 4, 1923, c. 285, 42 Stat. 1511. They are all brought upon notes issued by the Imperial German Government and alleged to have been recognized by the present German Government. They seek to collect the amounts from funds alleged to have belonged to the Imperial Government and now in the hands of the Alien Property Custodian or the Treasurer of the United States under the above mentioned Act. The defences relied upon were: (1) that Germany had an interest in the fund and that the suits required a judgment as to the obligations of a foreign sovereign and that therefore the courts had no jurisdiction; (2) that there was no competent evidence that any funds in the hands of either of the defendants had belonged to the German Government and (3) that the United States had claims against Germany, arising out of the war, in excess of the funds and was entitled to satisfaction from those funds either in preference to other claims or at least on an equal footing with them. The last point is reinforced by a suggestion on behalf of the United States in all the cases except number 423 that it has filed notice of its claim

under oath, that the claims other than its own would more than exhaust the funds on hand, that it is entitled to priority, and that the Court should dismiss the other bills and proceed to establish the claims of the United States. The Court of Appeals of the District of Columbia in a careful opinion overruled the defence, dismissed the suggestion and affirmed decrees for the plaintiffs. We are of opinion that its decision and that of the District Court in Missouri were right.

The elaborate argument that was made against the jurisdiction of courts over actions against foreign governments or to examine the conduct of such governments is beside the mark. In these cases no judgment is asked against Germany or against property that it is entitled to defend. The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. *Brown* v. *United States,* 8 Cr. 110, 129. *Miller* v. *United States,* 11 Wall. 268. The treaty with Germany has recognized their effect. Article 1, according the rights asserted by the joint resolution of July 2, 1921, § 5, recited in the Treaty, 42 Stat., Part II, 1939. Turning then to the Trading with the Enemy Act we find in § 9 express authority to any person not an enemy to maintain bills like the present for satisfaction of debts owing from an enemy, out of the property that has come from such enemy into the Custodian's hands. By § 2 " enemy " as used in the Act is defined and stated to include the government of any nation with which the United States is at war. The jurisdiction is complete unless the suggestion of an adverse interest on the part of the United States should induce a different result.

We will take up the claim of the United States in this connection, as it is the only point that is entitled to any

serious consideration. The United States seized the property in question from an enemy and of course could do with it what it liked. When it comes into court and seeks to appropriate it there is a natural notion that it has elected to use its power. Its power could not be denied if the Attorney General were the complete mouthpiece of its will. But whatever his authority, it is subordinate to Congress; and Congress has more authentically declared the sovereign intent by the statute to which we have referred. The statute gives an absolute right to the suitor who comes within its terms, unqualified by any reservation of a superior lien in case the United States should be a rival creditor. Even assuming, notwithstanding *Davis* v. *Pringle,* 268 U. S. 315, 318, that the United States is a "person" given the right to sue by § 9, there is no reservation of priority in the Act, or of a right to intermeddle in the private suit of another, or of any advantage that it might have retained as captor of the fund. Whether from magnanimity or forgetfulness, it has assumed the position of a trustee for the benefit of claimants and has renounced the power to assert a claim except on the same footing and in the same way as others, if at all. There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past, and it may be that the enactment was intended to exhibit the self-denial that, whether intended or not, was achieved in the bankruptcy act with regard to the priority of liens. *Davis v. Pringle,* 268 U. S. 315. There is more reason for it when, as here, the competition is between claims imposed by reason of success in war, and those arising out of ordinary business transactions of citizens in time of peace.

With regard to the evidence, the contention on behalf of the United States does not seem to us to need more than a word of reply. The facts admitted by answer under oath of the Custodian and the Treasurer in one of the cases

were that the Custodian determined after investigation that five hundred and fifteen thousand five hundred and seventy-five dollars were owing to the German Government, that he demanded and received them under the Act, paid them to the Treasurer, and holds them in a special trust; that he afterwards collected and paid over to the Treasurer five million dollars in a special trust as from an unknown enemy, but later determined that two million two hundred thousand dollars of the latter sum were held when he received them for the Imperial German Government, and directed the Treasurer to transfer that amount to a special account to the credit of the Imperial German Government, and that this was done. It was pressed at great length that the Custodian had no authority to determine the fact, especially after the money had been transferred to the Treasurer. But it is immaterial whether he had that authority or not. He had authority to answer in his own case, and the admission of the two defendants under oath is evidence against them in other cases as it would be conclusive against them in the one where it was filed, in the absence of any evidence to the contrary. *Pope* v. *Allis,* 115 U. S. 363. No evidence to the contrary was given in any of the cases nor was any reason shown to doubt the fact.

Decrees affirmed.

MR. JUSTICE STONE took no part in this case.

EX PARTE GRUBER.

No. —. Original. Motion for leave to file petition for mandamus, November 23, 1925.—Decided December 14, 1925.

The provision of the Constitution granting this Court original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls" refers to diplomatic and consular representatives accredited to the United States by foreign powers, and not to those representing this country abroad.

Leave to file denied.

APPLICATION for leave to file a petition and for a rule directing the consul general of the United States at Montreal to show cause why a writ of mandamus should not issue against him.

Mr. Marcus Gruber, pro se.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an application for leave to file a petition and for a rule directing Albert Halstead, Consul General of the United States at Montreal, Canada, to show cause why a writ of mandamus should not issue commanding him to visa the passport or the certificate of origin and identity presented to him by one Rosa Porter, a citizen of Russia, who recently arrived in Montreal from Russia and from whom petitioner, a relative, desires a visit in the United States of several months' duration. We do not review the averments of the petition, since, other questions aside, it is clear that this court is without original jurisdiction.

Article III, § 2, cl. 2, of the Constitution provides that this court shall have original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls." Manifestly, this refers to diplomatic and consular representatives accredited to the United States by foreign powers, not to those representing this country abroad. *Milward* v. *McSaul,* 17 Fed. Cas. 425, 426, No. 9624. The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy, considerations which plainly do not apply to the United States in its own territory. See generally *Davis* v.

Packard, 7 Pet. 276, 284; *Marshall* v. *Critico,* 9 East 447; *Valarino* v. *Thompson,* 7 N. Y. 576, 578; *The Federalist,* No. 80, Ford's Ed., pp. 531, 532–533, 537.

The application is denied for want of original jurisdiction.

UNITED STATES *v.* NEW YORK & CUBA MAIL STEAMSHIP COMPANY.

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

No. 65. Argued October 20, 1925.—Decided December 14, 1925.

1. The Act of December 26, 1920, providing, *inter alia,* that "alien seamen" found on arrival in ports of the United States to be afflicted with any of the diseases mentioned in § 35 of the Immigration Act of 1917, shall be placed in a hospital designated by an immigration official, and treated, and that all expenses connected therewith shall be borne by the owner or master of the vessel, applies to seamen who are aliens in personal citizenship, without regard to whether the nationality of the vessel be foreign or domestic. P. 310.
2. As applied to American vessels this provision is not repugnant to the due process clause of the Fifth Amendment, and is within the power of Congress over the exclusion of aliens. P. 313.

297 Fed. 159, reversed; Dist. Ct. affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court recovered by the United States from the Steamship Company, representing the hospital expenses incurred in curing a diseased seaman.

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

Mr. Mark W. Maclay, with whom *Mr. John Tilney Carpenter* was on the brief, for respondent.

As a general principle, seamen partake of the nationality of the ships upon which they are employed. All seamen, including aliens, regularly employed on vessels of the United States, are "American seamen." *In re Ross,* 140 U. S. 453. This principle has been followed by the Department of State in administering statutory provisions relating to seamen, through the Consular Service, which is governed by the Consular Regulations. Revised Stats. § 4577, which provides for the repatriation of destitute American seamen, has been construed both by the Consular Regulations and by Judge Story as covering seamen of foreign nationality on American vessels. *Matthews* v. *Offley,* 3 Sumn. 115. See *The Santa Elena,* 271 Fed. 347; *The Laura M. Lunt,* 170 Fed. 204; *The Blakeley,* 234 Fed. 959. Aliens or foreigners employed on American vessels are considered as American seamen. Citizens of the United States while employed as seamen on foreign ships are "alien seamen." *Rainey* v. *N. Y. & P. S. S. Co.,* 216 Fed. 449; *The Marie,* 49 Fed. 286; *The Ester,* 190 Fed. 216; *The Albergen,* 223 Fed. 443.

The Act of December 26, 1920, should be construed in accordance with the general doctrine of nationality of seamen. The drastic and highly penal character of this Act require a strict construction. The language and clear intention of the statute do not require application to American shipowners. The provision of the statute for the return of incurable cases is clear as applied to seamen on foreign ships, but is meaningless or absurdly unjust if applied to an alien person shipped at a United States port on an American vessel. *Castner, Curran & Bullitt, Inc.* v. *Hamilton,* 275 Fed. 203; *Neilson* v. *Rhine Shipping Co.,* 248 U. S. 205. Both *United States* v. *Union Supply Co.,* 215 U. S. 50, and *Neilson* v. *Rhine Shipping Co.,* 248 U. S. 205, depend on the same fundamental canon, that a

statute must be construed, if possible, as a harmonious whole, and in such a way as to give effect to all its parts. As the second proviso cannot be given effective meaning unless the words "alien seamen" throughout the Act be construed as not applying to seamen on American vessels, that is a sufficient reason for the construction adopted by the Circuit Court of Appeals.

Finally, if "it is not thinkable" that the American shipowner engaged in foreign trade should be required to return a diseased alien to the distant country from which he originally came, it is certainly "not thinkable" that Congress intended that American vessels in the coastwise service, employing aliens who contract one of the specified disabilities or diseases during the voyage, be required to return them to their distant native land. Yet if the term "alien seamen" means persons who individually are aliens, even though they are seamen on an American vessel, the Act necessarily applies to coastwise shipping. The legislative history of the Act shows that it was intended to apply to foreign ships, and not to seamen of any individual nationality on vessels of the United States.

The relation, if any, between the Act of December 26, 1920, and the Immigration Laws, does not require the construction of "alien seamen" to mean "alien individuals employed as seamen on American vessels." The Act of December 26, 1920, is not an amendment of the Immigration Act. The subject matter of the Act of December 26, 1920, relates to seamen and public health rather than to immigration. The title and form of the Act of 1920 distinguish it from the immigration statutes. References in the statute to immigration are unimportant. The Act of 1920 differs from the Immigration Act, § 35, in respect of the persons and vessels described and the conditions of liability. *Castner, Curran & Bullitt, Inc.* v. *Hamilton,* 275 Fed. 203. The unconstitutionality of the statute as

applied to owners of vessels of the United States is a sufficient reason for affirming the judgment of the Circuit Court of Appeals.

An examination of the decisions on liability without fault, reveals that statutory liability should not be sustained under the police power, or any other power under the Constitution of the United States, against a defendant who cannot reasonably be said to be in the chain of causation leading to the damage, or in control of the instrumentality which gives rise to it. *Fritz* v. *Railroad,* 243 Mo. 62. The basis of the validity of legislation of this character is found in the fact that the party sought to be charged has control over the instrumentality which causes the damage. *St. Louis & S. F. Ry. Co.* v. *Mathews,* 165 U. S. 1; *Eastman* v. *Jennings-McRae Logging Co.,* 69 Oregon 1. Furthermore, a statute making a railroad absolutely liable for all damage, such as the death of animals occurring on its right of way, without imposing any duty, or without providing for a judicial determination as to whether there has been a breach of duty, is clearly unconstitutional. *Zeigler* v. *South & North Alabama R. R.,* 58 Ala. 594; *Birmingham Mineral R. R.* v. *Parsons,* 100 Ala. 662; *Union Pacific Ry.* v. *Kerr,* 19 Colo. 273; *Wadsworth* v. *Union Pacific Ry.,* 18 Colo. 600; *Cateril* v. *Union Pac. Ry.,* 2 Idaho 540; *Bielenberg* v. *Montana Union Ry.,* 8 Mont. 271; *Atchison, etc. R. R.* v. *Baty,* 6 Neb. 37; *Jensen* v. *Union Pacific Ry.,* 6 Utah 253; *Jolliffe* v. *Brown,* 14 Wash. 155; *Schenck* v. *Union Pacific Ry.,* 5 Wyo. 430.

The same basis of determining what is due process was relied on in two cases in which statutes, not in respect of railroads, but in respect of highway collisions, were held unconstitutional. *Camp* v. *Rogers,* 44 Conn. 291 and *Daugherty* v. *Thomas,* 174 Mich. 371. See *Ex parte Hodges,* 87 Calif. 162.

By the same reasoning, this respondent, which had no control over the contraction of the disease or the condition

of the seaman, should not be held liable for the expenses of treatment as provided in the Act of 1920. In relations between master and servant, although both by the maritime law and also under workmen's compensation statutes, the employer is liable, without fault, for injury to the employee resulting from risks inherent in the employment, or due to its peculiar conditions, such liability does not extend to losses caused by the wilful misconduct of the employee. 25 Harv. L. Rev. 129; *Cudahy* v. *Parramore,* 263 U. S. 418. It is believed that every one of these statutes upheld by the courts has contained a provision exempting the employer from liability for the results of the employee's wilful misconduct. *Missouri Pacific Ry.* v. *Castle,* 224 U. S. 541; *N. Y. Central R. R.* v. *White,* 243 U. S. 188; *Hawkins* v. *Bleakly,* 243 U. S. 210; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Arizona Employers' Liability Cases,* 250 U. S. 400.

Under the maritime law it is well settled that a shipowner is liable, irrespective of negligence, for the maintenance and cure of seamen who are injured or become sick in the course of the employment. *The Osceola,* 189 U. S. 158. As in the case of the express provisions of workmen's compensation acts, the maritime law holds that seamen suffering from venereal disease, or from injury due to their own wilful misconduct, are not entitled to maintenance and cure. *Pierce* v. *Patton* (1833), Gilp. 435. *Chandler* v. *The Annie Buckman* (1853), 21 Betts D. C. (MS.) 112; *The Alector,* 263 Fed. 1007; *The Bouker No. 2,* 241 Fed. 831.

Mr. Justice Sanford delivered the opinion of the Court.

The questions involved in this case relate to the construction and constitutionality of the Act of December 26, 1920, c. 4, 41 Stat. 1082, entitled "An Act to provide for the treatment in hospital of diseased alien seamen." It

provides: "That alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in section 35 of" the Alien Immigration Act of 1917 [1]—including any loathsome or dangerous contagious disease—"shall be placed in a hospital designated by the immigration officials in charge at the port of arrival and treated, all expenses connected therewith . . . to be borne by the owner . . . or master of the vessel, and not to be deducted from the seamen's wages"; and that where a cure cannot be effected within a reasonable time "the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came, upon such conditions as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall prescribe, to insure that the aliens shall be properly cared for and protected, and that the spread of contagion shall be guarded against."

The Steamship Company, a Maine corporation, is the owner of a merchant vessel of American registry. On a voyage from New York to the West Indies and return, this vessel carried a seaman who was a citizen of Chile. On returning to New York he was found by the immigration officials to be afflicted with a venereal disease, and on the order of the Commissioner of Immigration was placed in the Public Health Service hospital on Ellis Island for treatment. He was later discharged from the hospital as cured, and admitted into the United States. The Steamship Company having refused to pay the hospital expenses, the United States brought suit against it in the Federal District Court for the amount of such expenses. Judgment was recovered, which was reversed by the Circuit Court of Appeals, on the ground that the Act applied only to seamen on foreign vessels. 297 Fed. 159. The case is here on writ of certiorari. 265 U. S. 578.

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[1] Act of February 5, 1917, c. 29, 39 Stat. 874.

This decision is in conflict with the earlier decisions in *Franco* v. *Shipping Corporation,* (D. C.) 272 Fed. 542, and *Castner* v. *Hamilton,* (D. C.) 275 Fed. 203, in which the Act was applied to aliens brought in as seamen on American vessels.

The question of construction presented is whether the term "alien seamen," as used in the Act, means seamen who are aliens, as the Government contends, or seamen on foreign vessels, as the Steamship Company contends: that is, whether in applying the Act the test is the citizenship of the seaman or the nationality of the vessel.

We think the term "alien seamen" is not to be construed as meaning seamen on foreign vessels. The general principle that an alien while a seaman on an American vessel is regarded as being an American seaman in such sense that he is under the protection and subject to the laws of the United States, *In re Ross,* 140 U. S. 453, 479, has no application to the question whether aliens employed on American vessels are included within the terms of a special statute dealing solely and specifically with "alien seamen," as such. And if the rule attributing to a seaman the nationality of the vessel should be applied to this Act so as to give to the term "alien seamen" the meaning of "seamen on foreign vessels," it would result, under the terms of its last clause, that an American seaman employed on a foreign vessel who was afflicted with an incurable disease, on being brought into an American port could not be admitted into the United States, but would have to be returned; an anomalous result which, obviously, Congress did not intend.

It is clear that the term "alien seamen" as used in the Act means "seamen who are aliens." It describes, aptly and exactly, seamen of alien nationality, dealing with them, as individuals, with reference to their personal citizenship; and it has no other significance either in common usage or in law. The Act does not qualify this term by

any reference to the nationality of the vessels. Nor does it use the words "seamen on foreign vessels" or any equivalent phrase which would have been appropriate had it been intended to describe the seamen on such vessels.

This conclusion is emphasized when the Act is considered in the light of the Alien Immigration Act of 1917, and the legislative history showing the condition it was evidently the intention to correct. *United States* v. *Morrow,* 266 U. S. 531, 535. The Act of 1917, *inter alia,* dealt specifically with "alien seamen," using that term, as shown by its general definitions and various provisions, as meaning "aliens employed on *any vessel* arriving in the United States from a foreign port." It provided that, if not within any of the classes excluded by reason of disease or otherwise, they might be admitted into the United States as other aliens, but, if not so admitted, prohibited them from landing, except for certain temporary purposes, under regulations prescribed by the Secretary of Labor; and it required the owner or master of "any vessel" coming from a foreign port to furnish a list of all its alien seamen and not to pay off or discharge them unless duly admitted or permitted to land. (§§ 1, 2, 32–34, 36.) And by § 35—which was specifically referred to in the Act of 1920—it was provided that if "any vessel" carrying passengers, on arrival from a foreign port, had on board employed thereon, any alien afflicted with any enumerated disability or disease which had existed when he shipped on the vessel and might then have been detected by competent medical examination, the owner or master of the vessel should pay a fine, and, pending its departure, the alien should be treated in hospital at the expense of the vessel.

There was, however, no provision expressly authorizing the hospital expenses incurred in the treatment of a diseased alien seaman to be charged to the vessel when it carried freight or the disease could not have been detected at the time that he shipped on the vessel.

In this situation the Department of Labor, in 1919, prepared the draft of the bill which later, with minor changes, became the Act of 1920. In a letter transmitting this draft to the Chairman of the House Committee on Immigration and Naturalization, the Secretary stated that the Department was very anxious to have it enacted into law in order to fix definitely "the responsibility of steamship lines and vessels for the expenses which arise from the frequent necessity of placing in hospitals alien seamen who, upon arrival at our ports, are found to be afflicted with various diseases, often of a loathsome or dangerous contagious character"; the existing law not being clear upon this matter. The Committee, in reporting the bill,[2] set forth this letter from the Secretary, and said: "The bill simply provides that the care and treatment in hospital of diseased alien seamen be placed on the same basis as the care and treatment in hospital of diseased aliens, namely, at the expense of the ship or steamship company bringing the diseased alien seamen into this country. At present there is a difference of opinion as to who shall pay the expenses of taking care of these alien seamen who come here and require medical or surgical treatment."

No substantial doubt is cast upon the purpose of the Act by the incidental statement of the Chairman of the Committee in the course of debate, that the bill applied only to foreign ships, especially since, in the same debate, he described it as referring to "sick alien seamen," and stated that it perfected a provision already "partly in the immigration laws" making the owners of vessels responsible for their medical treatment.[3]

In the light of this history, as well as from the face of the Act itself, it is clear that the words "alien seamen" were used in the same sense as in the Act of 1917, with

[2] Ho. Rep. No. 173, 66th Cong., 1st Sess.

[3] 60 Cong. Rec., 66th Cong., 3d Sess., Pt. 1, pp. 600, 601.

which it is *in pari materia,* that is, as meaning aliens employed as seamen on any vessel arriving in the United States; and that it was intended to extend the provisions of § 35 of that Act by providing that the hospital expenses incurred in treating any such diseased alien should be borne in all cases by the vessel bringing him in, whether carrying passengers or freight, and without reference to the time when the disease might have been detected. And it has been so construed and applied by the Department of Labor.

The Steamship Company, while conceding that the Act as thus construed is constitutional as applied to foreign vessels, contends that as applied to American vessels it is repugnant to the due process clause of the Fifth Amendment in that "it imposes liability without causation or causal connection." This contention is without merit. The power of Congress to forbid aliens and classes of aliens from coming within the borders of the United States is unquestionable. *The Chinese Exclusion Case,* 130 U. S. 581, 606; *Wong Wing* v. *United States,* 163 U. S. 228, 237; *Turner* v. *Williams,* 194 U. S. 279, 289; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 336. Congress may exercise this power by legislation aimed at the vessels bringing in excluded aliens, as by penalizing a vessel bringing in alien immigrants afflicted with diseases which might have been detected at the time of foreign embarkation, *Oceanic Navigation Co.* v. *Stranahan, supra,* p. 332, or by requiring a vessel bringing in aliens found to be within an excluded class, to bear the expense of maintaining them while on land and of returning them, *United States* v. *Nord Deutscher Lloyd,* 223 U. S. 512, 517. There is no suggestion in any of these cases that this power is limited to foreign vessels. It may be exercised in reference to alien seamen as well as other aliens. And if they are found to be diseased when brought into an American port, the vessel, whether American or for-

eign, may lawfully be required to bear the expenses of their medical treatment.

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

Reversed.

OKLAHOMA *v.* TEXAS.

No. 13, Original. Decree announced January 4, 1926.[1]

Decree (1) confirming report of commissioners showing that they have run, located and marked portions of the interstate boundary along the south bank of Red River, other than the Big Bend and Fort Augur areas, from the 100th meridian of longitude to the eastern limit of Lamar County, Texas; (2) establishing the same as the true boundary between Texas and Oklahoma, at the places designated in the report, subject to future change by erosion and accretion; (3) directing that copies of decree, report and maps be transmitted to the Chief Magistrates of the two States.

On consideration of the third report of the Commissioners, heretofore selected to run, locate and mark portions of the boundary between the States of Texas and Oklahoma along the south bank of the Red River, showing that they have run, located and marked particular portions of such boundary from the One Hundredth meridian of longitude to the eastern limit of Lamar County, Texas, other than the Big Bend and Fort Augur areas covered by two reports heretofore presented and confirmed, which said third report was presented and filed herein November 16, 1925;

And no objection or exception to such report being presented, although the time therefor has expired;

It is now adjudged, ordered and decreed that the said report be in all respects confirmed.

It is further adjudged, ordered and decreed that the boundary line delineated and set forth in the report and

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[1] For another order of this date, respecting the expenses and compensation of the commissioners, see *post*, p. 539.

on the maps accompanying the same and referred to therein be established and declared to be the true boundary between the States of Texas and Oklahoma along the Red River at the several places designated in such report, subject, however, to such changes as may hereafter be wrought by the natural and gradual processes known as erosion and accretion as specified in the second, third and fourth paragraphs of the decree rendered herein March 12, 1923, 261 U. S. 340.

It is further ordered that the clerk of this Court do transmit to the Chief Magistrates of the States of Texas and Oklahoma copies of this decree, duly authenticated under the seal of this Court together with copies of the said report and of the maps accompanying the same.

UNITED STATES v. ROBBINS ET AL.

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

No. 493. Argued December 7, 8, 1925.—Decided January 4, 1926.

1. A judgment of the District Court in an action against the United States under the Tucker Act, Jud. Code, § 24, Par. 20, was reviewable directly by this Court. P. 326.
2. The whole income from community property in California was returnable by and taxable to the husband, under the Revenue Act of Feb. 24, 1919. *Id.*

So *held* in view of the power of the husband over community property, its liability for his debts, etc., under the law of that State, without deciding whether the wife's interest is "a mere expectancy," or something more.

5 Fed. (2d) 690, reversed.

ERROR to a judgment of the District Court in favor of the executors of Robbins, in an action against the United States to recover money paid by the decedent as income tax.

Solicitor General Mitchell, with whom *Messrs. Robert P. Reeder* and *Frederick W. Dewart,* Special Assistants to the Attorney General, and *A. W. Gregg,* Solicitor of Internal Revenue, were on the brief, for the United States.

The proper method of approaching the question is to ascertain the nature of the wife's interest in community income in California, by finding what rights of ownership she may exercise over it under California law. The decisions of the California courts as to the extent of the wife's interest in the community income and her want of power to exercise proprietary rights over it are binding on the federal courts. A general review of the decisions of the California courts discloses that under the so-called community system applicable to the community property here involved, the wife during the existence of the community had no estate, title, or ownership in the community income, and the husband had absolute ownership and power of disposition of the income, restricted only by a prohibition against gifts. *Panaud* v. *Jones,* 1 Cal. 488; *Chance* v. *Kobsted,* 226 Pac. 632; *Van Maren* v. *Johnson,* 15 Cal. 308; *Packard* v. *Arellanes,* 17 Cal. 525; *Directors of Fallbrook Irrigation Dist.* v. *Abila,* 106 Cal. 355; *Spreckels* v. *Spreckels,* 116 Cal. 339, 172 Cal. 775; *Roberts* v. *Wehmeyer,* 191 Cal. 601; *Beard* v. *Knox,* 5 Cal. 252; *Payne* v. *Payne,* 18 Cal. 291; *Morrison* v. *Bowman,* 29 Cal. 337; *Taylor* v. *Taylor,* 192 Cal. 71; *Blum* v. *Wardell,* 270 Fed. 309; *Rice* v. *McCarthy,* 239 Pac. 56; *McMullin* v. *Lyon Fireproof Storage Co.,* 239 Pac. 422.

Disregarding descriptive phrases and terminology, the California statutes and decisions applicable to the property here involved have never yielded to the wife any semblance of a proprietary interest or ownership in the community property prior to dissolution of the community. The husband has complete and absolute dominion, possession, and control of the community prop-

erty. Sec. 172, Civil Code of California; Vol. 5, "California Jurisprudence," p. 335, § 27, and cases cited. The entire community property is subject to the husband's debts contracted before and after marriage. *Meyer* v. *Kinzer,* 12 Cal. 247; *Van Maren* v. *Johnson, supra; Schuyler v. Broughton,* 70 Cal. 282; *Spreckels* v. *Spreckels,* 116 Cal. 339; *Davis* v. *Green,* 122 Cal. 364. The husband may expend all of the community property and income as he pleases, wastefully and for his own pleasure, without infringing the wife's rights. *Spreckels* v. *Spreckels,* 116 Cal. 339; *Garrozi* v. *Dastas,* 204 U. S. 64. The only restrictions on the exercise of absolute ownership by the husband are a prohibition against gifts without the wife's consent (which has been held to vest no interest in her) and a prohibition (enacted in 1917 and not applicable to the property involved here) requiring the wife to join in a conveyance of community real estate. *Roberts* v. *Wehmeyer, supra; Spreckels* v. *Spreckels,* 172 Cal. 775. During the community the wife has no right to expend or have expended for her benefit any part of the community property. The obligation of the husband to provide support and necessaries is a personal one arising out of the marital relation, having no relation to the community property, and is a charge upon him and his separate as well as the community estate, and not based on the theory that the wife owns an interest in the community. *Sheppard* v. *Sheppard,* 15 Cal. App. 614; *Whittle* v. *Whittle,* 5 Cal. App. 696; *St. Vincent's Inst.* v. *Davis,* 129 Cal. 17; *Nissen* v. *Bendixsen,* 69 Cal. 521; *Shebley* v. *Peters,* 53 Cal. App. 288; *Brezzo* v. *Brangero,* 51 Cal. App. 79; *Davis* 1. *Davis,* 65 Cal. App. 499. During the community the wife may not maintain any action respecting the community property, and she is not a necessary or even a proper party to a suit involving the community property. *Greiner* v. *Greiner,* 58 Cal. 115; *Spreckels* v. *Spreckels,* 116 Cal. 339; *Mott* v. *Smith,* 16 Cal. 533; *Barrett* v. *Tewksbury,* 18 Cal. 334; *Chance* v. *Kobsted, supra.*

On dissolution of the community by her death her inchoate interest disappears. Absolute ownership remains in the husband. She leaves no estate in the community subject to administration, nor is it liable for her debts or expenses of administration, nor does the husband take by succession or descent. California Civil Code, § 1401; *In re Rowland,* 74 Cal. 523; *In re Burdick,* 112 Cal. 387. If she survives her husband, the wife succeeds to one-half of whatever may then remain of the community property, subject to payment of his debts, and expenses of administration. The entire community property forms part of his estate and is administered as such. The wife takes as heir, and her succession is subject to imposition of inheritance taxes. The Act of 1917, relieving the interest of the surviving wife from inheritance tax is merely an exemption and does not alter the nature or extent of the wife's interest. *In re Moffitt's Estate,* 153 Cal. 359; Civil Code § 1402; *In re Burdick,* 112 Cal. 387; *Sharp* v. *Loupe,* 120 Cal. 89; *Cunha* v. *Hughes,* 122 Cal. 111; *Moffitt* v. *Kelly,* 218 U. S. 400.

The statutory restriction on gifts by the husband has been held to vest no interest or ownership in the wife, and no case has yet held that she may, before dissolution of the community, sue to set aside a gift made without her consent. *Spreckels* v. *Spreckels,* 172 Cal. 775; *Dargie* v. *Patterson,* 176 Cal. 714; *Winchester* v. *Winchester,* 175 Cal. 391; *Greiner* v. *Greiner,* 58 Cal. 115; *Cummings* v. *Cummings,* 2 Cal. Unrep. 774.

On dissolution of the community by divorce, the community property is distributed by the divorce court, and in the absence of adultery or cruel treatment is divided equally. If such misconduct has occurred, the court distributes the community property according to what appears to be just and proper. *Gould* v. *Gould,* 63 Cal. App. 172; *Taylor* v. *Taylor,* 192 Cal. 71.

The community property is not liable for debts of the wife contracted after marriage. It is liable for her debts contracted *dum sola,* not because of her ownership in the community property, but because her husband became liable for her debts on marriage, and only his separate estate is exempted by statute. The freedom of the community property from liability for the wife's debts would prevent the United States from satisfying a claim against the wife for income taxes out of the community property. The United States could not lawfully compel the wife to pay an income tax on any share of the community income because it is not hers, but is the income and property of her husband. *Van Maren* v. *Johnson,* 15 Cal. 308; Civil Code, § 167; *Schuyler* v. *Broughton,* 70 Cal. 282; *Svetinich* v. *Sheean,* 124 Cal. 216.

The case of *Blum* v. *Wardell,* 270 Fed. 309 and 276 Fed. 226, may be distinguished, because it dealt with the nature of the wife's interest in the community property after dissolution of the community and not with her interest in the income during the community. If not distinguished, it should be disapproved, because it misconceived the nature of the Act of 1917, exempting the wife's succession from state inheritance tax, and treated it as changing the wife's interest, although it merely exempted it. It also mistakenly applied the Act of 1917, requiring the wife to join in a conveyance of real estate, to property acquired prior to 1917.

The amendments to the California laws affecting the wife's interest in the community property adopted in 1917 and later are not pertinent here, because all the property here involved was acquired prior to 1917, and under California decisions these amendments do not affect property acquired before their passage. *Roberts* v. *Wehmeyer,* 191 Cal. 601; *Spreckels* v. *Spreckels,* 116 Cal. 339. The opinions of the Attorney General hold that the

community income in California is taxable to the husband alone. 32 Ops. A. G. 298, 435; 34 Ops. A. G. 376, 395. Congressional inaction on the questions here involved is without particular significance. In the Philippine Islands the community income is held to be the income of the husband for Federal income tax purposes. *Madrigal and Paterno* v. *Rafferty,* 38 Phil. 414. The decisions of this Court in *Warburton* v. *White,* 176 U. S. 484, *Garrozi* v. *Dastas,* 204 U. S. 64, and *Arnett* v. *Reade,* 220 U. S. 311, do not deal with the California system and the California court has held that *Arnett* v. *Reade* does not describe the community system prevailing there. Opinions of text writers, including law writers from California law schools, completely refute the claim that in California the wife has any ownership in the community property and the claim that the system in California is like that in all the other States where a system of "community" property prevails. McKay, Community Property; Pomeroy, in West Coast Rep. Vol. 4, p. 390; "California Jurisprudence," Vol. 5, p. 330, (McMurray); 35 Harvard L. Rev. p. 48, (Evans.)

A comparison of the nature and extent of the wife's interest in the community property in California with the nature and extent of the wife's interest in the separate property and income of the husband in States where the community system does not prevail, shows that in California she is no more the owner of half the community income than is the wife an owner in a share of the separate property and income of the husband in States having a statutory substitute for common law dower. McKay, Community Property; *Griswold* v. *McGee,* 102 Minn. 114; *Stitt* v. *Smith,* 102 Minn. 253; *In re Rausch,* 35 Minn. 291; *Scott* v. *Wells,* 55 Minn. 274; *Hayden* v. *Lamberton,* 100 Minn. 384.

So far as concerns the question of discrimination and the uniformity of federal taxes throughout the United

States, it may be said that to permit the wife in California to reduce the surtaxes on what is really her husband's income by returning half of the community income as her own would be the most direct discrimination against husbands and wives in some forty States of the Union, where, in order to split their incomes between husband and wife to avoid high surtaxes, husbands must convey part of their property outright to their wives, paying a gift tax in the process.

Messrs. Lloyd M. Robbins and *Peter F. Dunne,* with whom *Mr. Carey Van Fleet* was on the brief, for defendants in error.

The community property law of California, as of the other community property States, was derived from the Spanish-Mexican Law of the community system, under which husband and wife were co-proprietors and equal owners of the community estate. *Meyer* v. *Kinzer,* 12 Cal. 248; *Packard* v. *Arellanes,* 17 Cal. 525; *Estate of Moffitt,* 153 Cal. 359; *Spreckels* v. *Spreckels,* 116 Cal. 339; Walton, Civil Law in Spain; Schmidt's Civil Law in Spain and Mexico; The Fuero Juzgo; Fuero Real; Siete Partidas; Moreau & Carleton, Partidas, Vol. 1, pp. 507–8, 532; Laws of Toro; Nueva Recopilacion; Novisima Recopilacion; Recopilacion de las Indias; *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *La Tourette* v. *La Tourette,* 15 Ariz. 200; Op. A. G. Feb. 26, 1921, T. D. 3138; *Beals* v. *Ares,* 185 Pac. 780; *Wright* v. *Hays,* 10 Tex. 130; Novisima Sala Mexicana; *Reade* v. *DeLea,* 14 N. M. 442, Escriche, Elements of Spanish Law, Coopwood trans.; Escriche, Diccionario Razonado de Legislacion y Juris Prudencia; Febrero, Libreria de Escribanos; *Fuller* v. *Ferguson,* 26 Cal. 569; de la Serua and Montalbau, Elements of the Civil and Penal Law of Spain; Manresa, on the Spanish Civil Code; Solicitor's Opinion, Internal Revenue Bulletin, Cum. Bulletin III–2, p. 177; *Murphy* v. *Crouse,* 135 Cal. 14;

Bates v. *Howard,* 105 Cal. 173; *Water Co.* v. *Anderson,* 170 Cal. 683; *Phelps* v. *Brady,* 168 Cal. 73; *Clokke Inv. Co.* v. *Lissner,* 186 Cal. 731; Cal. Civ. Code, § 1384; *Landreau* v. *Louque,* 43 La. Ann. 234; Decision of January 28, 1898, Supreme Court of Spain, Vol. 83, p. 218, of the Jurisprudencia Civil; Felipe Sanchez Roman, Studies of Civil Law and the Civil Code.

The vested interest during coverture of the wife in the community estate is fundamental as well to the French community system, as to the Spanish-Mexican law of community, from which the law of California, like the law of other community property States, has been derived. Howe, Studies in the Civil Law; *Saul* v. *Creditors,* 6 Mart. 569; *Cole's Widow* v. *Executors,* 7 Ibid. 41; *Dixon* v. *Dixon's Executors,* 4 La. 188; Moreau & Carlton, Partidas, Preface pp. 18–20; *Garrozi* v. *Dastas,* 204 U. S. 64; *Arnett* v. *Reade, supra; Guice* v. *Lawrence,* 2 La. Ann. 226; *Reade* v. *DeLea,* 95 Pac. 131; Troplong, Contrat de Mariage, vol. 2, p. 136; *Celestine de Nicols* v. *Curlier,* 1900, Appeal Cases 21.

The constitution and statutes of California reflect the Spanish-American law in full recognition of the wife's vested estate in half the acquisitions made during the marriage. *Botiller* v. *Dominguez,* 130 U. S. 238; *Hart* v. *Burnett,* 15 Cal. 530; *Estate of Moffitt,* 153 Cal. 359; Constitution of 1849, Art. XI, § 14; Act of April 17, 1850, Cal. Stats. 1850, p. 254; Act of 1891, Cal. Stats. p. 425, Civil Code § 172; Civil Code, § 172a; *Dow* v. *Gould & Curry Silver Mining Co.,* 31 Cal. 630; Civil Code of 1872; Stats. 1901, p. 198; Stats. 1917, p. 829; Stats. 1921, p. 91, Civil Code, § 172b; *Galland* v. *Galland,* 38 Cal. 265; Stats. 1905, p. 205; Civil Code, §§ 92, 105, 107; Stats. 1907, p. 82, Civil Code § 137; *Robinson* v. *Robinson,* 79 Cal. 511; Stat. 1917, p. 35; Stats. 1923, p. 30, amending Civ. Code § 1401; *Blum* v. *Wardell,* 270 Fed. 309; *Meyer* v. *Kinzer,* 12 Cal. 248.

The policy of the legislation of California has been consistent from the beginning, to establish the wife's vested interest on a parity with the like interest of the husband, and to hedge it round with one safeguard after another. The decisions of the courts have not been without conflict. The vested interest of the wife, in far the great number of decisions, from *Beard* v. *Knox,* 5 Cal. 252, (1855,) to the last expression of the Supreme Court of the State, in *Estate of Jolly,* 238 Pac. 353, has been sustained upon the firm ground that she was a co-partner and equal owner with her husband in the community estate, and that, upon his death, she took her half of the dissolved community, not as the heir of a husband who was exclusive owner, but in her own right, as survivor of the matrimonial partnership. There are conflicting cases,—in point of number a minority; and in point of authority, largely *dicta;* with perhaps a single exception, all *dicta.* These are the *dicta* which apply to the wife's interest the attenuating similitude of an "expectancy"—the expectancy of an heir apparent in the property of his ancestor. The remark fell primarily from Mr. Justice Field, *obiter,* in *Van Maren* v. *Johnson,* 15 Cal. 308, written in 1860. In his decisions, before and after, Mr. Justice Field upheld the vested and equal interest of the wife.

[The following California decisions were reviewed by counsel: *Beard* v. *Knox,* 5 Cal. 252; *Estate of Buchanan,* 8 Cal. 507; *Smith* v. *Smith,* 12 Cal. 217; *Meyer* v. *Kinzer,* 12 Cal. 248; *Scott* v. *Ward,* 13 Cal. 459; *Packard* v. *Arellanes,* 17 Cal. 525; *Johnston* v. *S. F. Sav. Union,* 63 Cal. 554, 75 Cal. 134; *Estate of Donahue,* 36 Cal. 330; *Ord* v. *DeLaGuerra,* 18 Cal. 67; *Payne* v. *Payne,* 18 Cal. 292; *Hart* v. *Robertson,* 21 Cal. 346; *Fuller* v. *Ferguson,* 26 Cal. 547; *Morrison* v. *Bowman,* 29 Cal. 337; *Dow* v. *Gould & Curry Mining Co.,* 31 Cal. 630; *Peck* v. *Brummagim,* 31 Cal. 442; *Galland* v. *Galland,* 38 Cal. 265; *De-*

Godey v. *DeGodey,* 39 Cal. 158; *Broad* v. *Broad,* 40 Cal. 493; *Broad* v. *Murray,* 44 Cal. 228; *Johnston* v. *Bush,* 49 Cal. 198; *Cook* v. *Norman,* 50 Cal. 634; *Plass* v. *Plass,* 121 Cal. 131; *Johnston* v. *S. F. Savings Union,* 75 Cal. 141; *Greiner* v. *Greiner,* 58 Cal. 116; *Estate of Rowland,* 74 Cal. 524; *Estate of Burdick,* 112 Cal. 387; *Spreckels* v. *Spreckels,* 116 Cal. 339; *Sharp* v. *Loupe,* 120 Cal. 89; *Cunha* v. *Hughes,* 122 Cal. 111; *Estate of Moffitt,* 153 Cal. 359; note to *English* v. *Crenshaw,* 127 Am. St. 1025, 1063.]

California decisions, both before and after the "erroneous triad" of *Burdick, Spreckels,* and *Moffitt* cases, hold that the wife, so far from succeeding to her share of the community as an heir of the husband, takes it "in her own right," as the surviving member of the matrimonial partnership: *Beard* v. *Knox,* 5 Cal. 252; *Johnston* v. *Bush,* 49 Cal. 198; *Payne* v. *Payne,* 18 Cal. 292; *Estate of Silvey,* 42 Cal. 210; *King* v. *LaGrange,* 50 Cal. 328; *Estate of Frey,* 52 Cal. 658; *Estate of Gwin,* 77 Cal. 313; *In re Gilmore,* 81 Cal. 240; *Directors* v. *Abila,* 106 Cal. 362; *In re Smith,* 108 Cal. 115; *Estate of Wickersham,* 138 Cal. 355; *Estate of Vogt,* 154 Cal. 508; *Estate of Prager,* 166 Cal. 450; *Estate of Rossi,* 169 Cal. 148.

[Later cases reviewed were: *Spreckels* v. *Spreckels,* 172 Cal. 775; *Dargie* v. *Patterson,* 176 Cal. 714; *Estate of Brix,* 181 Cal. 668; *Schneider* v. *Schneider,* 183 Cal. 335; *Roberts* v. *Wehmeyer,* 191 Cal. 601; *Taylor* v. *Taylor,* 192 Cal. 71; *Estate of Jolly,* 238 Pac. 353.]

We are dealing here with a federal statute. It concerns, not California alone, but all the community property States, and calls for uniform application. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.,* 182 U. S. 499. In construing and applying a federal statute, laying a tax, this court will look to the fact of the matter; not to the mere name which a state court, at one time or another, may have given to the thing. *New Jersey* v. *Anderson,* 203 U. S. 483; *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292; *Burgess* v. *Seligman,* 107 U. S. 20. If any-

thing may be deemed settled by the Supreme Court of California, in the law of community property, it is to be found in its latest decision as in its first, separated by an interval of seventy years,—that the community system rests dominatingly and basically on a matrimonial partnership, to the assets of which the wife conclusively contributes on an equality with her husband, and in which, from the moment of the marriage, she has a "present, defined, certain interest," as co-owner and co-partner. The voluntary partnership, so familiar in everyday life, pays income tax on the just principle that taxation is correlated with ownership. One partner pays the tax on the share of the income which belongs to him, not on the share which belongs to his co-partner. If it be said that the husband, the managing partner, pays the tax of his co-partner out of community funds, the discrimination is not redressed. The tax upon partnership income is not computed upon the aggregated revenue, with reference to the higher surtax bracket, and the larger exaction; it is computed, for each partner, upon his share. It would be so computed in the case of a brother and sister, succeeding to the undivided ownership of an income-bearing property; it is so computed by the Treasury, it has been so computed by the Treasury for a period of years, in respect to seven out of eight community-property States. (Solicitor's Opinion, 121; T. B. 31–21–1845). Congress, in two general revisions of the Revenue Law, refused to alter the method of computation; once, at large, as to the community-property States, as well one as the other; again, in the specific case of California. But the discrimination against California still persists, though the highest law officer of the Government has advised to the contrary.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover $6,788.03 income tax for the year 1918, paid by R. D. Robbins, late of California. Mr.

Robbins was married and the income taxed came from community property in California, acquired before 1917, when some changes were made in the law, and from the earnings of Mr. Robbins. He was required by the Treasury Department to return and pay the tax upon the whole income, against the effort of Mr. and Mrs. Robbins to file returns each of one-half. The result was that he had to pay the amount sued for, above what would have had to be paid if his contention had been allowed. The District Court found the facts as agreed by the parties and upon them ruled that the plaintiffs, the executors of Robbins, were entitled to recover as matter of law. 5 Fed. (2d) 690. A writ of error was taken by the United States, before the Act of February 13, 1925, c. 229, 43 Stat. 936, went into effect. *Greenport Basin & Construction Company* v. *United States,* 260 U. S. 512, 514.

Elaborate argument was devoted to the question whether the interest of a wife in community property has the relatively substantial character in California that it has in some other States. That she has vested rights has been determined by this Court with reference to some jurisdictions, *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; and the Treasury Department has carried those rights to the point of allowing a division in the return of community income in other States where the community system prevails. Regulations 65 relating to the Income Tax under the Revenue Act of 1924, Art. 31. Its adoption of a different rule for California was based, we presume, upon the notion that in that State a wife had a mere expectancy while the husband was alive.

If on the whole this notion seems to us to be adopted by the California courts it is our duty to follow it, so far as material, even if contrary expressions should be found here or there in the books; and it is no concern of ours whether the prevailing decision is a legitimate descendant from its parent the Spanish law or otherwise.—We can see no sufficient reason to doubt that the settled opinion of

the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than sixty years, and shows that *Arnett* v. *Reade,* 220 U. S. 311, would not be followed in that State. *Roberts* v. *Wehmeyer,* 191 Cal. 601, 611, 614. In so doing it accords with the intimations of earlier cases, and does no more than embody the commonly prevailing understanding with regard to California law as shown by commentators and the action of the Treasury Department, as well as by the declarations of the Court. McKay, Community Property, Section xi, p. 44. 35 Harvard Law Review, 47, 48. Treasury Regulations 65 relating to the Income Tax under the Revenue Act of 1924, Art. 31. *Rice* v. *McCarthy,* (Cal. Ct. App.) 239 Pac. Rep. 56.

But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, §§ 210, 211; 40 Stat. 1057, 1062. Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the

husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, § 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. § 219. See Regulations 65, Art. 341.

Judgment reversed.

MR. JUSTICE SUTHERLAND dissents.

MR. JUSTICE STONE took no part in the case.

NEW JERSEY *v.* SARGENT, ATTORNEY GENERAL, ET AL.

No. 20, Original. Submitted October 5, 1925.—Decided January 4, 1926.

1. A bill by a State for an injunction against federal officers charged with the administration of a federal statute can not be entertained by this Court, where the bill does not show that any right of the State which in itself is an appropriate subject of judicial cognizance, is being, or is about to be, affected prejudicially by the application or enforcement of the Act, but seeks merely to obtain a judicial declaration that, in certain features, the Act exceeds the authority of Congress and encroaches upon that of the State. P. 330.
2. The bill in this case, which seeks to draw in question the constitutionality of parts of the Federal Water Power Act in their relation to waters within or bordering on the complaining State, fails to present any case or controversy appropriate for exertion of the judicial power. P. 334.
3. The power of Congress to regulate interstate and foreign commerce includes the power to control, for the purposes of such commerce, all navigable waters accessible to it and within the United States, and to that end to adopt all appropriate measures to free such waters from obstructions to navigation and to preserve, and even enlarge, their navigable capacity; and the authority and rights of a State in respect of such waters within its limits are subordinate to this power of Congress. P. 337.

Bill dismissed.

On a motion to dismiss a bill filed by the State of New Jersey, against the Attorney General of the United States and the members of the Federal Power Commission, all alleged to be citizens of other States, to enjoin the defendants from taking any steps to apply or enforce, in respect of waters within or bordering on New Jersey, certain provisions of the Federal Water Power Act.

Messrs. Thomas F. McCran, Attorney General, *William Newcorn* and *Harry R. Coulomb,* Assistant Attorneys General, of New Jersey, for complainant.

The bill presents a justiciable controversy. It alleges the State's proprietary interest in and over its water resources, from which it derives, and may expect, revenue of considerable magnitude; that the defendants claim the right under the Federal Water Power Act to license and control such water resources and to receive revenue therefrom by way of license fees and otherwise; threats on the part of the defendants to enforce the provisions of the Act, and that such enforcement irreparably affects the revenues of the State derived and to be derived from such sources. These allegations set forth a specific and concrete situation resulting in an irreparable injury to the State individually, and to its citizens in their property rights derived through grants by the State. *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Louisville, etc. R. R.* v. *Railroad Commissioners of Alabama,* 157 Fed. 944; *Waite* v. *Macy,* 246 U. S. 266. The defendants have threatened to exercise certain authority under an act which the complainant claims to be unconstitutional and which, if exercised, would result in irreparable injury.

The bill presents a controversy within the original jurisdiction of this Court. *Pennsylvania* v. *West Virginia,* 262 U. S. 591; *Heckman* v. *United States,* 224 U. S. 413; *United States* v. *New Orleans R. R.,* 248 U. S. 507; *Missouri* v. *Illinois, etc.,* 180 U. S. 208; *Kansas* v. *Colorado*

185 U. S. 125; 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *United States* v. *Rickert*, 188 U. S. 432; *Cohen* v. *Virginia*, 6 Wheat. 264.

The suit is not against the United States. *Truax* v. *Raich*, 239 U. S. 33; *Ex Parte Young*, 209 U. S. 123; *United States* v. *Lee*, 160 U. S. 196; *Kennington* v. *Palmer*, 255 U. S. 100; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605. The bill sets forth a cause of action against all of the defendants.

Solicitor General Beck, *Messrs. Robert P. Reeder*, Special Assistant to the Attorney General, *Lewis W. Call* and *J. F. Lawson* were on the brief for defendants.

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

This is a bill in equity brought in this Court by the State of New Jersey against the Attorney General of the United States and the members of the Federal Power Commission, all alleged to be citizens of other States, to obtain a judicial declaration that certain parts of the Act of June 10, 1920, called the Federal Water Power Act, c. 285, 41 Stat. 1063, are unconstitutional in so far as they relate to waters within or bordering on that State, and to enjoin the defendants from taking any steps towards applying or enforcing them, in respect of those waters. The defendants respond with a motion to dismiss on the grounds, among others, that the bill does not present a case or controversy appropriate for the exertion of judicial power but only an abstract question respecting the relative authority of Congress and the State in dealing with such waters. If this be a proper characterization of the bill the motion to dismiss must prevail, as a reference to prior decisions will show.

In *Georgia* v. *Stanton*, 6 Wall. 50, this Court had before it a bill by the State of Georgia challenging the power of Congress to enact the so-called Reconstruction Acts and

seeking an injunction against the Secretary of War and others to prevent them from giving effect to that legislation. On examining the bill the Court found that it was directed against an alleged encroachment by Congress on political rights of the State and not against any actual or threatened infringement of rights of persons or property; and on that ground the bill was dismissed. The nature and extent of the judicial power under the Constitution were much considered; the statement of Mr. Justice Thompson in *Cherokee Nation* v. *Georgia,* 5 Pet. 75,—" It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here."—was quoted with approval; and the Court added: " By the second section of the third article of the Constitution 'the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States,' etc., and as applicable to the case in hand, ' to controversies between a State and citizens of another State,'—which controversies, under the Judiciary Act, may be brought, in the first instance, before this Court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to a remedy, a case must be presented appropriate

for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or in equity."

In *Marye* v. *Parsons,* 114 U. S. 325, an owner of coupons cut from bonds of the State of Virginia issued with a guaranty that the coupons should be receivable in payment of taxes, brought a bill in equity in a federal court in that State against the tax collectors to compel them to recognize the guaranty and to disregard later statutes forbidding acceptance of such coupons in payment of taxes. The coupons were overdue, the State had made default in their payment, and the tax collectors had announced a general purpose to follow the subsequent statutes. The coupons were transferrable and could be sold at nearly their face value to other persons who had taxes to pay, provided the plaintiff obtained a decree adjudging the subsequent statutes invalid and directing the collectors to accept the coupons when tendered in payment of taxes by any lawful holder. Indeed, an arrangement to sell the coupons on these terms had been effected before the bill was filed. But no one was then in a position to tender the coupons to the tax collectors, because the plaintiff who owned the coupons had no tax to pay, and because the prospective transferees, while having taxes to pay, did not as yet own the coupons. The bill set forth the situation just described and prayed a decree along the lines suggested. In the court of first instance the plaintiff obtained a decree, but this Court reversed it and directed a dismissal of the bill for want of jurisdiction, saying:

"The bill as framed, therefore, calls for a declaration of an abstract character, that the contract set out requiring coupons to be received in payment of taxes and debts due to the State is valid; that the statutes of the General Assembly of Virginia impairing its obligations are con-

trary to the Constitution of the United States, and therefore void; and that it is the legal duty of the collecting officers of the State to receive them when offered in payment of such taxes and debts.

"But no court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description."

In *Muskrat* v. *United States,* 219 U. S. 346, the question was whether, consistently with the limitations of the judicial power, this Court could entertain, on an appeal from the Court of Claims, a suit brought under a permissive Act of Congress by members of the Cherokee Tribe of Indians to determine the constitutional validity of congressional enactments enlarging prior restrictions on the alienation of their allotments and permitting newly-born children and other members of the tribe omitted from a prior enrollment to share in the distribution of tribal lands and funds. In an extended opinion the Court pointed out that the suit did not present an actual controversy between the parties respecting any specific right of person or property, but only a question of the power of Congress to enact the legislation described, and held that such a suit was not within the scope of the judicial power and could not be entertained by this Court, originally or on appeal, even under a permissive Act of Congress.

In *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, where a bill praying that an act enlarging the powers of the Interstate Commerce Commission and creating the Railroad Labor Board be declared unconstitutional and action thereunder prevented by injunction was dismissed for want of jurisdiction, this Court said:

"The bill is of unusual length, sixty-five printed pages. Much of it is devoted to the presentation of an abstract question of legislative power—whether the matters dealt with in several of the provisions of Titles III and IV fall within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States. The claim of the State, elaborately set forth, is that they fall within the latter field, and therefore that the congressional enactment is void. Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or are about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."

And in *Massachusetts* v. *Mellon,* 262 U. S. 447, the Court recognized and gave effect to the reasoning and principle of those cases by dismissing a bill brought by the Commonwealth of Massachusetts to restrain executive officers from giving effect to an act of Congress alleged to be an unconstitutional usurpation of power, but not shown to affect prejudicially any proprietary or other right of the State subject to judicial cognizance.

On reading the present bill we are brought to the conclusion, first, that its real purpose is to obtain a judicial declaration that, in making certain parts of the Federal Water Power Act applicable to waters within and bordering on the State of New Jersey, Congress exceeded its own authority and encroached on that of the State, and secondly, that the bill does not show that any right of the State, which in itself is an appropriate subject of judicial cognizance, is being, or about to be, affected prejudicially by the application or enforcement of the Act. We think the reasons for this conclusion will be

indicated sufficiently by describing the Act and then pointing out the distinctive features of the bill.

The Act is a long one, extends to all the States and organized Territories and the District of Columbia, and varies its operation according to local situations and conditions. Some of its provisions are general, some relate to areas containing public and Indian lands, and some have special application to the use of government dams in developing power. As respects the State of New Jersey, the Act may be adequately described for present purposes by stating that it relates particularly to navigable waters; subjects their improvement and utilization for purposes of navigation and developing power to stated restrictions and supervision by a public commission, which it creates; requires that such operations be carried on under preliminary permits and long-term licenses obtained from the commission and conditioned on compliance with the restrictions; provides that no license "affecting the navigable capacity of any navigable waters" shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War; directs that preference be given to applications by the State or any municipality; requires that each applicant for a license to use the waters for power purposes submit satisfactory evidence of his compliance with the laws of the State and of his right to engage in such business; prescribes that licensees shall pay to the United States reasonable annual charges, to be fixed by the commission, for the purpose of reimbursing the United States for the cost of administering the Act, " and for the expropriation to the Government of excessive profits until " the State " shall make provision for preventing excessive profits or the expropriation therefor [thereof] to " itself, but relieves the State and any municipality from the payment

of any charge in respect of licenses for power purposes where the power is sold without profit or used for public purposes, and also in respect of licenses for projects primarily designed to improve navigation; and provides that any person or corporation, including the State or any municipality, intending to construct a dam or other works in a stream not declared navigable "may in their discretion" file a declaration of their intention with the commission, whereupon it shall by investigation ascertain whether "the interests of interstate or foreign commerce" will be affected thereby, that if it finds they will be affected the construction shall not proceed unless a license is sought and obtained, and that if it finds the other way the construction may proceed without a license. Some provisions relate particularly to the development of power, some only to improvement of navigation, and others to both, but all taken together suggest, if they do not show, that conservation for the purposes of navigation is a leading object. Thus it is said, in § 9(a), that every licensed project must be "adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial uses," and, in § 10(c), that the licensee "shall so maintain and operate said works as not to impair navigation." One provision declares that nothing in the Act shall be construed as affecting or interfering with the laws of the State relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." There are also provisions making it a misdemeanor, punishable by a fine of not exceeding $1,000, for any licensee, or any person, wilfully to fail or refuse to comply with any provision of the Act, condition of a license, or regulation or order of the commission,—and other provisions authorizing the Attorney General, on the recommendation of the commission or the Secretary of

War, to bring suits to prevent, remedy or correct violations of the Act or lawful regulations or orders thereunder, and also suits to revoke permits or licenses for violations of their terms.

Rightly to appraise the bill one should have in mind the doctrine, heretofore firmly settled, that the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a State, and to that end to adopt all appropriate measures to free such waters from obstructions to navigation and to preserve and even enlarge their navigable capacity; and that the authority and rights of a State in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress. *Philadelphia* v. *Stimson,* 223 U. S. 605, 634–638; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62–65; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, 88; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 258, *et seq.; Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 703.

The bill is directed against many provisions of the Act, especially those requiring permits and licenses and subjecting licensees to various restrictions and conditions and those relating to projects for utilizing the waters in the development of power; and it directly alleges that they all go beyond the power of Congress and impinge on that of the State. Plainly these allegations do not suffice as a basis for invoking an exercise of judicial power.

The bill further alleges, in an indefinite way, that "it is the intention" of the State to utilize the Morris Canal, which it recently has acquired, for "water power development" and in the "conservation of potable waters"; that there are "opportunities" for developing water

power at several places along streams which feed the canal and in designated localities along the Delaware River "where dams could be erected and power developed"; that the State "contemplates" utilizing these opportunities "through a state agency or by private enterprise" with a resulting profit to its treasury; that the State has an established policy respecting "the conservation of potable waters" which has been put into partial effect "through its agencies and by private enterprise" by means of reservoirs and water works constructed at large cost; and that in its sovereign capacity the State owns lands under the Bay of New York, the Hudson River, adjacent waters, and the Delaware River, from the leasing of which for dock, pier and related purposes it derives a large revenue. These allegations are followed by others, similarly indefinite, to the effect that the challenged provisions of the Act, if applied and enforced, will interfere with the State's contemplated development of "the aforesaid power projects," will jeopardize its policy respecting the conservation of potable waters and work serious injury to reservoirs and water works constructed and used in that connection, will deprive the State of revenue from the leasing of its submerged lands and from the development and conservation of water resources, and will subject the State and its citizens to onerous restrictions and conditions not required for the protection or promotion of navigation or of interstate or foreign commerce.

There is no showing that the State is now engaged or about to engage in any work or operations which the Act purports to prohibit or restrict, or that the defendants are interfering or about to interfere with any work or operations in which the State is engaged. If the use of particular waters in connection with the Morris Canal or with any reservoirs and water works, before the Act was passed, gave rise, as the bill suggests, to a right to continue such use, the Act does not purport to disturb, but rather to rec-

ognize, that right; and there is no showing that the defendants are taking or about to take any steps to prevent the State from exercising it. Passing that right, the State is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project. Neither is it shown that the defendants are now taking or about to take any definite action respecting waters bordering on or within the State, save as the commission is about to consider and act on "various applications from persons in New Jersey" for preliminary permits and licenses to utilize "navigable waters on the boundary and inland" for the development of water power. As the applications are not further described, it must be assumed that the permits are sought, as the Act provides, "for the sole purpose of maintaining priority of application for a license," and that the licenses are sought conformably to the provision requiring applicants to submit satisfactory evidence of compliance with the laws of the State with respect to "the appropriation, diversion and use of water for power purposes" and to "the right to engage in" that business. While the State is thus apparently put in the position of objecting to the licensing of projects sanctioned by its own laws, the bill explains that the objection is chiefly to the restrictions and conditions to which, according to the terms of the Act, an applicant is deemed to assent by seeking and accepting a license. These restrictions and conditions are assailed in the bill as passing beyond the field of congressional power and invading that reserved to the State. But whether they are thus invalid cannot be made the subject of judicial inquiry until they are given or are about to be given some practical application and effect. Naturally this will be after they become part of an accepted license, and after some right, privilege, immunity or duty asserted under them becomes the subject of actual con-

troversy. Such a situation is not presented here. As respects the State's submerged lands, the bill signally fails to disclose any existing controversy within the range of the judicial power. Stating merely that the State will be deprived of revenue from the leasing of such lands is not enough. Facts must be stated showing that the Act is being or about to be applied in a way which does or will encroach on or prejudicially affect the State's qualified right in the lands. There is no such showing.

The State places some reliance on *Pennsylvania* v. *West Virginia,* 262 U. S. 553. But in this it overlooks important factors in that decision. Two bills substantially alike—one by Pennsylvania and the other by Ohio—were considered. Both were brought to prevent the enforcement of a West Virginia statute restricting the carrying of natural gas from that State into others. The gas had been for several years carried in large and continuous volume through pipe lines into Pennsylvania and Ohio, and those States had come to be largely dependent on it as a fuel for public institutions and otherwise. The statute, in its first section, imposed on the pipe-line carriers an unconditional and mandatory duty (opinion p. 593), which if respected would largely prevent this supply of fuel from moving into Pennsylvania and Ohio and would subject those States to great loss. The bills disclosed that the situation when they were brought was such that the statute directly and immediately would effect a serious diminution of the volume of gas carried into the complaining States, and on which they were dependent (p. 594). Of the cases thus presented the Court said:

"Each suit presents a direct issue between two States as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant State asserts and the de-

fendant State denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between States.

"What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant State before set forth and is about to be carried into effect by her officers acting in her name and at her command."

This bill falls far short of showing a situation like that presented there, and what it does show falls on the other side of the jurisdictional line.

Our conclusion is that the bill cannot be entertained.

Bill dismissed.

FIRST NATIONAL BANK OF GUTHRIE CENTER *v.* ANDERSON, COUNTY AUDITOR, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 26. Argued January 27, 1925.—Decided January 4, 1926.

1. In a case from a state court the question whether the federal right was sufficiently alleged in the pleading must be determined by this Court for itself. P. 346.
2. When a state court has treated a case as cognizable in equity, this Court can not decline to review the federal questions involved upon the ground that it was not so. *Id.*
3. Decree *held* reviewable by writ of error, and certiorari denied. *Id.*
4. The restriction imposed by Rev. Stats. § 5219, upon state taxation of national bank shares, viz., that the taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," was violated where the national and state bank stock within a county, not exceeding $316,852, was taxed at the rate of 143.5 mills per dollar, while

$5,000,000 of other moneyed capital in the hands of individuals, consisting of notes, mortgages and other evidences of indebtedness, such as normally enter into the business of banking, and which was used in competition with the complaining national bank, was taxed in the county at only 5 mills on the dollar. P. 347.

5. The Act of March 4, 1923, in reënacting the above provision of Rev. Stats. § 5219 with additions, did no more than put into express words that which, according to repeated decisions of this Court, was implied in the original section. P. 349.

6. The investment of individual capital in farm mortgages is not inconsistent with its being used in competition with national banks, since the prohibition against loans on real estate by national banks was partly withdrawn by the Acts of Dec. 22, 1913, and Sept. 7, 1916. P. 352.

7. Where a bill by a national bank to restrain a state tax on its shares alleged facts showing a discrimination, violative of Rev. Stats. § 5219, in taxing other capital consisting of notes, mortgages, etc., at a lower rate, it was error to assume, on demurrer, as a matter of judicial notice, that such capital was, in practice, loaned by the plaintiff and other banks, acting as agents for their customers, and was therefore non-competing. P. 354.

196 Iowa 587, reversed.

Error to a judgment of the Supreme Court of Iowa, affirming a judgment dismissing the bill, on demurrer, in a suit brought by a national bank on behalf of its shareholders, to restrain collection of a discriminating tax on their shares.

Mr. J. G. Gamble, with whom *Messrs. John P. Foster* and *Ralph L. Read* were on the briefs, for plaintiff in error.

Messrs. Ben J. Gibson, Attorney General of Iowa, and *Earl W. Vincent,* with whom *Mr. Maxwell A. O'Brien,* Assistant Attorney General of Iowa, was on the briefs, for defendants in error.

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

This is a suit by a national bank on behalf of its shareholders to restrain the collection of a tax levied against

the latter on their shares. The bank is located at Guthrie Center in Guthrie County, Iowa. The defendants, who are county officers charged with the duty of collecting taxes, interposed a general demurrer to the petition. The demurrer was sustained, judgment against the plaintiff was entered, and the judgment was affirmed by the Supreme Court of the State, 196 Iowa 587.

The petition assails the tax on several distinct grounds, only one of which is relied on here. The allegations displaying this ground are:

"The said tax as entered upon the tax list by the County Auditor is void because it is a discrimination between bank stock and moneyed capital invested in competition therewith, and in violation of Sec. 5219, Revised Statutes of the United States. Plaintiff avers that in the town of Guthrie Center, Iowa, the total levy for local, county and state tax purposes was one hundred forty-three and five-tenths mills on the dollar for the year 1920, and said tax on plaintiff and its shareholders was estimated and charged at said rate. . . . That under the laws of Iowa a levy of only five mills on the dollar is imposed upon notes, mortgages and other evidences of debt, and investments of individuals in securities, which represent money at interest, and other evidence of indebtedness such as normally enter into the business of banking, and the tax for the year 1920 upon moneyed capital of individual citizens of Guthrie County, Iowa, and of the Town of Guthrie Center, engaged in competition with plaintiff, was so levied and computed. That the amount of notes, mortgages and other evidences of money loaned and put out at interest by individual citizens in the county of Guthrie, Iowa, was a very large sum, which amount plaintiff is unable to state; but upon information and belief plaintiff charges said amount to be more than five millions of dollars, which were included in the 1920 assessment, and upon which the tax levy was

but five mills on the dollar; while the total of all bank stock, including state and national in Guthrie County, Iowa, does not exceed the sum of $316,852.00. That approximately five millions of dollars of moneyed capital in the hands of individual citizens consisting chiefly of notes, mortgages and money loaned at interest was taxed for the year 1920 in Guthrie County, Iowa, under the laws of Iowa, at five mills on the dollar."

"That said assessment is erroneous in that it is contrary to the provisions of Section 5219 of the Revised Statutes of the United States; because by said assessment the shares of stock of the plaintiff are subjected to a greater assessment and tax than is imposed upon money capital in the hands of individual citizens in said State used and utilized in the same business."

The Supreme Court of the State, in the fore part of its opinion, summarizes the several grounds on which the bank urged it to hold the tax invalid. The ground relied on here, as there summarized, is "that the [state] statute providing for a tax of five mills on the dollar of moneyed capital loaned and invested in competition with national banks discriminates against the same and is void under Section 5219 of the Revised Statutes of the United States." The record also shows that in that court the defendants recognized that the bank was contending "its shares of stock are taxed at a greater rate under the Iowa law than is moneyed capital" contrary to the restrictions of the federal statute, and that they made the counter contention that "the law under which it is sought to hold appellant bank liable for the 1920 taxes does not violate Sec. 5219 of the U. S. Revised Statutes." True, the Supreme Court in the latter part of its opinion says, "It is not claimed that section 1310 of the statute [the state law] is invalid, or that ample provision is not made thereby for the assessment of other moneyed capital in the hands of individuals or other owners at the same rate

as national and state banks are taxed, when invested in competition therewith." At first this seems a contradiction of the court's earlier statement. But these statements are explained and the seeming conflict dispelled by what otherwise appears in the record, which is, that the bank was making the alternative contentions that the state law, if construed and applied according to its words, does not permit any discrimination against national bank shares and is in accord with the federal statute, but, if construed and applied as sustaining what is alleged in the petition, it permits the discrimination which the federal statute forbids and is in that respect invalid.

The case is here on writ of error, the substance of the assignment of errors being that the Supreme Court of the State, although holding that the state law permits the discrimination against national bank shares alleged in the petition, denied the bank's contention that, when so construed and applied, that law is in conflict with the federal statute.

A petition for review on writ of certiorari also was presented and its consideration was postponed to the hearing on the writ of error.

By a motion to dismiss, the jurisdiction of this Court on the writ or error is challenged on the grounds, first, that the state court rested its judgment on the construction and sufficiency of the allegations of the petition and its decision of that question is conclusive here; and, secondly, that the judgment is right independently of any ruling on the asserted federal question, in that the suit is not one in which relief may be had in equity, because (a) an adequate remedy at law may be had under the local law by paying the tax and suing to recover the money, (b) the bank has not exercised the local statutory right of appealing from the action of the county officers in imposing the tax, and, (c) there has been no payment or tender of so much of the tax as would be due if the five-mills levy were applied to the shares.

Plainly, the first ground cannot be maintained. Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. *Mitchell* v. *Clark,* 110 U. S. 633, 645; *Boyd* v. *Thayer,* 143 U. S. 135, 180; *Covington and Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 595; *Carter* v. *Texas,* 177 U. S. 442, 447. The principle is general, and is a necessary element of this Court's power to review judgments of state courts in cases involving the application and enforcement of federal laws. *Davis* v. *Wechsler,* 263 U. S. 22, 24.

The second ground is not better. The Supreme Court of the State treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here. In cases coming from state courts this Court's power and concern are specially directed to rulings made or refused on federal questions. *Murdock* v. *Memphis,* 20 Wall. 590, 638; *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441, 444.

With the objections just considered out of the way, it suffices to say this Court's jurisdiction on the writ of error has full support in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. The motion to dismiss is accordingly overruled, and the petition for certiorari is denied.

The state court holds that the state law authorizes the taxation shown in the petition; and, as this ruling on a purely state question must be accepted here, we turn to

the question, chiefly pressed on our attention, whether the state law, so construed and applied, conflicts with the federal statute. In approaching its solution there is need for having in mind the occasion for the federal statute and the purpose and words of the restriction therein which is said to have been violated here.

National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent. *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 106, and cases cited. The early legislation respecting these banks contained a restricted consent, which afterwards became § 5219 of the Revised Statutes. By it Congress assented to the taxation of the shares to their owners under the laws of the State where the bank was located, subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and further assented to the taxation of the real property of the bank for state, county, and municipal purposes "to the same extent, according to its value, as other real property is taxed." This consent thus restricted was in force when the tax here assailed was levied.

The restriction on the taxation of the shares often has been considered by this Court. The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, so far as is material here

1. The purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in opera-

tions and investments normally common to the business of banking. *Mercantile National Bank* v. *New York,* 121 U. S. 138, 155; *Des Moines National Bank* v. *Fairweather, supra,* 116.

2. The term "other moneyed capital" in the restriction is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. *Mercantile National Bank* v. *New York, supra,* 157; *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440, 461.

3. Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking; and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. *Mercantile National Bank* v. *New York, supra,* 155–157; *Palmer* v. *McMahon,* 133 U. S. 660, 667–668; *Talbot* v. *Silver Bow County,* 139 U. S. 438, 447.

4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction. *People* v. *Weaver,* 100 U. S. 539; *Boyer* v. *Boyer,* 113 U. S. 689, 701; *National Bank of Wellington* v. *Chapman,* 173 U. S. 205, 216.

In the briefs there is some discussion as to whether our decision in *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, attributed to the term "other moneyed

capital" a wider meaning than was recognized before. But nothing was said in the opinion indicating that an enlargement was intended. On the contrary, it distinctly accepted the meaning adopted in prior decisions. The case was unusual in one respect. The defendants took the position that the congressional restriction was directed only against discrimination in favor of state banking associations, and they persisted in it to the extent of making no effort at the trial to controvert the evidence produced by the plainiff to show that a relatively large amount of moneyed capital, taxed at a lower rate than the bank's shares, was employed in substantial competition with the business of the bank. When that position proved untenable by reason of settled rulings to the contrary, the case was left where the outcome turned on the evidence of competition produced by the plaintiff. That evidence was somewhat meager, but in the absence of any counter evidence was held sufficient, and the tax was accordingly pronounced invalid. If the outcome was open to criticism, it was not because any enlarged meaning was attributed to the term "other moneyed capital," but because the facts bearing on the question of competition were not sufficiently brought out at the trial and shown in the record.

By the Act of March 4, 1923, c. 267, 42 Stat. 1499, passed after the levy of the tax in question, § 5219 of the Revised Statutes was amended by extending the consent of Congress to any one of three forms of taxation. That of taxing the shares to their owners was retained as one of the three, and the prior restriction was reënacted with added words here shown in italics, making it read as follows:

"In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State *coming into competition with the business of*

national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The defendants say that this reënactment was intended as a legislative interpretation of the prior restriction, and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the reënactment did no more than to put into express words that which, according to repeated decisions of this Court, was implied before. In *Mercantile National Bank* v. *New York, supra,* where the terms and purpose of the restriction were much considered, it was distinctly held that the words "other moneyed capital" must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the reënactment as after. What bearing a different legislative interpretation might have on a tax already levied, as here, need not be considered.

With this understanding of the congressional restriction, we come to consider whether the allegations of fact in the petition, admitted by the demurrer, show that the tax on the bank's shares, which the state court regards as authorized by the state law, was imposed con-

trary to that restriction. The allegations before quoted are all that are material. They declare at the outset and again later on that the shares were subjected to a greater rate of taxation than was imposed on other moneyed capital in the hands of individuals used and utilized in competition with the bank. This declaration is so connected with the intervening allegations that it both colors and explains them. Some of these are directly to the effect that the tax on the shares was computed at the rate of one hundred and forty-three and five-tenths mills on the dollar, while that on notes, mortgages and other evidences of indebtedness, "such as normally enter into the business of banking" and representing moneyed capital of individual citizens "engaged in competition" with the bank, was computed at five mills on the dollar. Then follows an allegation that the amount of notes, mortgages and other evidences of indebtedness representing moneyed capital of individual citizens of the county, and taxed at five mills on the dollar, was approximately $5,000,000, while the total bank stock, state and national, in the county was not more than $316,852.

The defendants point out that the allegation last mentioned does not in itself say that the $5,000,000 of other moneyed capital, or any substantial portion of it, was employed in competition with the bank; and from this they argue that the petition falls short of showing a discrimination in favor of a relatively substantial amount of moneyed capital so employed. But that allegation is so related to the others that, to be rightly understood, it must be read with them. We think such a reading shows that it is intended to refer to the notes, mortgages and other evidences of indebtedness which the others describe as representing moneyed capital of individual citizens engaged in competition with the bank, and that it means that this competing capital, on which the five-mills tax

was imposed, approximated $5,000,000, while the bank stock, which was subjected to the tax of one hundred and forty-three and five-tenths mills, did not exceed $316,852. Thus understood, the allegation is in accord with the theory on which the others obviously proceed, and serves, with them, to show a serious discrimination against the bank's shares and in favor of a relatively substantial amount of competing moneyed capital.

It may be that some of the allegations were in such general terms as to be subject to a motion for a more specific statement, but such a motion was not made, and the objection appears not to have been open on the general demurrer. *Lamb* v. *McCormick*, 116 Iowa 169, 174–175; *B., C. R. & M. R. Co.* v. *Stewart*, 39 Iowa 267, 272; *Noyes* v. *Mason City*, 53 Iowa 418, 419.

The Supreme Court of the State regarded the petition as alleging "simply that notes and other evidences of money loaned, payment of which is secured by mortgages upon farm lands," were taxed at a lower rate than the bank shares; and in that view of the allegations the court observed that the tax on the shares was not imposed contrary to the congressional restriction, unless moneyed capital loaned on farm mortgages was to be regarded as loaned or invested in competition with national banks. On this question the court said:

"Although it does not appear upon the face of the petition, it is a matter of common knowledge that banks, national as well as state, particularly in the rural communities of Iowa, are the instrumentalities through which much the larger portion of farm loans is made; that many banks, as such, or through others with which they are interested, act as agents of insurance companies and other financial institutions having large sums of money to loan upon farm security; and that the money of individuals is either loaned directly by the bank for the accommodation of the owner, who is its customer, or

loans are made in advance by the bank, and later transferred to such other customers as have money to loan. The money of individuals loaned in the community thereby becomes a source of profit to the bank. It is also well known that money borrowed upon farm security finds its way at once, or ultimately, into the local banks, and is drawn out in the regular course of the borrower's business.

"The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry, and the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition."

The allegations of the petition already have been quoted at length. They say, "notes, mortgages, and other evidences of money loaned at interest," and they describe these securities as "such as normally enter into the business of banking" and as representing moneyed capital of individuals "engaged in competition with the plaintiff." We find in them no specific mention of farm mortgages, nor anything indicating that they refer only to such mortgages. No doubt they are broad enough to include farm mortgages; but this does not weaken the allegation of competition, for while national banks were formerly prohibited from making loans on real estate, Rev. Stats., §§ 5136, 5137; *Union National Bank* v. *Matthews*, 98 U. S. 621, 625; *National Bank of Genessee* v.

Whitney, 103 U. S. 99, the prohibition was partly withdrawn and much of that field was opened to such banks by the Acts of December 22, 1913, c. 6, § 24, 38 Stat. 273, and September 7, 1916, c. 461, 39 Stat. 754.

As the case now stands, we think no effect can be given to what the state court assumes is the practice of banks in rural portions of Iowa in making farm loans as agents for their customers or others. If there be such a practice, it is not a matter which may be noticed and given effect without pleading or proof. If followed by some banks, it may not be followed by others. The state court does not speak of it as universal, but only as followed by "many banks." Certainly the record gives no ground for holding that the plaintiff follows it. In this situation the allegation of competition stands unaffected by the assumed practice.

We conclude that the state law, when construed and applied as authorizing the discrimination against the bank's shares which is charged in the petition, is in that regard in conflict with the restriction in the federal statute.

Judgment reversed.

LIVE OAK WATER USERS' ASSOCIATION ET AL. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 73. Argued October 22, 1925.—Decided January 4, 1926.

1. A rate-fixing order made by a commission acting under a state statute is, for jurisdictional purposes in applying Jud. Code § 237, as amended Sept. 6, 1916, an act of the legislature. P. 356.
2. A judgment of a state supreme court sustaining such an order *held* not reviewable here by writ of error, under Jud. Code § 237, as amended Sept. 6, 1916, where the constitutionality of the order itself was not definitely drawn in question before the state court

prior to a petition for rehearing which was denied without more. P. 357.

3. In a case where the state court has decided a local question adequate to support its judgment without regard to federal questions, the better practice in this Court, (generally at least) is to dismiss the writ, rather than affirm the judgment. P. 359.

Writ of error to 192 Cal. 192, dismissed.

ERROR to a judgment of the Supreme Court of California sustaining upon review an order of the State Railroad Commission which increased the rates demandable by a public service corporation for supplying water for irrigation purposes. Plaintiffs in error were consumers of the water and claimed that the order conflicted with their rights under standing contracts with the company.

Mr. F. S. Brittain, for plaintiffs in error.

Mr. Carl I. Wheat, for defendant in error, Railroad Commission of California.

Messrs. Isaac Frohman, Frank R. Devlin, and *Douglas Brookman* for the defendant in error, Sutter Butte Canal Company.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Sutter-Butte Canal Company, a public service corporation of California, has long supplied water for irrigation in the Sacramento Valley. Before 1913 plaintiffs in error or their predecessors severally contracted with it for water to be used during long terms on definitely described parcels of land, at prices based upon their total areas at specified rates per acre, whether actually consumed or not. Payment of the stipulated sums was secured by liens on the entire tracts; rights so acquired were appurtenant to the land and constituted a servitude upon the water. Other stipulations concerned lateral ditches, etc.,

etc. Those who held these agreements are referred to as contract customers. Other parties—non-contract customers—were supplied and charged according to number of acres actually irrigated from year to year.

In 1918 the Railroad Commission permitted a general increase of rates but gave contract customers somewhat lower ones than those prescribed for others. Thereafter the company continued to demand and receive from all contract customers yearly sums reckoned according to entire acreage.

April 26, 1922, the Commission granted another increase of rates, again giving lower ones to contract customers. Plaintiffs in error obtained from the court below a review of this order. Their petition therefor asked, "that upon such review such order and decision of said Railroad Commission be annulled and set aside insofar as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners." That court first held the challenged order produced unlawful inequalities between contract and non-contract customers, contrary to the law of the State, and therefore should be set aside. 65 Cal. Dec. 69. Having granted a rehearing, it declared the inequalities were not unreasonable and affirmed the order. 192 Cal. 132.

The cause is here upon writ of error. Considering the circumstances disclosed by the record, we have no jurisdiction unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution, treaties or laws of the United States. Jud. Code § 237, as amended Sept. 6, 1916. Under repeated rulings here, for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature. *Lake Erie & West. R. R. Co.* v. *State Public Utilities Commission ex rel. Cameron,* 249 U. S. 422, 424, and cases there cited.

The brief for plaintiffs in error declares: "The plaintiffs in error maintain that by the judgment of the Supreme Court of California the obligations of their contracts have been impaired, that their property has been taken without due process of law, that they have been denied the equal protection of the laws, and that the California court has denied and renounced its power to protect the plaintiffs in error in their claims of rights, privileges and immunities secured by the Constitution of the United States." This statement shows no jurisdiction here under the writ of error although it specifies a federal question justiciable by certiorari. Something more than a claim of federal right is necessary; the attack must be upon the validity of the order, not merely upon the court's judgment.

The brief further states that by the application to the Railroad Commission for rehearing and in the petition to the Supreme Court of California for review, plaintiffs in error set up their federal claims. No citations to the record accompany this statement, as our rules require. Rule 25, 2(c). A claim merely presented to the Commission upon application for rehearing would not suffice to give us jurisdiction. It must have been definitely brought to the court's attention. Although a copy of the request for rehearing addressed to the Commission is annexed to the petition to the Supreme Court, this petition made no claim under the federal Constitution with sufficient definiteness for us to say that the court's attention was challenged thereto. Neither opinion of the court shows that it considered or necessarily passed upon any such question. After the second opinion a petition for rehearing dwelt much on federal rights, but this was denied without more and is now without consequence. *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117.

Under the heading, "Authorities on Jurisdiction Relied on by Petitioners on Rehearing (Addressed to the Chief

Justice and Associate Justices of the Supreme Court of California)," there are printed in the record before us extracts from the written argument of counsel for the Water Users' Association and others, wherein this appears—

"Three rights of the petitioners under the Constitution of the United States are violated unless the order be annulled:

"(1) The obligations of their contracts are impaired by a law passed after the contracts were made; (2) The impairment of their contracts makes their lands subject to a lien to which they never agreed, and requires of them payment for the use of water not served, hence their property is taken without due process of law; and (3) By reason of the impairment of their contracts they are classified as consumers upon no real distinction of the character of the service, and know as citizens of the United States they are denied the equal protection of the laws."

In his brief here counsel for plaintiffs in error has not relied upon the foregoing as sufficient to show that the points there suggested were duly raised and presented to the court below, and we are not aware of any rule of practice in that court which permits such questions to be thus raised in a proceeding upon certiorari.

In *Zadig* v. *Baldwin,* 166 U. S. 485, 488, here upon error to the Supreme Court of California, this court said: "The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the Supreme Court of the State, in which such a federal question is discussed, and it is asserted orally at bar that in the oral argument made in the Supreme Court of California a claim under the federal Constitution was presented. But, manifestly, the matters

referred to form no part of the record and are not adequate to create a federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the State."

As we interpret its opinion and judgment the court below ruled only that the order of the Commission fixed rates to be charged, leaving all other questions subject to determination by the courts. Counsel for the Commission affirmed this interpretation and at the bar agreed that judgment here might rest thereon. In printed argument he said: "Except as to rates, the Commission did not attempt (in fact, expressly disclaimed any attempt) to change any of the provisions of these contracts, and the effect of this rate order, as a matter of law, on those other provisions was left by the Commission for determination by the courts as the occasion might arise." The decision below upon this point of local law is enough to support the judgment and leaves no federal question open for our determination.

In cases where the state court has decided a local question adequate to support its judgment this court has sometimes affirmed, and sometimes has dismissed the writ of error. *Murdock* v. *Memphis,* 20 Wall. 590, 634–636; *Eustis* v. *Bolles,* 150 U. S. 361, 370; *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601, 610; *Howat* v. *Kansas,* 258 U. S. 181; *Browne* v. *Union Pacific,* 267 U. S. 255. We have again considered the matter and have concluded that, generally at least, it is better practice to dismiss.

The writ of error must be

Dismissed.

UNITED STATES *v.* DAUGHERTY.

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

No. 303. Argued December 1, 1925.—Decided January 4, 1926.

1. *Semble* that, in view of later decisions on cognate questions, the constitutionality of the Anti-Narcotic Act, sustained by a divided court in *United States* v. *Doremus*, 249 U. S. 86, is open to question. P. 362.
2. Assuming the validity of the Anti-Narcotic Act, which was not questioned in this case, an indictment charging in three counts the making of three completed, unauthorized sales of cocaine, to three different named persons, on three different, specified days, alleges three separate offenses. P. 363.
3. A sentence, under three counts of an indictment alleging three separate offenses, which adjudged the defendant guilty of "the crime aforesaid" and that he be confined in a penitentiary "for the term of five years on each of said three counts" and until he shall have been discharged by due course of law; "said term of imprisonment to run consecutively and not concurrently"—is to be construed as imposing total imprisonment of fifteen years, made up of three five year terms, one under each count, to be served consecutively in the same sequence as the counts appeared in the indictment. P. 363.
4. Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. *Id.*

C. C. A. 2 Fed. (2d) 691, reversed; Dist. Ct. affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed but, by interpretation, reduced the scope of a sentence imposed by the District Court in a prosecution for violations of the Anti-Narcotic Act.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. Anthony P. Nugent, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

An indictment of three counts charged respondent with violating the Harrison Anti-Narcotic Act, c. 1, 38 Stat. 785, by making unauthorized sales of cocaine to three different persons on different days. Each count alleged a completed sale to the named individual on a specified day. The judgment below followed a plea of guilty—

"It is by the court considered and adjudged that said defendant is guilty of the crime aforesaid, and that as punishment therefor said defendant be confined in the United States Penitentiary situated at Leavenworth, Kansas, for the term of five (5) years on each of said three counts and until he shall have been discharged from said Penitentiary by due course of law. Said term of imprisonment to run consecutively and not concurrently."

He took the cause to the Circuit Court of Appeals for the Eighth Circuit and there maintained—

"1. That the [trial] court erred in imposing a sentence of fifteen years upon defendant, James Daugherty; that the court exceeded its jurisdiction in imposing a sentence of fifteen years, which is ten years above the maximum penalty prescribed for a violation of the Harrison Anti-Narcotic Act as amended by Revenue Act of 1918, 40 Stat. 1130.

"2. That each of the offenses charged, alleged and set forth in the indictment constitute a single continuous act inspired by the same intent, which is equally essential to each of the offenses charged in the three counts of said indictment, and the court erred and exceeded its jurisdiction in imposing a sentence of fifteen years upon defendant."

That court interpreted and affirmed the judgment.

It held that "the contention that each sale should be taken as resulting from one and the same criminal intent and therefore the three counts charge only one crime, is

not sound; because criminal intent is not an element of the crime, and because each count charges a different sale to a different person and on a different day, and if the sales were made as charged they constituted three separate offenses."

It further concluded that the sentence was for five years only and, in support of this view, said: "Where sentences are imposed on verdicts of guilty, or pleas of guilty, on several counts or on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provision therein that they be made to run consecutively by specifying the order of sequence. If the order in which the terms of imprisonment for the different offenses is to be served, is not clearly designated, the terms are to be served concurrently, and the defendant cannot be held in further confinement under the sentence after the expiration of the longest term imposed. Cumulative sentences are permissible, and in some cases are appropriate, but when imposed on different counts or indictments there must be certainty in the order of sequence." Mr. Justice Bradley's opinion in *United States* v. *Patterson,* 29 Fed. 775, was cited and relied upon.

The cause is here by certiorari, granted upon petition of the United States, for whom counsel say: "The judgment of the Circuit Court of Appeals has resulted in an unwarranted alteration and misapplication of the original sentence imposed upon the defendant. The purpose of this proceeding is to restore the original judgment and sentence of the District Court, imposing three consecutive terms of five years each."

The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus,* 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax*

Case, 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44, 67; and *Linder* v. *United States,* 268 U. S. 5, may necessitate a review of that question if hereafter properly presented.

In denying the contention that the indictment charged but a single crime the court below was clearly right. Further discussion of that point would serve no good purpose. But, we think, it erred in holding that the sentence was for only five years.

Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry. The words, "said term of imprisonment to run consecutively and not concurrently," are not consistent with a five-year sentence.

United States v. *Patterson, supra,* grew out of a sentence under pleas of guilty to three separate *indictments.* A single judgment entry directed that the prisoner "be confined at hard labor in the State's prison of the State of New Jersey, for the term of five (5) years upon each of the three indictments above named, said terms not to run concurrently; and from and after the expiration of said terms until the costs of this prosecution shall have been paid." The question there was materially different from the one here presented which concerns *counts* in one indictment. We think the reasoning of that opinion is not applicable to the present situation. *Neely* v. *United States,* 2 Fed. (2d) 849, 852, 853, is more nearly in point.

This and similar unfortunate causes should admonish the trial courts to require the use of meticulously precise language in all judgment entries. Especial care is essential where sentences for crime are imposed.

We deem it proper to add that the sentence of fifteen years imposed upon respondent seems extremely harsh. Circumstances not disclosed by the record may justify it, but only extraordinary ones could do so.

The judgment of the Circuit Court of Appeals is *reversed* and the one entered by the District Court is *affirmed*. The cause will be remanded to the latter court for further proceedings in conformity with this opinion.

O'HARA ET AL. *v.* LUCKENBACH STEAMSHIP COMPANY.

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

No. 224. Argued November 19, 1925.—Decided January 4, 1926.

1. Under the requirement of the Seamen's Act of March 4, 1915, that "the sailors shall, while at sea, be divided into at least two, and the firemen, oilers and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel," all the sailors must be divided into watches as nearly equal to each other numerically as the whole number of sailors will permit. P. 367.
2. The purpose of this provision, as shown by the Act and its history, is to promote safety at sea rather than to regulate the working conditions of the men. *Id.*
3. The phrase "divided into watches" is to be given the meaning it had acquired in the language and usages of the nautical trade—connoting a division of the crew as nearly equal as possible. P. 370.

1 Fed. (2d) 923, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a libel for seamen's wages.

Mr. H. W. Hutton, for petitioners.

Mr. Peter S. Carter, with whom *Messrs. Louis T. Hengstler* and *Frederick W. Dorr* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners, libellants below, quit the service of the steamship company and sought to recover their earned wages on the ground of a violation of § 2 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164, copied in the margin.[1] Omitting the various provisions with which we

[1] "SEC. 2. That in all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts."

are not here concerned, the pertinent requirement of that section is that "the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel." For a failure on the part of the master to comply with this, among other provisions of the section, the seamen are entitled to a discharge and to receive the wages earned. The failure complained of was that the sailors were not divided into watches of equal or approximately equal numbers, as, it was insisted, the statute contemplated.

The company was the owner of the steamship "Lewis Luckenbach," a vessel of 14,400 tons burden, upon which libellants were hired as sailors for a voyage from New York to Pacific ports and return to some port north of Cape Hatteras on the Atlantic. Altogether, there were thirteen sailors on board, three of whom, including libellants, were assigned as quartermasters. On the voyage and while at sea, these sailors were not equally divided into watches. Three watches were on duty, each consisting of one quartermaster and one able seaman, the remaining seven sailors being kept at day work only. The district court dismissed the libel and this was affirmed by the court of appeals. 1 Fed. (2nd) 923. Both courts were of opinion that the primary object of the statutory provision was to fix hours of service so as to prevent overwork, not to prescribe the number of seamen on each watch. The district court thought that this conception of the law was borne out by the consideration that, if one-half or one-third of the crew must be assigned to duty at night, a majority of them would have little or nothing to do. The court of appeals seemed to think that the purpose of Congress to provide for the safety of the ship was satisfied rather in the selection of qualified quartermasters and men for the lookout than in the equality of the watches. With these views we are unable to agree.

The general purpose of the Seamen's Act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also "to promote safety at sea." The Act as a whole shows very clearly that, while hours of work and proper periods of rest were regarded as considerations of primary concern while the vessel is in a safe harbor, these considerations must yield, as they have always yielded, to the paramount necessity of safety while the ship is at sea. And, as indicating that the provision under review was not intended primarily as a regulation of working hours, it is significant that it does not apply to the entire crew, but requires a division into watches only of the sailors and the firemen, oilers and water tenders. It is natural to suppose that if the purpose of Congress was chiefly to regulate hours of work, something would have been said about the service, while at sea, of those employed in the steward's department as well. And not only is the division confined to those of the crew engaged in the mechanics of conducting the ship on her voyage, but the imperative requirement is that the watches into which they are divided "shall be kept on duty successively," that is to say by turns, so that one watch must come on as another goes off. The evident purpose was to compel a division of the men for duty on deck and in the fireroom and continuity of service, to the end that in those departments the ship should at all times be actively manned with equal efficiency. It probably is true, as said below, that to construe the statute as compelling numerical equality of the watches will result, so far as the sailors are concerned, in the performance of less work on deck at night. And it may be noted, in that connection, that in the hearings before the House committee having charge of the bill, it was objected on behalf of the shipowners, obviously, as the context shows, upon the theory that such equality was in fact contemplated by the provision, that, "on cargo steamers, it would

be an injustice to keep a lot of men on watch, all night, and have nothing for them to do." House Hearings on S. 136, Vol. 104, pt. 2, p. 5, Feb. 24, 1914. But the provision, fundamentally, is a measure of precaution against those perilous and often unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death; its effect as a regulator of working conditions is a matter of subordinate intent. A consideration of other safety provisions of the Act will help to make this clear.

Among them, the Act (§ 13, p. 1169) provides that not less than seventy-five per centum of the crew in each department shall be able to understand any order given by the officers of such vessel; and that a certain percentage of her deck crew shall be of a rating not less than able seaman—meaning, except on the Great Lakes, a seaman nineteen years of age or upwards who has had at least three years' service on deck at sea or on the Great Lakes. It also contains elaborate provisions (§ 14, pp. 1170–1184) for the equipment of ocean-going vessels with life-saving appliances, and, among other things, requires (p. 1180) that "At no moment on its voyage may any ocean-cargo steam vessel of the United States have on board a total number of persons greater than that for whom accommodation is provided in the lifeboats on board." None of these provisions is of much if any concern except as a precaution against the unusual crises of the sea.

As a ship pursues her way in security, perhaps for many years, these requirements for safety appliances and for able seamen may seem over-exacting, and the language test, as well as a division of the watches into equal numbers, needlessly burdensome. But it is apparent from the hearings and debates, that Congress looked forward to the possibility of other disasters like those of the

Titanic and the *Volturno,* (the facts of which had been subjected to inquiry by its committees) where, in the one, the lack of lifeboats probably caused the loss of many lives, although in a quiet sea, and where, in the other, lifeboats lowered in a great storm were engulfed, it was thought by some, from the absence of the skill of able seamen in launching them; or like that of the *City of Rio de Janeiro* (*In re Pacific Mail S. S. Co.,* 130 Fed. 76), which sank with many of its lifeboats unlaunched because the crew of Chinese sailors were unable to understand the language in which the orders of their officers were given. The following from the opinion in that case (pp. 82–83) is peculiarly apposite:

"It is, as was said by Judge Hawley in *Re Meyer* (D. C.) 74 Fed. 855, 'the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route'; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, . . . The case shows that the City of Rio de Janeiro left the port of Honolulu, on the voyage under consideration, with a crew of 84 Chinamen, officered by white men. The officers could not speak the language of the Chinese, and but two of the latter—the boatswain and chief fireman—could understand that of the officers. Consequently, the orders of the officers had to be communicated either through the boatswain or chief fireman, or by signs and signals. So far as appears, that seemed to have worked well enough on the voyage in question, until the ship came to grief, and there arose the necessity for quick and energetic action in the darkness. In that emergency the crew was wholly inefficient and incompetent, as the sad results proved. The boats were in separate places on the ship. The sailors could not understand

the language in which the orders of the officers in command of the respective boats had to be given. It was too dark for them to see signs (if signs could have been intelligibly given), and only one of the two Chinese who spoke English appears to have known anything about the lowering of a boat; and there had been no drill of the crew in the matter of lowering them. Under such circumstances it is not surprising that but three of the boats were lowered, one of which was successfully launched by the efforts of Officer Coghlan and the ship's carpenter, another of which was swamped by one of the Chinese crew letting the after fall down with a run, and the third of which was lowered so slowly that it was swamped as the ship went down. We have no hesitation in holding that the ship was insufficiently manned, for the reason that the sailors were unable to understand and execute the orders made imperative by the exigency that unhappily arose, and resulted so disastrously to life, as well as to property."

See also R. S. § 4463, amended c. 72, 40 Stat. 548; *Flint & P. M. R. Co.* v. *Marine Ins. Co.,* 71 Fed. 210, 219; *Northern Commercial Co.* v. *Lindblom,* 162 Fed. 250, 254.

It is not unreasonable to conclude that Congress determined that each of the watches, like the crew as a whole, should be " adequate in number," competent and in a state of readiness " for any exigency that is likely to happen "—such as a collision, the striking of the ship upon a reef of rocks or an iceberg, the sudden breaking out of fire, and other happenings of like disastrous tendency—and to this end meant to provide for successive and continuous watches to be constituted in numbers as nearly equal as the sum of the whole number would permit.

In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase " divided into . . . watches " is to be given the meaning which it had acquired in the language and usages of the trade to which the Act relates, in accordance with the rule stated in *Unwin* v.

Hanson, [1891] L. R. 2 Q. B. 115, 119: "If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words." In the understanding of the sailor, a division into "watches," as applied to the personnel of the ship, connotes a division as nearly equal as possible. "At sea a ship's crew is commonly divided into two watches; the Master, 2nd Mate, 4th Mate (if any) with one-half of the seamen and boys, forming the so-called 'Starboard Watch'; after four hours these are relieved by the Chief-mate, and the 3rd Officer (if any) and the other half of the men, who form the 'Port Watch'." Paasch, Marine Encyclopedia, 300, 301. R. H. Dana, Jr., in his "Dictionary of Sea Terms," p. 129, defines the term "watch" as: "Also, a certain portion of a ship's company, appointed to stand a given length of time. In the merchant service all hands are divided into two watches, larboard and starboard, with a mate to command each." And, at page 133, he says: "The men are divided as equally as possible, with reference to their qualities as able seamen, ordinary seamen, or boys, (as all green hands are called, whatever their age may be;) but if the number is unequal, the larboard watch has the odd one, since the chief mate does not go aloft and do other duties in his watch, as the second mate does in his." The point is emphasized by the use of the distinctive terms "anchor watch" and "sea watch", the former meaning the lookout entrusted to one or two men when the vessel is at anchor and the latter being used "when one half of a ships crew is on duty" at sea. Paasch, 301.

It is true that this meaning had its origin in the customs of the sea before the advent of steam, but there is nothing

to show that it has now a different meaning; and, with nothing in the context and no evidential circumstances to suggest the contrary, we fairly may assume that the use of the technical terms of the trade to which the statute relates imports their technical meaning.

Decree reversed.

AMERICAN STEEL FOUNDRIES *v.* ROBERTSON, COMMISSIONER, ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 156. Argued November 16, 17, 1925.—Decided January 4, 1926.

1. The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the adoption and use of the same trade-mark by others on articles of a different description. P. 379.
2. The law of trade-marks is but a part of the broader law of unfair competition, the general purpose of which is to prevent one person from passing off his goods or his business as the goods or business of another. *Id.*
3. Whether the name of a corporation be regarded as a trade-mark, a trade name, or both, the law affords protection against its appropriation on the same fundamental principles. P. 380.
4. The effect of assuming a name by a corporation under the law of its creation is to exclusively appropriate it as an element of the corporation's existence. *Id.*
5. Equity will enjoin the appropriation and use by another of a trade-mark or trade name resembling the name of a corporation where, from the closeness of the resemblance and the other facts of the particular case, it appears that confusion of identity may likely result to the injury of such corporation. P. 381.
6. The provision of § 5 of the Trade Mark Act of February 20, 1905, that no mark consisting merely of the name of a corporation shall be registered under the Act, is to be construed in harmony with the foregoing principles, and does not prevent registration of part of the name of a corporation where the partial appropriation is

unlikely to deceive or confuse the public to the injury of the corporation to which the name belongs. P. 381.

7. The fact that the word "Simplex" was a salient part of the name of a corporation other than the applicant for registration, *held* not a ground for refusing registration, where the goods to which it was applied by the applicant were unlike those manufactured or sold by the corporation, where many registrations of the same word, singly or in combinations, had been made by others for other goods, and where it did not appear that, standing alone, the word denoted that corporation or any other, to the mind of the public. P. 382.

RESPONSE to questions certified by the Circuit Court of Appeals, upon appeal to that court from a decree of the District Court dismissing the bill, in a suit under Rev. Stats. § 4915 brought by the American Steel Foundries against the Commissioner of Patents and Simplex Electric Heating Co., to enforce registration of the word "Simplex" as a trade mark for articles made and sold by the plaintiff. See 262 U. S. 209; 256 U. S. 40; 258 Fed. 160.

Mr. George L. Wilkinson, for American Steel Foundries.

Solicitor General Mitchell filed a memorandum, submitting the case without brief or argument, on behalf of Robertson, Commissioner.

Mr. Nathan Heard, for the Simplex Electric Heating Company.

The prohibition of the registration of the name of a person, firm, corporation, or association—that is, a personal name—is grounded on the same fundamental reason as the prohibition of the registration of a geographical term. It rests upon the essential character of the mark, and has nothing to do with the character of the goods. Congress has enacted that such marks are not to be given the advantages of registration, but are to be left to the protection afforded at common law and usually to the

protection afforded by the law of unfair competition. Almost all the States, in their corporation acts, have provisions preventing the adoption by one corporation of a name the same as, or similar to, that of another; and this is entirely independent of the business carried on by the corporation. It is not the business, but the name, which these statutes aim to protect. Not only is such a provision common in state legislation, but it appears in federal legislation, as, for example, in "An Act to Establish a Code of Law for the District of Columbia," approved March 3, 1901, § 604, as amended.

The same principles affecting trade-mark character and registration are largely true of the names of persons, corporations, etc. But there is this difference: that a corporation, or other artificial person, may adopt either (a) the name of an individual, as, for example, "Remington," or (b) an entirely arbitrary name, as, for example, "Simplex." The former cannot be, the latter may be, a valid trade-mark. But in the Trade Mark Act the names of persons are always treated on precisely the same basis as the names of corporations. See *United Cigar Stores Co.* v. *Miller Bros. Co.*, 15 T. M. Rep. 143. The only exceptions which Congress has made are (a), in the very clause under consideration, by permitting registry if the name is written, etc., "in some particular or distinctive manner, or in association with a portrait of the individual"; (b), in the clause added to § 5 by the Act of February 18, 1911, which permits registry if the mark is "otherwise registerable" and is "the name of the applicant or a portion thereof"; (c), in the provisions of the so-called ten-year clause, forming a part of this § 5, permitting registry of any mark "in actual and exclusive use as a trade mark" during the ten years from February 20, 1895, to February 20, 1905; (d), in the provisions of the Act of March 19, 1920, granting certain limited privileges of registration. No serious contention can be made that the

prohibited mark must include every word in the corporate name. *United Cigar Stores Co.* v. *Miller Bros. Co.,* 15 T. M. Rep. 143; *National Cigar Stands Co.* v. *Frishmuth Bro. & Co.,* 54 App. D. C. 275.

In the proviso of § 5, with which this case is concerned, the word "merely" is used three times. In every case it is obviously an adverb modifying the verb "consists." It means that the mark shall not be registered if it merely consists of (1) the name of an individual, firm, corporation, or association; (2) words or devices which are descriptive, etc.; (3) a geographical name or term. The plaintiff in effect seeks to make the word "merely" in this section an adjective modifying the word "name," so as to make the section mean that the trade-mark shall not be registered if it consists of the entire, whole, complete name. In the case of the name, with which we are here concerned, the section contains its own definition as to the meaning of the word "merely," that is—"not written, printed, impressed or woven in some particular or distinctive manner or in association with a portrait of the individual." *Dunlap & Co.* v. *The Jackson and Gutman,* 13 T. M. Rep. 66; *Beckwith* v. *Com. of Patents,* 252 U. S. 538. The amendment by the Act of February 18, 1911, is furthermore a distinct ratification by Congress of this construction of the clause in question. It will be seen from the legislative history that the object was by amendment to prevent the prohibitory clause from denying registration to the applicant's own name, as had been done in *Ex parte Champion Safety Lock Co.,* 143 O. G. 1109, and *In re The Success Company,* 34 App. D. C. 443, and other cases. The use of the words "or a portion thereof" in the amendatory Act, which reads: "That nothing herein shall prevent the registration of a trade mark otherwise registrable because of its being the name of the applicant or a portion thereof"—shows that the Act in the clause in question prevented, in the opinion of

Congress, the registration of a word which formed a portion only of a corporate name. Nowhere else in the Act, except in the clause in question, was there anything requiring this language.

Registration being a privilege, may be granted by Congress to such extent and to such classes of marks or persons as it may please. If property rights exist in a mark, that fact alone does not entitle the owner of such rights to registration. All provisions relating to registration are wholly statutory and may be modified or entirely withdrawn at any time. *Stamatopoulos* v. *Stephano Bros.*, 41 App. D. C. 590. There are no general principles of substantive law applicable, but all questions must be determined according to the terms and limitations of the statutes. Registration confers no title, and there is no vested right, or vested right of property in trade-mark registrations, and registration confers no new right of title. *Trade-Mark Cases*, 100 U. S. 82; *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90; *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403; *Andrew Jergens Co.* v. *Woodbury, Inc.*, 273 Fed. 953; *Ewing, Commissioner,* v. *Standard Oil Co.*, 42 App. D. C. 321.

The fundamental principles and the details of trade-mark legislation have throughout been treated arbitrarily and inconsistently by Congress. The history of the trade-mark legislation, the judicial construction placed upon § 5 of the Act of 1905, and the original and amendatory acts before and since the Act of 1905 establish the clear intent of Congress to enact and maintain in force the clause in controversy in its ordinary, natural meaning, and thus to enforce the construction given this clause repeatedly by the Court of Appeals of the District of Columbia. Act of 1870; Act of 1881; *G. & C. Merriam Co.* v. *Syndicate Pub. Co.* 237 U. S. 618; Act of 1905; *Kentucky Distilleries Co.* v. *Old Lexington Club Distillery Co.*, 31 App. D. C. 223; *Ex parte Champion Safety Lock Co.*, 143 O. G.

1109; *In re The Success Co.,* 34 App. D. C. 443; amendatory Act of February 18, 1911, c. 113, 36 Stat. 918; amendment of January 8, 1913, c. 7, 37 Stat. 649; *N. Y. Athletic Club* v. *John M. Given, Inc.,* 4 T. M. Rep. 172; *Asbestone Co.* v. *The Carey Mfg. Co.,* 41 App. D. C. 507; *In re United Drug Co.,* 44 App. D. C. 209; *Mansfield Tire & Rubber Co.* v. *Ford Motor Co.,* 44 App. D. C. 205; *Burrell & Co.* v. *Simplex Elec. Heating Co.,* 44 App. D. C. 452; *Simplex Elec. Heating Co.* v. *Ramey Co.,* 46 App. D. C. 400; *In re American Steel Foundries,* 258 Fed. 160; *Beechnut Cereal Co.* v. *Beech-Nut Packing Co.,* 273 Fed. 367; *Tinker* v. *Patterson Co.,* 287 Fed. 1014; *Howard Co.* v. *Baldwin Co.,* 48 App. D. C. 437; *In re Landis Machine Co.,* 298 Fed. 1019; *Bernet, Craft & Kauffman Co.* v. *Pussy Willow Co., Inc.,* 2 Fed. (2d) 1013; *Eversharp Pencil Co.* v. *American Safety Razor Co.,* 297 Fed. 894.

National Cash Register Co. v. *National Paper Products Co.,* 297 Fed. 351 turned upon the question of identity of goods, and the Court of Appeals, in its decision affirming the Commissioner of Patents, devoted itself entirely to that question.

The Circuit Court of Appeals for the Second Circuit, in *Stephano Bros., Inc.,* v. *Stamatopoulos,* 238 Fed. 89, has given the statute the same construction. During this long period the matter has been repeatedly brought to the attention of Congress, and Congress has amended the Act in the particulars which we have noted. The intent of Congress, therefore, to maintain the construction of this clause placed upon it by the Court of Appeals of the District of Columbia has been clearly evidenced. The Act of March 19, 1920, was for the very purpose of relieving cases like that of plaintiff.

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff and its predecessor, the Simplex Railway Appliance Company, have used the trade-mark "Simplex"

on railway car bolsters since 1897 and on car couplers since 1907, the former being registered in the Patent Office in 1911, the latter, in 1909. In 1917 plaintiff adopted and thereafter used the same trade-mark on brake rigging, brake heads, brake beams, brake shoes, brake hangers, and clasp brakes. Application was made in 1917 to register the trade-mark for the last named uses, but the Commissioner of Patents refused the registration on the ground that the trade-mark consisted merely in the name of a corporation, viz., the Simplex Electric Heating Company, defendant herein. The commissioner's ruling was affirmed by the Court of Appeals of the District of Columbia. *In re American Steel Foundries,* 258 Fed. 160. The case came to this court on certiorari, but was dismissed for want of jurisdiction. *Sub nom., American Steel Foundries* v. *Whitehead, Commissioner of Patents,* 256 U. S. 40.

Thereupon, this suit in equity was brought in the federal district court for the northern district of Illinois under § 4915 R. S. (*American Foundries* v. *Robertson,* 262 U. S. 209), to which the Commissioner of Patents voluntarily appeared. That court dismissed the bill and an appeal to the court of appeals followed.

The defendant company was organized as a corporation in 1902. Its predecessors in business had adopted in 1886, and thereafter had used, the trade-mark "Simplex" on insulating or protected conducting wire, the same being registered in 1890. In 1906, the company registered trade-marks comprising the word "Simplex" as applied to a large variety of other goods.

The word "Simplex" has comprised the whole or a part of trade-marks registered in the Patent Office in approximately sixty registrations by nearly as many different parties and as applied to many classes of merchandise. There are other corporations in the country which now have or have had names which embody the word "Sim-

plex." Neither the defendant company nor its predecessors ever have been engaged in the manufacture or sale of any of the devices upon which plaintiff has used the trade-mark as hereinbefore specified.

Upon these facts the court below has certified the following questions upon which it desires instruction:

"1. Does the clause of Section 5 of the Trade Mark Act of February 20, 1905, 'Provided, that no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of an individual . . . shall be registered under the terms of this Act,' prohibit registration as a trade-mark under said Act of the word 'Simplex' by the plaintiff under the recited facts?

"2. Does the said clause quoted of Section 5 prohibit registration under the Act of February 20, 1905, of a trade-mark consisting solely of a single word otherwise registrable under the said Act if that word is the salient feature of the name of a corporation not the applicant for registration?

"3. Does the above quoted clause of Section 5 of the Trade Mark Act of February 20, 1905, prohibit the registration under said Act, of a common-law trade-mark which is the name, or part of the name of another than the applicant, whose business relates exclusively to goods in a different and non-competing class from the goods on which the trade-mark is used by the applicant?"

For the purposes of discussion, these three questions may be resolved shortly into one: Upon the facts, is the word "Simplex" merely the name of the Simplex Electric Heating Company within the meaning of the quoted proviso? The answer to this question will be simplified if we approach it by first considering certain principles of the substantive law of trade-marks and unfair competition, in the light of which the legislation under review must be examined.

The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the adoption and use of the same trade-mark by others on articles of a different description. There is no property in a trade-mark apart from the business or trade in connection with which it is employed. *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413–414. "The law of trade-marks is but a part of the broader law of unfair competition" (*idem*), the general purpose of which is to prevent one person from passing off his goods or his business as the goods or business of another.

Whether the name of a corporation is to be regarded as a trade-mark, a trade name, or both, is not entirely clear under the decisions. To some extent the two terms overlap, but there is a difference more or less definitely recognized, which is, that, generally speaking, the former is applicable to the vendible commodity to which it is affixed, the latter to a business and its good will. See *Ball* v. *Broadway Bazaar*, 194 N. Y. 429, 434–435. A corporate name seems to fall more appropriately into the latter class. But the precise difference is not often material, since the law affords protection against its appropriation in either view upon the same fundamental principles. The effect of assuming a corporate name by a corporation under the law of its creation is to exclusively appropriate that name. It is an element of the corporation's existence. *Newby* v. *Oregon Cent. Ry. Co., et al.*, Deady 609, 616; s. c. 18 Fed. Cases 38, Case No. 10,144. And, as Judge Deady said in that case:

"Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity."

The general doctrine is that equity not only will enjoin the appropriation and use of a trade-mark or trade name where it is completely identical with the name of the corporation, but will enjoin such appropriation and use where the resemblance is so close as to be likely to produce confusion as to such identity, to the injury of the corporation to which the name belongs. *Cape May Yacht Club* v. *Cape May Yacht & Country Club,* 81 N. J. Eq. 454, 458; *Armington & Sims* v. *Palmer,* 21 R. I. 109, 115. Judicial interference will depend upon the facts proved and found in each case. *Hendriks* v. *Montagu,* L. R. 17 Ch. Div. 638, 648; *Higgins Co.* v. *Higgins Soap Co.,* 144 N. Y. 462, 469–471.

These principles, it must be assumed, were in mind when Congress came to enact the registration statute. And, since that body has been given no power to legislate upon the substantive law of trade-marks, it reasonably may be assumed, also, that, to the extent the contrary does not appear from the statute, the intention was to allow the registration of such marks as that law, and the general law of unfair competition of which it is a part, recognized as legitimate. The House Committee on Patents, in reporting the bill which upon enactment became the registration statute in question, said: "Section 5 of the proposed bill we believe will permit the registration of all marks which could, under the common law as expounded by the courts, be the subject of a trade-mark and become the exclusive property of the party using the same as his trade-mark." Report No. 3147, Dec. 19, 1904, H. of R., 58th Cong., 3d Sess.

The provision, therefore, that no mark consisting merely in the name of a corporation shall be registered, is to be construed in harmony with those established principles in respect of the appropriation of corporate names to which we have referred. Where the appropriation of the corporate name is complete, the rule of the statute, by its own

terms, is absolute and the proposed mark must be denied registration without more. But where less than the whole name has been appropriated, the right of registration will turn upon whether it appears that such partial appropriation is of such character and extent that, under the facts of the particular case, it is calculated to deceive or confuse the public to the injury of the corporation to which the name belongs.

The fact, for example, that the articles upon which the mark is used are not of the same description as those put out by the corporation, is entitled to weight, since the probability of such confusion and injury in that situation obviously is more remote than where the articles are of like kind. The cases, naturally, present varying degrees of difficulty for the application of the rule. Primarily, the power and the duty rests with the Commissioner of Patents to determine the question in each case in the exercise of an instructed judgment upon a consideration of all the pertinent facts.

In the present case, these facts are: The word "Simplex" is only a portion of the corporate name; its use by plaintiff is upon articles the like of which has never been manufactured or sold by the defendant corporation; it comprises the whole or a part of about sixty registrations by nearly as many different parties upon many kinds of merchandise; and it forms part of the names of other corporations in the country.* It is argued that the word in question is the salient feature in the name of the defendant corporation. But that, if conceded, does not

* The Commissioner of Patents, in a footnote to *Simplex Electric Heating Co.* v. *The Ramey Co.*, Decisions, Commr. Pat., 1916, 74, 78, gives the following list of corporations, in the names of which the word "Simplex" occurs:

Simplex Arms Mfg. Co., Denver; Simplex Window Co., San Francisco; Simplex Lubricating Co., Boston; Simplex Wire & Cable Co., Boston; Simplex Auto Specialty Co., Detroit; Simplex Concrete Piling Co., Cincinnati; Simplex Machine Co., Atlanta; Simplex Exer-

settle the question. There may be, of course, instances where a single word in the corporate name has become so identified with the particular corporation that whenever used it designates to the mind of the public that particular corporation. But here it is not shown that, standing alone, the word "Simplex" has that effect; that it is any more calculated to denote to the public the defendant corporation than any of the other corporations in the names of which it is likewise embodied; or, indeed, that it signifies the appropriation of some corporate name though incapable of exact identification. In *Simplex Electric Heating Co.* v. *The Ramey Co.,* Decisions, Commr. Pat., 1916, pp. 74, 77, 79, 82–83, the Commissioner of Patents, admitting the same word to registry under like facts, said:

"It is a fact that the word 'Simplex' has been in such wide and varied use in this country not only as a trademark but as part of a firm or corporation name that everybody has heretofore considered something more than the word 'Simplex' necessary to identify a corporation. . . .

". . . the word 'Simplex' does not identify any corporation in particular, for the simple reason that it is equally the name of various corporations. In short, if one referred to 'the company Simplex,' without anything else, it would not be known to what he was referring. . . .

"The word involved in this case is one of a large class of words which have for a great many years been much used because of their peculiarly suggestive meaning. For

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cising Co., Philadelphia; Simplex Valve & Meter Co., Philadelphia; Simplex Floor Surfacing Co., Baltimore; Simplex Railway Appliance Co., St. Louis; Simplex Air Brake & Mfg. Co., Pittsburgh; Simplex Button Works, New York; Simplex Fire Extinguisher Co., New York; Simplex Golf Practice Machine Corporation, New York; Simplex Ink Co., New York; Simplex Letter Opener Co., New York; Simplex Typewriter Co., New York; Simplex Refrigerating Machine Co., Chicago; Simplex Sand Blast Manufacturing Co., Chicago.

other examples there are the words 'Acme,' 'Anchor,' 'Champion,' 'Eureka,' 'Excelsior,' 'Ideal,' 'Jewel,' 'Liberty,' 'National,' 'Pride,' 'Premier,' 'Queen,' 'Royal,' 'Star,' 'Sunlight,' 'Triumph,' 'Victor.' It would be a serious matter if the law actually permitted any one who chose to do so to organize a series of corporations with names containing these words, respectively, and thereupon virtually withdraw these words from public use as trade-marks and monopolize them by preventing their registry as such."

On appeal to the District court of appeals, the decision of the commissioner was reversed upon the ground, in part, that the word "Simplex" was a distinctive part of the name of the corporation, *Simplex Electric Heating Co.* v. *Ramey Co.*, 46 App. D. C. 400, 406; and this was followed by the same court in the present case. It already is apparent that we agree with the commissioner and not with the court.

Under the facts, we are of opinion that it does not appear that the use of the word as a trade-mark upon the goods of the plaintiff will probably confuse or deceive the public to the injury of the defendant or of any other corporation. It follows that the refusal to allow the registration was erroneous.

Question No. 1, therefore, should be answered in the negative, and, since this will dispose of the case, categorical answers to the other questions are deemed not necessary.

It is so ordered.

CONNALLY, COMMISSIONER, ET AL. *v.* GENERAL CONSTRUCTION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 314. Argued November 30, December 1, 1925.—Decided January 4, 1926.

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. P. 391.
2. Oklahoma Comp. Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed,"—*held* void for uncertainty. P. 393.

3 Fed. (2d) 666, affirmed.

APPEAL from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, *inter alia,* to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation.

Messrs. George F. Short, Attorney General of Oklahoma, and *J. Berry King,* with whom *Mr. Leon S. Hirsh* was on the brief, for appellants.

The constitutionality of statutes is the strongest presumption known to the courts. *United States* v. *Brewer,* 139 U. S. 278; *State ex rel. Hastings* v. *Smith,* 35 Neb. 13; *State* v. *Lancashire Fire Ins. Co.,* 66 Ark. 466; *Commonwealth* v. *Libbey,* 216 Mass. 356. The "Current Wage Law" meets all the requirements of definiteness considered in cases involving other statutes dependent upon a

state of mind, the Oklahoma law being dependent upon a given state of facts, readily ascertainable. *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86. Decisions upon the Sherman Anti-Trust Act are undoubtedly of considerable bearing in a case of this type, for had not a more liberal construction been there indulged than is required of the "Current Wage Law," the term "undue and unreasonable restraint of trade" would never have been considered sufficiently definite to sustain a prosecution as due process of law. *Standard Oil Co.* v. *United States,* 221 U. S. 31. See *United States* v. *Reading Co.,* 226 U. S. 84; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *Eastman Kodak Co.,* 226 Fed. 65; and *Northern Securities Co.* v. *United States,* 193 U. S. 197—all defining, in one way or another, what acts are "undue and unreasonable" acts, contracts or combinations resulting in, or tending to result in a monopoly or restraint of trade. *United States* v. *Trans-Missouri Freight Ass'n.,* 166 U. S. 290. *Nash* v. *United States,* 229 U. S. 373, foreclosed the entire question of vagueness and uncertainty. *United States* v. *Patterson,* 201 Fed. 697. In *State* v. *Tibbetts,* 205 Pac. 776, the question of uncertainty by reason of the term "current rate of per diem wages" was not involved; but the statute was attacked on rehearing for uncertainty of the term "locality" and held to be valid. Indefiniteness as to the term "locality" cannot be asserted by appellee since the *Tibbetts Case* and the *Waters-Pierce Oil Company Case* definitely foreclose that question.

Were it not for this proviso as to wages, the entire salutary effect of the "Eight Hour Law" would be aborted. General classes of labor maintain a fairly uniform rate of pay—what might properly be termed a "market price." Such was the recognition given to the term "prevailing rate of wages" in *Ryan* v. *City of New York,* 79 N. Y. S. 599 and *McMahon* v. *City of New York,* 47 N. Y. S. 1018. There can be but one prevailing or

market scale for each type of labor. In each locality there must be a current rate dictated by the law of supply and demand, modified by the standard of living in the particular community, the price of commodities and other various elements.

See *People ex rel. Rodgers* v. *Coler,* 166 N. Y. 1; *People* v. *Crane,* 214 N. Y. 154; *Fox* v. *Washington,* 236 U. S. 273; *Mutual Film Corp.* v. *Industrial Commission,* 236 U. S. 246; *Ellis* v. *United States,* 206 U. S. 246; *Bradford* v. *State,* 78 Tex. Cr. 285; *Commonwealth* v. *Reilly,* 142 N. E. 915; *Galveston, H. & S. A. Ry.* v. *Enderle,* 170 S. W. 278; *State* v. *Texas & Pacific R. Co.,* 106 Tex. 18; *Morse* v. *Brown,* 206 Fed. 232.

Statutes containing such provisions as prohibiting the driving of vehicles "at a speed greater than is reasonable or prudent" have been held, in numerous cases, to be valid against the charge of vagueness and uncertainty of the offense prescribed. See also *State* v. *Quinlan,* 86 N. J. L. 120; *United States* v. *Sacks of Flour,* 180 Fed. 518; *Aiton* v. *Bd. of Medical Examiners,* 13 Ariz. 354; *People* v. *Apflebaum,* 251 Ill. 18; *Klafter* v. *State Bd. of Examiners,* 259 Ill. 15; *Katzman* v. *Commonwealth,* 140 Ky. 124; *State* v. *Lawrence,* 9 Okla. Cr. 16; *Stewart* v. *State,* 4 Okla. Cr. 564; *Mustard* v. *Elwood,* 223 Fed. 225; *Miller* v. *United States,* 41 App. D. C. 52; *Keefer* v. *State,* 174 Ind. 255; *State* v. *Newman Lbr. Co.,* 102 Miss. 802; *Tanner* v. *Little,* 240 U. S. 369; *Pitney* v. *Washington,* 240 U. S. 387; *United States* v. *United States Brewers' Ass'n.,* 239 Fed. 163; *Denver Jobbers' Ass'n.* v. *People ex rel. Dixon,* 21 Colo. App. 350.

A close study of all of the foregoing decisions demonstrates that a mental attitude as the standard of certainty almost invariably sustains the constitutionality of a statute. Where the standard is dependent upon a condition or state of facts, ascertainable by investigation, as a "cur-

rent rate or per diem wages" in a given locality, a law based thereon is within all requirements of "due process."

There is no unlawful delegation of legislative power in the provision, in the Oklahoma labor laws, that the Commissioner of Labor is to carry into effect all the laws in relation to labor, passed by the Legislature of the State.

The provisions in question are not in conflict with the Federal Constitution as a taking of private property without compensation, nor as an interference with the freedom of contract.

Mr. J. D. Lydick, with whom *Messrs. Charles E. McPherren, K. C. Sturdevant* and *Irvin L. Wilson* were on the brief, for appellee.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of § 7255 and § 7257, Compiled Oklahoma Statutes, 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.

The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day; and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Oklahoma, near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $3.60 and $4.00; Johnson Refining Co., $3.60 and $4.05; Prairie Oil & Gas, $4.00; Gypsy Oil Co., $4.00; Gulf Pipe Line Co., $4.00; Brickyard, $3.00 and $4.00; I. Hansen, $3.60; General Construction Co., $3.20; Moore & Pitts Ice Co., $100 per month; Cotton Gins, $3.50 and $4.00; Mr. Pitts, $4.00; Prairie Pipe Line Co., $4.00; C. B. McCormack, $3.00; Harry McCoy, $3.00. The scale of wages paid by the construction company to its laborers was stated to be as follows: 6 men @ $3.20 per day; 7 men @ $3.60; 4 men @ $4.00; 2 men @ $4.40; 4 men @ $4.80; 1 man @ $5.20; and 1 man @ $6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under

authority of a statute of Oklahoma which imposes upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform; wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men; and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company and its officers, agents and representatives with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under § 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.

Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266 Jud. Code, and granted; the allegations of the bill being taken as true. 3 Fed. (2d) 666.

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221; *Collins* v. *Kentucky,* 234 U. S. 634, 638.

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *Omachevarria* v. *Idaho,* 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash* v. *United States,* 229 U. S. 373, 376; *International Harvester Co.* v. *Kentucky, supra,* p. 223, or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 92, "that, for reasons found to

result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." See also, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108. Illustrative cases on the other hand are *International Harvester Co.* v. *Kentucky, supra, Collins* v. *Kentucky, supra,* and *United States* v. *Cohen Grocery Co., supra,* and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding," was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the light of these principles and decisions, then, we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction.* The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The

* The commissioner's own investigation shows that wages ranged from $3.00 to $4.05 per day; and the scale of wages paid by the construction company to its laborers, twenty-five in number, ranged from $3.20 to $6.50 per day, all but six of them being paid at $3.60 or more.

"current rate of wages" is not simple but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See *People ex rel. Rodgers* v. *Coler,* 166 N. Y. 1, 24–25.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. See *State* v. *Partlow,* 91 N. C. 550, 553; *Commonwealth* v. *Bank of Pennsylvania,* 3 Watts & S. 173, 177.

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the criminal court of appeals on rehearing in *State* v. *Tibbetts,* 205 Pac. 776, 779. But all the court did there was to define the word "locality" as meaning "place,"

"near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt* v. *Kansas City Distilling Co.,* 90 Mo. 284, 296; *Woods* v. *Cochrane and Smith,* 38 Iowa 484, 485; *State ex rel. Christie* v. *Meek,* 26 Wash. 405, 407–408; *Millville Imp. Co.* v. *Pitman, etc., Gas Co.,* 75 N. J. Law 410, 412; *Thomas* v. *Marshfield,* 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

PERRY BROWNING ET AL. *v.* E. M. HOOPER ET AL.

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

No. 256. Argued November 17, 1925.—Decided January 4, 1926.

1. A Texas statute authorizes fifty property taxpaying voters, by petition to the commissioners' court of a county, to designate territory of which they are residents within the county as a road district and the amount of bonds to be issued for road improvements within the district, not to exceed one-fourth of the assessed value of real property therein, whereupon it becomes the duty of the commissioners' court to order an election in the district, as so described, for the purpose of determining whether the bonds in the amount named in the petition shall be issued and whether a tax shall be levied upon the property of the district for their payment; and if two-thirds of the votes at such election favor the proposition, the commissioners' court is required to issue and sell the bonds and levy a tax sufficient to pay them as they mature, by assessments on the same valuation, and which become liens and may be enforced in the same manner, as state and county taxes. *Held*, (a) that assessments so authorized and levied were special assessments for local improvements, not general taxes; (b) that a district so created could not be regarded as one created by the legislature, even though coincident in boundaries with two adjacent "commissioners' precincts"; (c) that the assessments were not legislative assessments. P. 403.
2. Where a special improvement district is not created by the legislature or a municipality to which the State has granted full legislative powers over the subject, and where there has been no legislative determination that the property to be assessed for the improvement will be benefited thereby, it is essential to due process of law that the property owner be given notice and an opportunity to be heard on the question of benefits. P. 405.

3 Fed. (2d) 160, reversed.

APPEAL from a decree of the District Court which dismissed the bill in a suit to restrain the issuance or sale of bonds of a road district.

Messrs. William R. Watkins and *C. K. Walsh,* for appellants.

The whole theory underlying the law of special assessments is that in the exaction thereof it is assumed that there has been a legislative determination that the portion of the community upon which they are laid is peculiarly benefited by the improvement. The principle applies as well to districts created by the legislature as to those created under delegated authority.

A state legislature cannot abdicate its power of taxation by delegating to private citizens the authority to fix the boundaries of and establish a taxing district, because this is a legislative question requiring deliberation by the legislature or under its direction. Due process requires that the powers vested in the government be exercised by the government and not by private individuals. These principles apply to the establishment of special assessment districts for public improvements to the same extent they have been applied to cases arising under the police power, in which it has been held by this Court that the Fourteenth Amendment is violated by vesting arbitrary power in private individuals to determine whether a business may be conducted in a certain locality or not, and, by vesting arbitrary power in private individuals to establish a property line. No law for the establishment of a special assessment district, other than by a legislative body, without notice or hearing has ever been held constitutional. A law permitting petitioners to irrevocably define and establish a taxing district is of such a nature, as that there is no reasonable probability that justice generally will be done in its application. Where a taxing district is not established by the legislature, but under its

delegated authority, it is essential to due process, that those affected thereby be given notice and an opportunity to be heard upon the question whether their property would be benefited by the improvement or not.

The cases in this Court fall into three classes. (1) Those in which, the power of establishing the district being vested in the legislature, the district is established by the legislature—when no notice or hearing is essential; (2) those in which the organic law vests the legislative power directly in a subordinate agency. In these two classes the law is always sustained unless it appears that there is no reasonable presumption that substantial justice will be done, but the probability is the parties will be taxed disproportionately to each other and to the benefits conferred. The third class comprehends those cases in which the district is not established by the legislature but by an exercise of delegated authority (as in this case), and therefore in the location of the boundaries and the creation of the district it is essential to due process that the owners be accorded an opportunity to be heard.

The district involved in this suit was established in 1924 under a general prospective law adopted by the legislature of Texas in 1909 and under that law is a "defined district." The record does not show that it is a "political subdivision."

Mr. John R. Moore, with whom *Messrs. Dan Moody,* Attorney General of Texas, *C. A. Wheeler,* Assistant Attorney General of Texas, and *W. E. Forgy* were on the brief, for appellees.

The facts show that Road District No. 2 is composed of two of the commissioners' precincts of Archer County, "political subdivisions" of the county which were established, recognized and ascertained long before the beginning of this controversy. The Constitution of Texas in effect created the district and fixed the tax. The Consti-

tution and the statutes of Texas did and authorized the doing of the things complained of by appellant. These political subdivisions included in the Road District when thrown together became a "defined district." The tax was fixed both by the Constitution and statutes in the provision that bonds should not be issued exceeding one-fourth the value of the real estate of the political subdivision or defined district. The question then arises whether the building of roads is of general benefit or is theoretically for the benefit of those whose property may be contiguous to or in the neighborhood of the roads.

The facts show that both of the roads sought to be improved have been designated as state highways, and one of the roads has been selected and designated by the federal highway engineer as recipient of federal aid in the building of highways. Public roads in Texas have always been state property over which the State has full control and authority. *Robbins* v. *Limestone County,* 268 S. W. 915; *Baker* v. *Dunning,* 77 Texas, 28.

In the building of public roads benefit is presumed just as the building of schools and the levying of taxes to maintain them is presumed to benefit the public generally. *Wright* v. *Police Jury,* 264 Fed. 705, is almost identical with the case here. The building and construction of public roads is a governmental function and one to be exercised by sovereignty. As for the matters of benefits and notice, see *Fallbrook Irrig. Dist.* v. *Bradley,* 164 U. S. 176; *Walston* v. *Nevin,* 128 U. S. 578; *Dallas County Levee Dist.* v. *Looney,* 109 Texas 326. In the exercise of governmental functions no particular or special notice is required to be given to the individual whose property may be affected thereby. It is the province of the sovereignty to say how a State shall be divided and to determine what shall constitute a political subdivision, and also to determine the machinery necessary for the proper operation and function of all governmental affairs. It is

the theory of sovereignty that public education and transportation are for the general benefit of the public, regardless of any direct benefit that may or may not accrue to the particular individual, and it would be the duty of sovereignty to function in the establishment of public highways, even though their establishment might in some instances harm the individual to a greater extent than he would be benefited. In such instances the individual is not entitled to any special notice that the authority of the sovereign will be exercised. *Wright* v. *Police Jury, supra.*

Mr. JUSTICE BUTLER delivered the opinion of the Court.

Appellants own taxable real and personal property in that part of Archer County, Texas, defined as Road District No. 2. The appellees are the county judge and four commissioners, (constituting the county commissioners' court,) the tax assessor and the sheriff of the county, who is the tax collector. Appellants brought this suit to restrain the issue or sale of bonds of the road district in the amount of $300,000 proposed to be sold to obtain money for the construction, operation, and maintenance of roads in that district, and to restrain the levy or collection of any tax upon their property to pay any part of the interest or principal of the bonds. They seek relief on the ground that the creation of the road district and the enforcement of the proposed tax, will deprive them of their property without due process of law in violation of the Fourteenth Amendment. The District Court dismissed the complaint. 3 Fed. (2d) 160. The case is here on direct appeal. § 238, Judicial Code.

The Texas statutes (Vernon's Complete Texas Statutes, 1920) provide: "Any county . . . or any political subdivision or defined district, now or hereafter to be described and defined, of a county," is authorized to issue bonds, not to exceed one-fourth of the assessed valuation

of real property in the district, for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and to levy and collect taxes to pay them. Art. 627. Upon the petition of fifty resident property taxpaying voters of any defined district of any county, it is the duty of the commissioners' court to order an election in the district as described in the petition to determine whether its bonds shall be issued for such road purposes, and whether a tax shall be levied upon the property of the district for their payment. Art. 628. If two-thirds of the votes cast are in favor of the proposition, the commissioners' court is required to issue and sell the bonds. Art. 631. But before they are put on the market, the court is required to levy a tax sufficient to pay the debt as it matures. The assessments are to be made on the same valuation, and they become liens and may be enforced in the same manner, as state and county taxes. Arts. 634, 2827, 2836. For the purposes of the act, any district accepting its provisions by such vote is thereby created a body corporate which may sue and be sued. Art. 637.

Archer County is about 30 miles square, and has a population of between 5000 and 6000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal aided state highway, and about 20 miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam about six miles northwest. About 18 miles of the Southwest Trail lies between Archer City and a point on the north line of the county about six miles from its northeast corner. There is another highway extending from a point

on the Southwest Trail about two miles south of the county line to Holliday on the Ozark Trail about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them.

January 17, 1924, there was presented to the commissioners' court a petition signed by 74 persons. It prayed an election to determine whether bonds of the territory, therein described by metes and bounds, and to be designated as "Road District No. 2 of Archer County, Texas," should be issued for road purposes in the amount of $300,000; and whether a tax should be levied upon the property therein to pay the bonds. The commissioners' court by order established the district within the metes and bounds and for the purposes set forth in the petition, and declared it to be a body corporate. On the same day the court fixed the time and place for an election. Its result was 303 votes for and 102 against the bond issue. Thereupon the court ordered the bonds to be issued, and levied the taxes. Before the election was called, the court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday furnished 252 votes for the bond issue,—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359, of which $257,080 belongs to appellants, and $111,388 to petitioners; and $60,500 of that amount belongs to one signer, leaving only $50,888 to the other 73. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner. The evi-

dence persuasively supports appellants' contention that the improvements of the roads designated will not benefit their property. Moreover, the inclusion of their lands in that road district makes it impossible, until the last bonds mature 30 years hence, to create another road district to raise money for the improvement of roads needed to serve the territory in which their lands are situated. Art. 637d.

Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads. *Missouri Pacific Railroad* v. *Road District,* 266 U. S. 187, 190. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242; Constitution Art. VIII, § 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements. *Embree* v. *Kansas City Road District,* 240 U. S. 242, 247; *Illinois Central Railroad* v. *Decatur,* 147 U. S. 190, 197, 209.

The legislature did not create the road district, levy the tax or fix the amount to be raised. Under the act, road

districts are not required to correspond with or to include any political subdivision. *Moore* v. *Commissioners' Court,* (Tex. Civ. App.) 175 S. W. 849; *Bell County* v. *Hines,* (Tex. Civ. App.) 219 S. W. 556. There is nothing in the law to guide or to limit the action of the signers of the petition in selecting property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners' court has no power to modify or deny; it is bound to grant the petition. *Huggins* v. *Vaden,* (Tex Civ. App.) 253 S. W. 877, 878; 259 S. W. 204, 206; *Meurer* v. *Hooper,* (Tex. Civ. App.) 271 S. W. 172, 176. And when the required vote is given, the court, once for all, must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures. The opinion of the District Court states that the road district "was composed of two of the precincts of Archer County—'political subdivisions' of the county well recognized and ascertained long before the controversy." We find nothing in the record to support the statement. But, if true, it does not tend to show that the legislature created the road district. A political subdivision is not a "defined district" within the meaning of the Texas Constitution (Art. III, § 52) or of the act. It has been held by the Texas Court of Civil Appeals that a "defined district" means a defined area in a county, and less than a county, other than a political subdivision of a county. *Bell County* v. *Hines, supra,* 557. The fact that the metes and bounds describing the road district happened to coincide with the external boundaries of two adjoining commissioners' precincts does not support the contention that the road district was created by the legislature. For the election of commissioners, each county is divided into four precincts, from each of which a commissioner is elected. These precincts are not defined by the legislature, but by the commissioners' courts. Art. 1356; Constitution, Art.

V, § 18. They are political subdivisions, but, unlike road districts, they are not bodies corporate. See *Ex parte Haney,* 51 Tex. Cr. Rep. 634; *Cofield* v. *Britton,* (Tex. Civ. App.) 109 S. W. 493, 496. They are not taxing or assessment districts; their powers and functions are wholly different from those of a road district. And plainly, the authority granted (Art. 627) to issue road bonds up to one-fourth the assessed valuation and to levy taxes ratably to pay them is not a legislative determination of the rate or amount of the tax imposed on appellants' property. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden. These were fixed by the petition and election. The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester,* 261 U. S. 155); but, where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall be so spread is not a legislative assessment.

Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. *Valley Farms Co.* v. *Westchester, supra; Hancock* v. *Muskogee,* 250 U. S. 454, 459; *Withnell* v. *Construction Co.,* 249 U. S. 63, 69; *Wright* v. *Police Jury,* 264 Fed. 705. But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the State to hear them, or to

consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment. *Embree* v. *Kansas City Road District, supra,* 251.

Decree reversed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* GONEAU.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 76. Argued December 3, 1925.—Decided January 4, 1926.

1. A brakeman, in an endeavor to couple a train where it had parted between two cars while *en route* due to a defect in one of the automatic couplings, went between the ends of the cars and, while exerting himself to bring the defective part into place, lost his balance as a result of its sudden yielding, fell from a bridge on which the cars had stopped and suffered injury. *Held:*

(1) That the defective car was in use, though motionless; P. 409.

(2) The act of the brakeman was a coupling, not a repair, operation; P. 410.

(3) The defective coupling was a proximate cause of the accident and, it being in violation of the Safety Appliance Act, the brakeman, under § 4 of the Employers' Liability Act, did not assume the risk; *Id.*

(4) Section 4 of the Supplemental Safety Appliance Act of 1910, which permits defective cars, in certain circumstances, to be hauled without penalties, to the nearest available point of repair, but without releasing the carrier from liability for the injury of any employee caused by or in connection with such hauling, had no application. *Id.*

159 Minn. 41, affirmed.

CERTIORARI to a judgment of the Supreme Court of Minnesota affirming a recovery of damages for personal injuries.

Mr. John E. Palmer, with whom *Mr. Marshall A. Spooner* was on the brief, for petitioner.

Mr. Samuel A. Anderson, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The respondent Goneau brought suit in a Minnesota court to recover damages for personal injuries sustained by him while employed as a brakeman on a freight train of the Railway Company; the right of action being based upon the Employers' Liability Act of 1908, 35 Stat. 65, c. 149, and the Safety Appliance Act of 1893, 27 Stat. 531, c. 196, as amended by the Act of 1903, 32 Stat. 943, c. 976. He recovered judgment, which was affirmed by the Supreme Court of the State. 159 Minn. 41. The writ of certiorari was granted in June, 1924. 265 U. S. 579.

A motion was interposed to dismiss the writ of certiorari, the further consideration of which was postponed to the hearing on the merits. We find that the motion is not well founded; and it is denied.

By § 2 of the original Safety Appliance Act, as amended by the Act of 1903—upon which the respondent relies—it is made unlawful to haul or permit to be hauled or used on any railroad engaged in interstate commerce any car not equipped with automatic couplers which can be operated "without the necessity of men going between the ends of the cars." And by § 4 of the Employers' Liability Act it is provided that an employee shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributes to his injury or death.

By § 4 of the Supplemental Safety Appliance Act of 1910, 36 Stat. 298, c. 160,—upon which the petitioner relies—it is provided that where a car has been properly equipped and its equipment becomes defective while it is being used by the carrier upon its line of railroad, the car may be hauled, if necessary, from the place where the

defect is first discovered to the nearest available point where it can be repaired, without liability for penalties,[1] but without releasing the carrier from liability for the injury of any employee caused by or in connection with the hauling of the car with such defective equipment.

It is admitted that the Railway Company was engaged in interstate commerce, and that Goneau was employed in such commerce. There was substantial evidence tending to show the following state of facts: Goneau was the rear brakeman on a freight train which broke in two, between stations, in the night time; the two sections of the train stopping a few feet part, on a narrow wooden bridge with open ties. The breaking of the train was caused by a defective coupler on the rear end of the last car in the front section. The defect was in the carrier iron, a bar or plate bolted cross-wise under the drawbar, which held the coupler in a position where it would interlock with that of the opposite car. Several bolts of this carrier iron were missing, and the nut had come off the bolt holding up one of its ends,—the threads being battered and partly stripped,—so that this end had fallen off the bolt and swung back slantingly underneath the drawbar, causing the coupler to drop down so that it no longer interlocked; and thus breaking the train in two. When the train stopped, Goneau, on an order from the conductor, went forward to ascertain the trouble; and, after he had discovered it, undertook, as was his duty, to get the train coupled up again so that it could proceed on its journey. To make the coupling it was necessary to get the carrier iron back in place so as to hold the coupler in a position where it would interlock. He made an effort to do this by pulling the carrier iron back into a right angled position and placing wooden wedges or "shims" which he found on the bank, between it and the drawbar. This raised the coupler so that it would partially interlock.

[1] 29 Stat. 85, c. 87.

Upon his signals, the cars were then coupled together and the train started upon its journey. But after proceeding a few feet, it again broke and the two sections stopped a second time upon the bridge. Finding the coupler in its former condition, he then attempted to make another coupling. To do this he again stood between the cars on the open ties, with his back to the outside of the bridge; and, as before, put one knee under the drawbar to raise it from the carrier iron, and with one hand attempted to pull the carrier iron around to a right angle with the drawbar. The carrier iron caught in some manner, and he failed at first to move it. He then braced himself, lifted more with his knee, and gave the carrier iron a harder pull, with both hands. This time it "came easy," causing his right foot to drop down between the ties; and, losing his balance, he fell backwards over the side of the bridge to the ground below, sustaining serious injuries.

The Railway Company contends that the evidence did not bring the case within the Safety Appliance Act or warrant its submission to the jury under that Act; the argument being, in substance, that the defective car, being motionless at the time of the accident, was not then in use; that Goneau was not engaged in any coupling operation or car movement, but was doing repair work at the place where the defect was first discovered, which was permitted by the Act of 1910, and whose risk he assumed; and that the defective condition of the carrier iron was merely a condition presenting the occasion for making the repairs, and not a proximate cause of the accident.

We cannot sustain this contention. Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. A defective car is still in use when it has been moved with the train from the main line to a siding, to be cut out and left so that the other cars may proceed on their journey. *Chicago Railroad* v.

Schendel, 267 U. S. 287, 291. And so it is while still in a section of the train on the main line, to be coupled up and proceed on its journey as a part of the train. And see *Baltimore Railroad* v. *Tittle* (C. C. A.), 4 Fed. (2d) 818, 820.

Nor can it be said that Goneau was engaged in doing repair work. He was not a repair man, but a brakeman, and was not repairing the carrier iron, but attempting to move it into place to support the coupler, so that the coupling could be made and the train proceed. In short, he was engaged in the work of coupling the cars, that is, as was said by the Supreme Court of Minnesota, "in a coupling operation." Where, on the failure of cars to couple by impact, a switchman goes between them for the purpose of adjusting the knuckle of a coupler so that it will make a coupling, and is injured by the fall of the knuckle, due to a broken lip, he is not engaged in repair work, but in coupling, and is within the protection of the Safety Appliance Act. *Baltimore Railroad* v. *Tittle, supra,* 820. And although Goneau, in testifying, stated that when he found the coupler in such a condition that he could not couple up the train unless he fixed it, it became his duty to "repair it and get the train going," his use of the word "repair," upon which the Railway Company lays great stress, does not change the situation in the eyes of the law or transform the coupling operation into repair work.

Since he was injured as a result of the defect in the coupler, while attempting to adjust it for the purpose of making an immediate coupling, the defective coupler was clearly a proximate cause of the accident as distinguished from a condition creating the situation in which it occurred. And under the Employer's Liability Act he cannot be held to have assumed the risk.

The Act of 1910, obviously, has no application.

As there was substantial evidence tending to show that the defective coupler was a proximate cause of the acci-

dent resulting in the injury to Goneau while he was engaged in making a coupling in the discharge of his duty, the case was rightly submitted to the jury under the Safety Appliance Act; and the issues having been determined by the jury in his favor, the judgment of the trial court was properly affirmed. *Davis* v. *Wolfe,* 263 U. S. 239, 244.

Judgment affirmed.

UNITED STATES *v.* RIVER ROUGE IMPROVEMENT COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 3. Argued March 10, 11, 1924.—Decided January 4, 1926.

1. An adjudication of a Circuit Court of Appeals final in its nature as to the general subject of the litigation may be reviewed by this Court, without awaiting the determination of a separate matter affecting only the parties to such particular controversy. P. 413.
2. Under the provision of the Rivers and Harbors Act of July 18, 1918, directing that in proceedings to condemn lands in connection with any improvement of rivers, where a part only of any parcel is taken, the jury " shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefit to the remainder arising from the improvement," an increase in value of such remainder, caused by its frontage on a river as widened and deepened by the improvement and the right of immediate access to and use of the improved stream, is such a " special and direct benefit," although the remaining portions of other riparian parcels would be similarly benefited. P. 414.
3. In the absence of a controlling local law, the right of the owner of riparian property on a navigable river to have access from the front of his land to the navigable part of the stream, and, when not forbidden by public law, to construct landings, wharves or piers for this purpose, is a property right incident to his ownership of the bank, which, though subject to the absolute power of Congress over the improvement of navigable rivers, may not be arbitrarily destroyed or impaired by legislation having no real or

substantial relation to the control of navigation or appropriateness to that end. P. 418.

4. In view of the substantial character of this right, an instruction in a condemnation case giving the jury to understand that, in considering benefits to riparian land from a river improvement, the owner's right amounted to no more than a mere uncertain and contingent privilege of such access, etc., as the Government might see fit to allow him, was error. P. 417.
5. An error which relates, not merely to formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is ground for reversal unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party. P. 421.
6. The Act of February 26, 1910, amending § 269 Jud. Code, did not alter this rule. *Id.*

285 Fed. 111, reversed.

ERROR to judgments of the Circuit Court of Appeals which affirmed judgments against the United States recovered in the District Court by owners of riparian land in a consolidated condemnation proceeding brought in aid of a river improvement.

Solicitor General Beck and *Mr. Alfred Lucking,* Special Assistant to the Attorney General, with whom *Mr. Howell Van Auken,* Special Assistant to the Attorney General, was on the brief, for the United States.

Messrs. Selden Dickinson and *Charles A. Wagner,* with whom *Messrs. Henry M. Campbell* and *Elliott G. Stevenson* were on the brief, for defendants in error.

Mr. Paul B. Moody filed a supplemental brief for defendants in error, Forman Company and Ramsby.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Pursuant to an appropriation for the improvement of the Rouge River, Michigan, made in the Rivers and Har-

bors Act of August 8, 1917,[1] the United States filed in the District Court for the Eastern District of Michigan five petitions for the condemnation of numerous parcels of riparian land needed for such improvement, and, also, of a gas main passing underneath the river.[2]

The petitions were consolidated, and a jury trial had resulting in seventy-three awards of compensation to the property owners. Judgments were entered confirming all these awards. Writs of error were sued out by the United States to review the judgments as to fifteen of the awards to riparian land owners and the award to the owner of the gas main. These were heard by the Circuit Court of Appeals as one case, and all the judgments were affirmed except that awarding compensation to the owner of the gas main, as to which a new trial was granted, 285 Fed. 111. This writ of error is brought to review the judgments as to the awards thus affirmed, involving fifteen parcels of land.

1. We are of opinion that, although a new trial was granted as to the award to the owner of the gas main, the judgment of the Circuit Court of Appeals as to the awards to the riparian land owners, has such finality and completeness that it may be reviewed under this writ of error. The controversy as to the gas main is entirely distinct

[1] 40 Stat. 250, 258, c. 49, § 1.

[2] The appropriation was made on condition that the "local interests" should donate the necessary land and settle all claims for damages. Act of 1917, *supra;* Ho. Doc. No. 2063, 64th Cong., 2nd Sess., pp. 5, 15. The "local interests" which had undertaken to secure the necessary lands, were unable to obtain them by purchase; and, at the request of the Secretary of War, condemnation proceedings were instituted in the name of the United States. Act of May 16, 1906, c. 2465, 34 Stat. 196, as amended by the Act of June 29, 1906, c. 3628, 34 Stat. 632. In order that the United States might be given immediate possession and proceed with the work, the Ford Motor Co., the principal "local interest," made a deposit to cover any awards of compensation and damages that might be made. Act of July 18, 1918, c. 155, 40 Stat. 904, 911.

from those as to the riparian lands; and its result can have no bearing whatever upon the awards to the land owners. While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. *Williams* v. *Morgan,* 111 U. S. 684, 699; *Collins* v. *Miller,* 252 U. S. 364, 371; *Arnold* v. *Guimarin,* 263 U. S 427, 434. And so, conversely, an adjudication final in its nature as to the general subject of the litigation may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy.

2. The principal matter here involved relates to the benefits to the land owners which were to be considered in reduction of their compensation and damages. The Rivers and Harbors Act of July 18, 1918,[3] contains a provision—whose validity is not questioned—that in all condemnation proceedings by the United States to acquire lands for the public use in connection with any improvement of rivers, where a part only of any parcel of land is taken, the jury "shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefit to the remainder arising from the improvement." In each of the fifteen instances here involved the United States condemned only a portion of the parcel of land belonging to the riparian owner. It insists that there was error in the instructions to the jury in reference to the extent and measure of the benefits to the remainder.

The Rouge River, which empties into the Detroit River, had long been used for purposes of navigation, and various

[3] 40 Stat. 901, 911, c. 155, § 6.

industrial plants were located along its banks. Although it had been somewhat improved by the United States prior to 1917, the channel was narrow, winding, comparatively shallow, and incapable of accommodating large freighters. Under the terms of the Act of 1917 the new improvement was to be made in accordance with a plan recommended by the engineers of the War Department.[4] This contemplated straightening the channel of the river and widening and deepening it for about four miles above its mouth, so that it would accommodate the largest type of freighters on the Great Lakes and become, as was said, "practically a long slip serving for numerous docks and industries." The bottom width of the new channel was to be 200 feet, the banks sloping to a top width of 290 feet between the harbor lines. After its completion riparian owners desiring to construct docks were to be "required to locate the dock line or retaining wall" upon the harbor line, and excavate the bank "in front of the retaining wall or dock front" to the depth necessary to permit vessels to lie alongside.

The portions of the lands which were condemned were those lying within the limits of the widened channel or harbor lines. The United States contended that the remaining portions of these parcels would receive special and direct benefits from the improvement by reason of fronting on the widened river and having direct access thereto for the building of docks and other purposes of navigation for which they had not been previously available.

We are of opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute, as distinguished from a benefit common to

[4] Ho. Doc. No. 2063, Note 2, *supra*, pp. 10, 11.

all the lands in the vicinity, although the remaining portions of other riparian parcels would be similarly benefited. This is in accordance with the rule recognized by this court and established by the weight of authority in the state courts in reference to special benefits to lands abutting upon a new or widened street. *Bauman* v. *Ross,* 167 U. S. 548, 575; *Allen* v. *Charlestown,* 109 Mass. 243, 246; *Hilbourne* v. *Suffolk,* 120 Mass. 393, 394; *Cross* v. *Plymouth,* 125 Mass. 557, 558; *Abbott* v. *Cottage City,* 143 Mass. 521, 526; *Lewis* v. *Seattle,* 5 Wash. 741, 758; *Lowe* v. *Omaha,* 33 Neb. 587, 593; *St. Louis Railway* v. *Fowler,* 142 Mo. 670, 683; 2 Lewis' Eminent Domain, 3d ed., § 702, p. 1216. And see *Roberts* v. *Commissioners,* 21 Kans. 247, 252; *Trosper* v. *Commissioners,* 27 Kans. 391, 393. In *Allen* v. *Charlestown, supra,* 246, the rule is thus stated: "The benefit is not the less direct and special to the land of the petitioner, because other estates upon the same street are benefited in a similar manner. The kind of benefit, which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof. . . . The advantages of more convenient access to the particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefited."

But while the trial judge recognized the right of the United States to the deduction of such special benefits, if any, it insists that in charging the jury in reference to them he erroneously minimized their nature and extent.

In this portion of the charge the court stated, *inter alia*, that the Government had "the absolute power of control" over navigable streams, and the right to deprive any riparian owner of all access to the navigable portion of the stream and order the removal of any docks or other structures placed in the stream; that the deepening and widening of the channel would not confer on any riparian owner any property right to use the river for loading or unloading of vessels, this being "subject to the absolute power of control by the Government"; that the jury could not make any deduction of benefits on the theory that the improvement would increase any property right in connection with the access to or use of the river or bring the owner any new or different property right of access and use for purposes of navigation; that no benefit could be deducted unless the remainder of the land was rendered suitable for new or greater uses in navigation because of its new location "and because of a greater opportunity directly and specially to enjoy such use of the improved river as the Government may permit such owner to have;" and that the jury should keep "always in mind the uncertainty of securing from the Government the privilege to enjoy these advantages, and the limited character of whatever advantages may be so secured."

The United States not only excepted to these portions of the charge, but also requested that the jury be instructed, as bearing upon the existence and amount of the special benefits, that a riparian owner bordering on the new stream would have in respect thereto the usual rights of navigation pertinent to riparian property, that is, the right of access to the navigable part of the river in front of his property and the right to make a landing, dock or pier upon his harbor line, subject only to such general rules and regulations as the Government, in its power over navigation, might properly impose for the protection of the public right of navigation; that this

power of the Government "over navigation for the protection of public rights can not be arbitrarily and capriciously exercised so as to destroy these riparian rights, but must be exercised with reasonable relations to the requirements of navigation"; and that, by the terms of the plan of improvement, riparian owners whose lands would border the new stream, were given the right or privilege of constructing docks or retaining walls for their use upon the harbor line, and to excavate the bank in front thereof to the depth necessary to permit vessels to lie alongside. These requests were denied; and the United States excepted.

We are of opinion that the giving of these instructions and the refusal of these requests involved prejudicial error. It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, *Shively* v. *Bowlby,* 152 U. S. 1, 40, he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose. *Dutton* v. *Strong,* 1 Black, 23, 31; *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 289; *Yates* v. *Milwaukee,* 10 Wall. 497, 504; *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, 699; *St. Louis* v. *Rutz,* 138 U. S. 226, 246; *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, 445; *Weems Steamboat Co.* v. *People's Co.,* 214 U. S. 345, 355; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 70. There is no limitation upon this right of a riparian owner in the laws of Michigan. On the contrary it was recognized in *Lorman* v. *Benson,* 8 Mich. 18, 25, that the rights of riparian owners must be determined by the common law so far as applicable to the local situation; and in *Ryan* v. *Brown,* 18 Mich. 196, 210, it was said that: "If wharves and similar conveniences were not allowed upon our large

streams, the shipping business would become practically worthless. It can never be unlawful for a land owner to make such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances, as narrows, bends, or the like, which may in particular cases render his structure improper."

This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigable rivers, but must suffer the consequences of the improvement of navigation, if Congress determines that its continuance is detrimental to the public interest in the navigation of the river. *United States* v. *Chandler-Dunbar Co., supra,* 62, 70.

The right of the United States in the navigable waters within the several States is, however, "limited to the control thereof for the purposes of navigation." *Port of Seattle* v. *Oregon Railroad,* 255 U. S. 56, 63. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States* v. *Chandler-Dunbar Co., supra,* 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. In *Yates* v. *Milwaukee, supra,* 504, it was said in reference to the right of a riparian owner on a navigable stream: "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired." This language was cited with approval in *Illinois Central Railroad* v. *Illinois, supra,* 445.

Considering the charge of the court in the light of these general principles, we find that it was permeated by the fundamental error, emphasized by the refusal of the requests, that the jury were left to determine the amount of the benefits to be deducted on the theory that a riparian owner on the improved river would have merely such uncertain and contingent "privileges" of access to the navigable stream and of constructing docks fronting on the harbor line, as the Government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him, instead of being instructed that he would have a right to such access and the construction and maintenance of such docks until taken away by the Government in the due exercise of its power of control over navigation. And this error was the more serious since the plan of the improvement contemplated that the improved river should become a slip for docks and industries and recognized the right of a riparian owner to construct docks upon the harbor line; and there was nothing in the evidence indicating any probability that the Government would at any time abrogate or curtail this right in any respect.

The Circuit Court of Appeals, while stating that the trial court had over-emphasized the elements of uncertainty in the rights of riparian owners and the contingent character of these rights, was of opinion that, under all the circumstances, such over-emphasis was not sufficiently prejudicial to call for a reversal of the judgment. With this we cannot agree. The charge was not merely an over-emphasis of the contingent character of the rights of the riparian owners, but in substance an instruction that they had no rights in this respect, and could only obtain uncertain privileges, as a matter of grace. There is an essential difference between a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain and

contingent privilege which may not be allowed at all. The failure to observe this distinction went to the root of the charge in reference to the deduction of benefits. And its natural, if not inevitable, effect, was to lead the jury to a lower estimate of the benefits than would have been made under a proper charge.

The present case is not controlled by the provision of § 269 of the Judicial Code, as amended by the Act of February 26, 1919,[5] that in an appellate proceeding judgment shall be given after an examination of the entire record, "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." We need not enter upon a discussion of the divergent views which have been expressed in various Circuit Courts of Appeals as to the effect of the Act of 1919. It suffices to say that since the passage of this Act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party. See *Yazoo Railroad* v. *Mullins,* 249 U. S. 531, 533; *Fillippon* v. *Albion Slate Co.,* 250 U. S. 76, 82. In the present case the error in the charge could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards; and it cannot be said from the whole record that the substantial rights of the United States were not prejudiced thereby. The judgments of the District Court should therefore have been reversed, and new trials granted.

3. It is unnecessary to set forth various errors assigned as to other rulings of the trial court. These matters were fully and carefully considered by the Circuit Court of

[5] 40 Stat. 1181, c. 48.

Appeals, and we are entirely satisfied with the conclusions which it reached in reference to them.

The judgments of the District Court and Circuit Court of Appeals are reversed, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

Judgments reversed.

UNITED STATES *v.* ANDERSON ET AL.

UNITED STATES *v.* YALE & TOWNE MANUFACTURING COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 337, 420. Argued November 20, 1925.—Decided January 4, 1926.

1. The Revenue Act of 1916 imposed a tax on net income and profits ascertained by deducting from gross income, expenses paid, losses sustained, interest and taxes paid during the calendar year, but provided, § 13(d), that "a corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as returned."

Held, that where the taxpayer's books, reflecting its income, were kept upon an "accrual" basis, i. e., by charging against income earned during the taxable period (1916) the expenses incurred in and attributable to the process of earning income during that period, and made its return upon that basis and not the basis of actual receipts and disbursements, it was permitted under the statute, as correctly construed by a Treasury regulation, to include in its deductions the amount of a "reserve" entered on its books for taxes imposed by the United States on the profits of munitions made and sold by the taxpayer during that year, although the tax had not "accrued" in the sense of having been assessed and become due; and that it was not permissible, as the taxpayer attempted, to defer deduction of the tax until the income return for the following year, during which the tax became due and was paid. Pp. 438, 441.

2. Findings considered and *held* to show that the books of a tax payer were kept on the basis of accruals and reserves to meet liabilities incurred. P. 442.
3. In a suit to recover a tax erroneously exacted, the burden is on the plaintiff to prove the facts establishing invalidity of the tax. P. 443.

60 Ct. Cls. 100; *Id.* 440, reversed.

APPEALS from judgments of the Court of Claims in two suits brought by the Trustees in dissolution of the Burton-Richards Company, a corporation and by the Yale & Towne Manufacturing Company, to recover income taxes alleged to have been erroneously exacted under the Revenue Act of 1916.

Solicitor General Mitchell, with whom *Mr. John B. Milliken,* Special Attorney in the Bureau of Internal Revenue, was on the brief, for the United States.

Under the Revenue Act of 1916 a taxpayer was permitted to make his income-tax return on an accrual basis if his books were kept on that basis. Corporation Excise Tax Law of 1909 plainly required the computation of net income on the basis of actual receipts and disbursements. There was no provision for accrual systems of accounting or for including items of expense incurred but not due and paid. The first corporation income tax Act of October 3, 1913, like the 1909 Act, provided for the calculation of net taxable income on the receipts and disbursements basis. Under these two Acts some departures from the strict receipts and disbursements basis were permitted by the Commissioner of Internal Revenue, such as the use of inventories. This legislation shows that the subject was undeveloped and the resulting system was a mongrel one, but, in the main, the returns were required to be made on a receipts and disbursements basis. *Lumber Mutual Fire Ins. Co.* v. *Malley,* 256 Fed. 380; *Maryland Casualty Co.* v. *United States,* 52 Ct. Cls. 201; same case, 251 U. S. 342. The first decided shift occurred in the

Revenue Act of 1916, evidenced by the insertion of a new provision, § 13 (d). This allowed the taxpayer the option to make his return on a cash basis without regard to how he kept his books, or if he kept his books on some other basis to make his return upon the basis upon which his accounts were kept. Montgomery's Income Tax Procedure, 1918, pp. 67–68. In connection with the accrual basis offered as an alternative by the 1916 Act, the Treasury Department, in T. D. 2433, issued January 8, 1917, approved of the practice of setting up and maintaining reserves to meet liabilities accrued but not yet due and including those the amount of which may not have been definitely determined. The next shift was made in the Act of February 24, 1919, c. 18, 40 Stat. 1057, which limited the taxpayer to making his return on the basis on which his books were kept provided the basis tended to correctly show net income. Under § 12 (a) of the Act of 1916, it is clear that if the taxpayer used the accrual basis in keeping his accounts and made his return on that basis he could not be permitted to depart from the accrual basis in dealing with any item of expense.

Under the accrual system an expense accrues when all the events have occurred from which liability is determined and the liability has become fixed, even though payment is not yet due. The munitions tax for 1916 accrued in 1916, and the taxpayer made no mistake in entering the item on its books for that year as an accrued expense. Under the accrual system of accounting, income is said to be accrued when it is definitely receivable, although its payment may not be due, and liabilities or expenses are said to be accrued when the events have occurred from which liability is determined and the liability has become fixed, even though payment is not yet due. The basic idea under the accrual system of accounting is that the books shall immediately reflect obligations and expense definitely incurred and income definitely

earned without regard to whether payment has been made or whether payment is due. Under this system, the use of the word "accrued" does not signify that the item is due. On the contrary, the accrual system wholly disregards due dates. Neither is it necessary that the amount of an incurred liability be accurately ascertainable in order to "accrue" it. Montgomery, Auditing Theory and Practice, 3rd Ed. Vol. 1, pp. 239, 240; Esquerre, Applied Theory of Accounts, pp. 299–301; Holmes, Federal Income Tax, 1917, pp. 299–301.

The munitions tax for 1916 is based on the amount of munitions profits for that year; it was an actual expense or element of cost in the production of the income for that year; the law imposing the tax was in force during that year; definite liability to pay the tax had arisen by the end of the year; every fact or circumstance affecting the amount of the tax had occurred by the end of the year, and no fact or event occurring after the end of the year was a factor in the computation or determination of the tax. By the close of the year, liability for the tax had become definitely fixed, the tax being based on the result of operations for 1916, which were closed December 31, 1916. Neither liability for the tax nor the amount properly payable could be affected under the law by anything occurring after December 31, 1916. It is true the monthly estimates of the amount of the tax appearing in the monthly trial balances during the year 1916 were tentative and might vary up or down from month to month, and required final correction in closing the books for the year, but if the accounts of the corporation were correctly kept and its profits computed in the manner required by law, the amount of the munitions tax was definitely ascertainable at the end of the year. In this case the taxpayer knew the amount of the munitions tax at the close of the year when it entered the reserve on its books as well as it did when the return was made and the

tax paid. The fact that a difference of opinion might arise after December 31, 1916, between the taxpayer and the Commissioner of Internal Revenue as to what was a reasonable depreciation on plant and equipment, or as to other items of that nature, did not provide new factors occurring after December 31, 1916, varying the tax. The accrual by the taxpayer of this tax on its books for 1916 was not only proper and in accordance with good accounting practice but was expressly approved by T. D. 2433. Cases of *United States* v. *Woodward,* 256 U. S. 632, and *Ed. Schuster & Co., Inc.,* v. *Williams,* 283 Fed. 115, distinguished.

The only respect in which case No. 337 differs from No. 420, is because of a dispute as to whether the taxpayer's books were kept and its income-tax return made on a cash basis or an accrual basis. The Findings show that the books were kept and the return made on the accrual basis. In this, a suit to recover taxes paid, the burden is on the taxpayer to show that the tax was illegally assessed and to overcome the *prima facie* validity of the assessment, and unless the Findings of the Court of Claims affirmatively show that the books were kept and the income-tax return made on a cash basis they do not sustain the judgment.

Mr. John W. Davis, with whom *Messrs. Frank S. Bright* and *Montgomery B. Angell* were on the brief, for appellees, in No. 337.

Under the Revenue Act of 1916, taxes may properly be taken as a deduction from income only in the year when paid, regardless of the character of the return made. In keeping its books for the year 1916, the Burton-Richards Company took up on its books all items of gross income and general business expenses as and when such items became fixed and ascertainable in the form of accounts receivable and accounts payable regardless of whether the

amounts shown were actually received or paid in cash. Interest was entered on its books during 1916 only as and when actually received or paid within the year. The Company's interest on its indebtedness was all paid in 1916, and so appeared on its books. No losses nor bad debts appeared in 1916, nor were any set up on its books during that year. The Company set up on its books month by month an arbitrary "reserve for taxes" of $35,000, as set forth in the Findings of Fact. It did not pretend in so doing to be "accruing" the amount for income tax or other purposes. The service of such an entry was solely to reflect in conjunction with other entries the general financial condition of the Company as a going concern and to guide it in the declaration of dividends or the making of other disbursements. In the original and amended income tax returns of the Burton-Richards Company for 1916 and 1917 there was included as gross income all items arising from sales made within the year whether paid or payable in cash, while the company took as deductions: (a) General expense, whether paid in 1916 or not; (b) Depreciation charged off; (c) Interest paid; and (d) Taxes, domestic, paid.

In the earlier Income Tax Acts Congress did not make what is commonly known as "commercial net income" the basis for the tax levy. That which is subject to tax under these several Acts is "net income," and in every case "net income" is ascertained by deducting from gross income certain arbitrary deductions. Obviously, a literal interpretation of the 1909 Excise Tax Act demanded a strict and thorough-going cash basis for making return and paying tax. Yet, from the first, the Treasury Department not only permitted but required a departure from a strict cash basis. See Regulations 31, under the 1909 Act, Arts. 4, 5; *Id.* ¶ 77, T. D. 1742. With these formal regulations issued by the Treasury Department before it, Congress, in passing the 1913 Revenue Act, em-

ployed substantially the same phraseology as to gross income, business expenses, losses, interest, and taxes as it had employed in the 1909 Act. Under this, also, the Treasury necessarily permitted departures from the strict cash basis, Regulation 33, Jan. 5, 1914, Arts. 104, 158. But when it came to taxes, the Treasury invariably permitted them to be taken as deductions only in the year when "actually paid." *Id.* Art. 156.

The 1916 Act employed the same phraseology as the earlier Acts had used in defining net income subject to tax. The Treasury Department in its regulations under the 1916 Act, namely Regulations 33 (Revised), as in the prior regulations under the 1909 and 1913 Acts, defined gross income as "the total sales . . . during the year" (Article 91), required that inventories "must be taken where the business consists of buying and selling commercial commodities" (Article 120), and in Article 126, in defining the word "paid" it was flatly stated: "If the amount involved represents an actual expense or element of cost in the production of the income of the year, it will be properly deductible even though not actually disbursed in cash, provided it is so entered on the books of the company as to constitute a liability against its assets." But again, so far as taxes were concerned, Regulations 33 (Revised), in Article 191 thereof, permitted as a deduction for taxes only such taxes as were "paid within the year."

It is evident from the foregoing that the so-called cash or receipts and disbursements basis used under the 1909 and 1913 Acts and recognized at least for a time under the 1916 Act, was not and never had been a literal cash basis. It was in reality a mongrel basis which had taken shape on account of the very necessities of the case and which after adoption had received Congressional sanction by the subsequent re-enactment of similar provisions of law. This statutory cash basis was consistently recognized and employed by the Treasury Department in

administering the several income tax acts until the issuance in January, 1921, of the opinion of the Solicitor of Internal Revenue known as L. O. 1059 (see Cumulative Bulletin 4, p. 147), the opinion upon which the Commissioner acted in disallowing the deduction for taxes and which gave rise to the instant case, an opinion which constituted an entire reversal of the Treasury's prior practice in treating the deduction for taxes.

Under the 1916 Act only taxes actually paid within the year were deductible in determining taxable net income, whether the tax returns were made on the so-called cash basis under §§ 10 and 12(a), or under the alternative basis contemplated in § 13(d). By the express provisions of the 1916 Act, that which is subject to tax is "net income," and "net income" must be determined by deducting from "the gross amount of its income received within the year" certain arbitrary deductions. One of these deductions, among others, is "taxes paid within the year imposed by the authority of the United States or its territories." All indications are that Congress intended to limit the deduction for taxes in any particular year to an amount not exceeding that actually paid within the year. Congress again employed the word "paid," and "paid" alone, in describing the allowable deductions for taxes. The re-enactment by Congress of provisions similar to those employed in an earlier Act which had received a certain construction by the Executive Department charged with the administration of the Act "amounts to an implied recognition and approval of the executive construction of a statute." *National Lead Co.* v. *United States,* 252 U. S. 140.

Whatever may be the effect of the appearance of § 13(d) in the 1916 Act, there is no warrant in law for imputing to Congress an intent to permit or require the deduction of taxes in any taxable period other than that in which such taxes were actually paid. That Congress

was familiar with the word "accrued" is evidenced by the phraseology used in the Munitions Tax law, which was Title III of the Revenue Act of 1916, § 302. Had Congress intended the word "paid" in § 12(a) of the 1916 Act to mean "paid or accrued," it would have said so. In the relative provision of the 1918 Act, namely, § 234(a) (3), Congress did say so, for that Act permitted the deduction of taxes "paid or accrued within the taxable year." To permit or require under the 1916 Act the deduction of taxes when accrued rather than when paid would be to impute to Congress an intent in enacting the 1916 Act to which it first gave expression in the 1918 Act. This is not to be done. *Shwab* v. *Doyle,* 258 U. S. 529; *Brilliant Coal Co.* v. *United States,* 59 Ct. Cls. 481. The proposition that § 13(d) sets up a separate and distinct method of reaching taxable income is a strain upon its language, quite aside from the fact that its very position in the Act as a minor section can hardly justify giving it such dignity. Obviously Congress did not contemplate that a taxpayer, regardless of the limitations imposed in § 12(a) upon the extent of the deductions for interest and taxes authorized, might, nevertheless, take as a deduction an amount of interest or taxes merely by the simple device of setting up on its books a reserve for interest or taxes. Such a construction would put it in the power of the taxpayer to take as a deduction from net income an amount of taxes or interest which Congress said specifically in § 12(a) could not be so taken. It is arguable that § 13(d) to a limited extent contemplated the so-called "accrual" system of accounting and that Congress by inserting that section in the 1916 Act intended to give express recognition and legislative sanction to the practice which had grown up under the earlier Acts by administrative regulation of permitting and even requiring the use of accounts receivable in determining gross income, and accounts payable in reaching deduc-

tible business expenses. In fact, it may be that the insertion of § 13(d) in the 1916 Act foreshadowed the decision of this Court in *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, in the sense that it was an express recognition by Congress of the necessity of subtracting from gross income the cost of earning gross income in reaching that "income" which alone is taxable under the Constitution. But it is hardly conceivable that § 13(d) authorized deductions for such items as taxes and interest without regard to the specific limitations placed on such deductions in § 12(a). It is true that the right to employ § 13(d) is made subject to regulations issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, but an interpretation of § 13(d) which would permit, under appropriate regulation, deductions for interest and taxes other than those specified in § 12(a) would vest in the Executive branch of the Government a discretion clearly not intended, and one which would perhaps amount to an unconstitutional delegation of authority. The fact is that § 13(d) was not a recognition of the so-called accrual system of accounting as the Treasury would have us believe, but contemplated a great variety of methods of accounting. The words "accrue" or "accrual" are nowhere used in the law. It is respectfully submitted that § 13(d) represented the first step by Congress, though a cautious one, toward a recognition of the principle that there are a number of corporations, which, on account of the nature of the business in which they are engaged, employ a variety of accounting methods not adapted to making returns upon the so-called statutory cash basis, and that in such cases a return on the basis upon which the accounts are kept will more clearly reflect income than a return on the statutory cash basis.

The regulations issued under § 13(d) preclude the deduction of the 1916 munitions tax in 1916. T. D. 2433. In the last paragraph of this regulation its application is

limited by the following provision: "The reserves contemplated by the foregoing rule are those reserves only which are set up to meet some actual liability incurred, the amount necessary to discharge which cannot at the time be definitely determined." This language leaves the reserve for taxes established by this taxpayer outside the bounds of the Treasury Decision, since the munitions tax here involved was not an actual liability at December 31st, 1916. Taxes constitute a liability only when they become due or at the earliest when they are assessed. *Lane County* v. *Oregon,* 7 Wall. 71; *Meriwether* v. *Garrett,* 102 U. S. 472. That T. D. 2433 was not intended to permit taxpayers to deduct reserves for taxes is indicated not only by the contemporaneous action of the Commissioner, but also by the specific provisions of T. D. 2490, issued January 2, 1918, nearly a year after T. D. 2433, under which Treasury Decision taxes deductible were without qualification described as "taxes paid within the year."

The appellees' munitions tax for 1916 did not accrue until 1917, in which year it was first assessed, became due and payable, and was in fact paid, and consequently it was properly deducted from income for that year. *United States* v. *Woodward,* 256 U. S. 632. *Clapp* v. *Mason,* 94 U. S. 589; *Mason* v. *Sargent,* 104 U. S. 689; *Sturges* v. *United States,* 117 U. S. 363. The fact is that the uncertainties attending the computation of the munitions tax in 1916 which could only be resolved by future events, were at least as many and as great as in the case of the ordinary estate tax. Moreover, there was always the possibility that the law would be changed before the tax became due. There is no analogy between taxes and expenses. *Meriwether* v. *Garrett,* 102 U. S. 472; *Schuster* v. *Williams,* 283 Fed. 115.

The Burton-Richards Company made its returns for 1916 and 1917, not under the alternative provisions of §

13(d), but under the provisions of §§ 10 and 12(a). That being the case, there can be no dispute that its 1916 munitions tax was deductible in 1917, the year when it was paid.

Mr. Louis H. Porter, with whom *Mr. F. Carroll Taylor* was on the brief, for appellee in No. 420.

I. Under the Revenue Acts of 1916 and 1917 only taxes actually paid within the taxable period could be deducted in determining taxable net income.

The specific language of § 12a permits only the deduction of taxes "paid within the year."

Under the 1909, 1913, and 1916 laws the clause allowing the deduction of taxes was substantially the same and, since under the earlier acts the Treasury adopted a construction permitting only the deduction of taxes actually paid, although permitting the deduction of business expenses accrued but not paid, Congress, in using the same clause in the 1916 Act, intended to adopt the former departmental construction. *United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337; *United States* v. *G. Falk & Bro.,* 204 U. S. 143.

The subsequent change of this clause in the 1918 Revenue Act to permit the deduction of taxes "paid or accrued during the taxable year" amounts to a Congressional construction that the prior act did not intend the deduction of taxes "accrued." *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Sarlls* v. *United States,* 152 U. S. 570.

Sec. 13d of Part II, Title I of the 1916 Revenue Act which permitted returns to be made on the basis of the corporate books, under the direction of the Treasury, where the books were kept on other than a receipt and disbursement basis, was merely a recognition of a privilege which had in fact been extended by the Treasury under the 1909 and 1913 acts and serves only to confirm the prior departmental construction permitting deduction of

accrued business expenses but only deduction of taxes actually paid.

II. The munition manufacturers tax did not accrue until the year in which it was due and payable.

III. The contention that appellee's accounting practice of setting up a tax reserve at the end of 1916 required its tax for the years 1916 and 1917 to be computed on the basis of such tax reserves, instead of on the basis of taxes actually paid, involves impossible inconsistencies.

Consistency and certainty in fiscal acts are of universal importance. *Comm'rs. of Inland Revenue* v. *Harrison,* L. R. 7 H. L. 1.

The Government's contention is unsound and inconsistent in that it substitutes a rule of accounting to determine when a tax "accrues" in place of a legal definition. *United States* v. *Merriam,* 263 U. S. 179.

Where there is ambiguity in the language of a taxing statute the taxpayer is entitled to the benefit of the doubt. *United States* v. *Wigglesworth,* Fed. Cas. No. 16690; *Gould* v. *Gould,* 245 U. S. 151; *Shwab* v. *Doyle,* 258 U. S. 529.

The right to deduct taxes "paid within the year" is specifically given by § 12a, while § 13d does not definitely or clearly vary the specific language of § 12a. *The Dollar Savings Bank* v. *United States,* 19 Wall. 227.

MR. JUSTICE STONE delivered the opinion of the Court.

The appellees in both cases brought suit in the Court of Claims to recover payments of corporate income taxes alleged to have been erroneously exacted. From judgments in their favor the Government brings the cases to this court on appeal. Jud. Code, § 242, before amendment of 1925.

For the purpose of discussing the main question raised by both appeals, No. 420 will first be considered, and such

additional questions as are involved in No. 337 will then be taken up.

The appellee, Yale & Towne Manufacturing Co., a Connecticut corporation, was, in 1916, engaged in the manufacture of munitions. The tax imposed by the United States on the profits on munitions manufactured by it and sold during that year, became due and was paid in 1917. In making its return for income tax for the year 1917, the appellee deducted from its gross income the amount of the munitions tax thus paid. Later the Commissioner of Internal Revenue held that the munitions tax paid in 1917 should have been deducted from the appellee's gross income in its return for 1916. There was in consequence an adjustment of the income taxes payable in those years, resulting in a net increase of the tax payable for the year 1917 of $116,044.40, which was assessed and paid under protest and is the amount for which suit was brought.

The correctness of the determination of the Commissioner depends upon the construction of the Revenue Act of 1916 and its application to the particular method employed by the taxpayer in keeping its books of account and in making return for income tax for 1916. The pertinent provisions of the statute are sections 10, 12(a), 13(a) and (d) and 300 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 765, 767–8, 770–1, 780–1). The Act imposes a tax on net income and profits ascertained as provided by § 12(a), by deducting from gross income, expenses paid, losses sustained, interest and taxes paid during the calendar year. Section 13(d) however, provides that:

"A corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its

accounts are kept, in which case the tax shall be computed upon its income as returned . . ."

In the year 1916 the appellee set up on its books of account all the obligations or expenses incurred during the year whether they fell due and whether they were paid during that year. It entered in an account, "reserves for taxes," items of various kinds of taxes, liability for which was incurred by reason of its operations for that year, whether paid or payable during the year. Included in the reserves for taxes for 1916 were items aggregating $247,763.19 for taxes on profits from the sale of munitions during the year. The return for the munitions tax was made by the appellee in 1917, and the tax, after revision and an additional assessment, was paid in 1917, the year when it was due.

In making up its income tax return for 1916, appellee deducted from gross income all the items appearing on its books as losses sustained and obligations and expenses incurred during the year, except that it omitted from the return the items of munitions tax, likewise carried on its books, as an obligation or expense incurred or accrued in the year.

It is urged by the Government that the appellee, not having kept its books or made its tax return on the basis of receipts and disbursements, has elected to avail itself of the privilege afforded by § 13(d) of making its return on what was referred to in the briefs and arguments as "the accrual basis"; that having so elected, it is required consistently to deduct from gross income all items appearing on its books as expenses accruing or incurred during the taxable year, including its reserve for munitions taxes, whether payable or not.

It is not denied by the appellee that its method of keeping its accounts and setting up a reserve for munitions taxes reflected its true income for 1916 or that its amended return on that basis accurately reflects its income and

profits for the year. But it contends that the munitions tax was deductible only in 1917 because under the Revenue Act of 1916 only taxes actually paid during the year were deductible in determining net income for the year; and that in any case the provisions of that Act and the regulations made by the Commissioner, authorizing the taxpayer to make his returns on an "accrual" basis if his books are so kept, could have no application to tax deductions, since a tax does not accrue until it is due and payable.

While § 12(a) taken by itself would appear to require the income tax return to be made on the basis of actual receipts and disbursements, it is to be read with § 13(d) which we have quoted and which obviously limits in some respects the operation of § 12(a) by providing in substance that a corporation keeping its books on a basis other than receipts and disbursements, may make its return on that basis provided it is one which reflects income.

Standing by themselves and taken at their face value, these sections would seem to require the taxpayer to make its return on the basis of receipts and disbursements or, in the alternative, on the basis of its own books of account if they reflect true income, under such regulations as the Commissioner may make, and indeed to require the latter alternative if the taxpayer is unable to make a return except on that basis.

So interpreting the statute, the Commissioner, with the approval of the Secretary of the Treasury, on January 8, 1917, before appellee made its income tax return for 1916, promulgated Treasury Decision 2433 which provides in part that under § 13(d) it "will be permissible for corporations which accrue on their books monthly or at other stated periods amounts sufficient to meet fixed annual or other charges to deduct from their gross income the amounts so accrued, provided such accruals approximate

as nearly as possible the actual liabilities for which the accruals are made, and provided that in cases wherein deductions are made on the accrual basis as hereinbefore indicated, income from fixed and determinable sources accruing to the corporations must be returned, for the purpose of the tax, on the same basis." It also provided in substance that when the taxpayer, following a consistent accounting practice, sets up reserves to meet liabilities, the "amount of which or date of maturity" is not definitely determinable, such reserve may be deducted from gross income. The decision also laid down a procedure for readjusting such reserves when the amount actually required for that purpose was definitely ascertained, and provided that if returns upon this basis of "accrual or reserves" did not reflect true net income, the taxpayer would not be permitted to make its return on any other basis than that of "actual receipts and disbursements."

We think that the statute was correctly interpreted by the Commissioner and that his decision referred to was consistent with its purpose and intent.

The Revenue Acts of 1909 and 1913 authorized a method of computing the income of corporations, which did not differ materially from that provided by § 12(a) of the Act of 1916. They required in terms that net income should be ascertained by deducting from gross income received, interest, expenses and taxes actually paid and losses actually sustained, but contained no provision corresponding to § 13(d) of the Act of 1916 by which a return might be made on the basis of the taxpayer's books of account. Corporation Excise Tax, Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112; Corporation Income Tax, Act of October 3, 1913, c. 16, Section II, subdiv. G, 38 Stat. 114, 172.

It was pressed upon us in argument by appellees that it was found impracticable to comply strictly with the

requirements of the 1909 and 1913 Acts for computing income on the basis of receipts and disbursements and that under both acts the administrative practice was established, by appropriate Treasury regulations, permitting the use of inventories and authorizing deduction of expenses constituting a liability of the taxpayer, whether paid or not, in ascertaining net income, but that those regulations did not permit the deduction of taxes except in the year when paid. From this it is argued that Congress, by reënacting in § 12(a) of the Act of 1916 the corresponding provisions of the earlier acts, adopted the settled administrative practice, and that accordingly under that act, as well as under the earlier acts and Treasury regulations, taxes could be deducted only in the year when paid.

This argument would have force had Congress stopped with the enactment of § 12(a). By thus adopting, without material change, the corresponding provisions of earlier acts, Congress might have been deemed to have recognized and adopted the established practice of the Department interpreting and applying them. *National Lead Co.* v. *United States,* 252 U. S. 140. But, in the Act of 1916, Congress added § 13(d), which did not have its counterpart in earlier legislation. This section went further than any previous regulation by authorizing the tax return to be made on the basis on which the taxpayer's books were kept, provided only that the basis was one reflecting income and the return complied with regulations made by the Commissioner.

Treasury Decision 2433, to which reference has been made, was in harmony with this view of § 13(d). It recognized the right of the corporation to deduct all accruals and reserves, without distinction, made on its books to meet liabilities, provided the return included income accrued and, as made, reflected true net income. If the return failed so to reflect income, the regulation reserved

the right of the Commissioner to require the return to be made on the basis of receipts and disbursements.

A consideration of the difficulties involved in the preparation of an income account on a strict basis of receipts and disbursements for a business of any complexity, which had been experienced in the application of the Acts of 1909 and 1913 and which made it necessary to authorize, by departmental regulation, a method of preparing returns not in terms provided for by those statutes, indicates with no uncertainty the purpose of §§ 12(a) and 13(d) of the Act of 1916. It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period; and indeed, to require the tax return to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis.

The appellee's true income for the year 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year. The reserve for munitions taxes set up on its books for 1916 must have been deducted from receivables for munitions sold in that year before the net results of the operations for the year could be ascertained. The taxpayer being unable to make its return on a strict receipts and disbursements basis, and not having attempted to do so, could not have complied with § 13(d) and Treasury Decision 2433 by deducting either accruals of interest or expenses alone without the other, or without deducting other reserves made on its books to meet liabilities such as the munitions tax, incurred in the process of creating income.

Only a word need be said with reference to the contention that the tax upon munitions manufactured and

sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued. It should be noted that § 13(d) makes no use of the words "accrue" or "accrual" but merely provides for a return upon the basis upon which the taxpayer's accounts are kept, if it reflects income—which is precisely the return insisted upon by the Government. We do not think that the Treasury decision contemplated a return on any other basis when it used the terms "accrued" and "accrual" and provided for the deduction by the taxpayer of items "accrued on their books".

United States v. *Woodward,* 256 U. S. 632, relied upon by appellees, arose under the Income Tax Law of 1918, (c. 18, Title II, §§ 210–214, 219, 1405, 40 Stat. 1062–1067, 1071, 1151). Section 213(a) and (e) of that Act provided that taxes "paid or accrued" within the taxable year imposed by authority of the United States, except income, war profits and excess profits taxes, might be deducted in ascertaining income. The claim of the taxpayer of the right to deduct estate taxes levied under that Act for the year when due, although paid in a later year, was upheld. It did not appear whether, as here, the taxpayer kept his books on the accrual basis or whether, as here, events had occurred before the tax became due which fixed the amount of it; for it did not appear

whether the deductions to be made from the testator's gross estate were ascertainable for the purpose of determining the estate tax. The question which we now have to determine was not raised, considered or decided in that case.

We conclude that the reserves for taxes which appeared on appellee's books in 1916 were deductible under § 13(d) of the Act of 1916 and Treasury Decision 2433 in its income tax return on the accrual basis for that year.

It was argued in behalf of the appellees in No. 337 that the taxpayer did not keep its books on an accrual basis; that consequently its case was not controlled by § 13(d) and Treasury regulations made under it, and that by § 12(a) it was authorized to deduct the amount assessed for munitions taxes only in 1917, the year when paid. On this point we are concluded by the findings. They show that in the year 1916 the taxpayer accrued on its books expenses, whether paid or not, including "insurance reserves," "freight reserves," "bonus reserves," and depreciation charged off, aggregating more than two and a half million dollars, which it deducted from accrued gross income, whether actually received or not, in making its income tax return for the year. It charged on its books and deducted in its income tax return, interest accrued and paid during the year. So far as appears no other interest accrued during the year and there was no reserve for interest. No charge or deduction was made for bad debts. It also set up on its books for that year a monthly reserve of $35,000 for the payment of munitions taxes beginning with September, the month of the passage of the Revenue Act of 1916 taxing munitions. On December 31, 1916, this reserve account was closed out and a charge was made on its books against the corporate surplus for account of munitions taxes of $86,541.95. No deduction was made by the taxpayer for munitions taxes in its income tax return for the year 1916. In 1917 the

munitions tax was returned and ultimately assessed and paid in the sum of $112,419.54.

Since the suit was one to recover a tax erroneously exacted, the burden was on the petitioners, appellees here, to prove the facts establishing the invalidity of the tax. But the findings fail to show affirmatively that the books were kept or the return made on the basis of receipts and disbursements. Indeed, the facts found, to which we have referred, show that the books were kept on the basis of accruals and reserves to meet liabilities incurred. It does not appear that there was any expense or liability of the taxpayer incurred by its operations during the year which was not accrued on its books. Its return was made on that basis, but omitted munitions taxes accrued on its books during the year for which the return was made. We think these facts bring the case clearly within the principle which we deem to be applicable to No. 420. The judgment of the Court of Claims in each case is

Reversed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE SANFORD dissent.

PROVOST ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 258. Argued November 18, 1925.—Decided January 4, 1926.

1. Transfers involved in the "lending" of stock and "return" of the stock "borrowed," on the New York Stock Exchange, are taxable transfers, within the meaning of provisions of the Revenue Acts of 1917, and 1918, imposing a stamp tax of two cents per share upon "all sales or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock." P. 456.
2. Under the rules and practice of the New York Stock Exchange, a broker requiring certificates of stock to deliver in consummation of a short sale, may "borrow" them for that purpose from another broker as follows: The "borrower" deposits with the

"lender" their full market price; and, until the loan is returned, this deposit is maintained, by daily payments back and forth between the borrower and the lender, at the level of the market value of the borrowed stock; the lender usually pays interest on the deposit, but whether interest is paid or the borrower pays a premium for the "loan" of the shares, may be matters of agreement between them; the borrower contracts to give the lender while the loan continues, all the benefits, (such as dividends,) and the lender contracts to bear all the burdens, (such as assessments,) incident to the ownership of the shares, as though the lender had retained ownership of them; concurrently with the receipt of the deposit, the lender delivers to the borrower or for his account, the certificates of the stock lent. The stock borrowed thus becomes available to the borrower for delivery upon his short sale. Upon demand of either broker, their mutual obligations may be satisfied by a "return" to the lender of the stock borrowed—i. e. of the same kind and amount of shares, which the borrower purchases, borrows, or otherwise procures for the purpose—and by repayment of the deposit to the borrower with interest, as agreed. *Held:*

(1) That, upon the physical delivery of the certificates by the lender, with full recognition of the right and authority of the borrower to appropriate them to his short sale contract, and their receipt by the purchaser, all the incidents of ownership of the stock borrowed pass to the latter. P. 456.

(2) The borrower, in that event, is neither a pledgee, trustee nor bailee for the lender; nor is the transaction within the meaning of a proviso in the above cited statutes, exempting from the tax, deposits of stock certificates as security for money loaned. *Id.*

(3) The "return" of the borrowed stock transfers to the lender all the incidents of ownership in the shares represented by the certificates delivered to him. *Id.*

(4) Consequently both the "loan" and the "return" transactions are within the terms of the above taxing statutes as "transfers of legal title to shares of stock." *Id.*

(5) And deliveries of indorsed certificates of stock incidental to these transfers, are "deliveries of . . . shares or certificates of stock" within the statutory provision. *Id.*

3. The reënactment of a taxing provision, after it has been construed by the Attorney General and the construction has been adopted by the Treasury Department and called to the attention of Congress, indicates a purpose to continue the law in force as so construed. P. 457.

4. When Congress in reënacting a provision, rejects a proposed alteration, a subsequent amendment incorporating it evinces a purpose to effect a change in the law. P. 458.

60 Ct. Cls. 49, affirmed.

APPEAL from a judgment of the Court of Claims, for the United States, in a suit to recover, as an illegally exacted tax, the cost of revenue stamps affixed to "tickets" constituting documentary evidence of "loans" of shares of stock and return of shares "borrowed," in transactions between brokers on the New York Stock Exchange.

Mr. Charles E. Hughes, with whom *Messrs. George W. Wickersham, William F. Unger, Samuel P. Gilman* and *Samuel Rubin* were on the brief, for appellants.

I. The history of similar legislation indicates clearly that it was not the intent of Congress to tax the borrowing and return of stock among brokers.

Earlier taxing acts, similar in language and purpose, were held not to apply to such transactions.

The reënactment in the 1918 Act of the stamp tax provisions of the 1917 Act, does not indicate a ratification by Congress of the Treasury Department's ruling.

The Revenue Act of 1921 contains an express declaration disapproving the Treasury Department's interpretation of the 1917 and 1918 Acts.

II. There is no ground for inferring that Congress intended to discriminate against short sales or to impose a greater tax on "short" than on "long" transactions, nor is there any ground for assuming that Congress knew of the practice of brokers to borrow and return stocks in connection with short sales and intended to tax such borrowing and return.

III. The transactions involved in this claim are not taxable under the enacting clauses of the 1917 and 1918 Acts.

The word "deliveries" as used in the 1917 and 1918 Acts cannot be held to apply to every transfer of physical possession. It must be construed in the light of its context, and limited to sales and other similar transfers of legal title. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Virginia* v. *Tennessee,* 148 U. S. 503; *People* v. *New York & Manhattan Beach Ry.,* 84 N. Y. 565; *United States* v. *Standard Brewery, Inc.,* 251 U. S. 210; 2 Sutherland, Statutory Construction 2nd Ed. p. 707; *Mackall* v. *District of Columbia,* 16 App. D. C., 301; *Isitt* v. *Beeston,* L. R., 4 Exch. 159; *Cotton* v. *James,* 1 Moody & Malkin 273.

The lending of stock as practiced by brokers, does not constitute a transfer of legal title. The relation between the lending broker and borrowing broker is that of pledgor and pledgee. The transaction being a pledge, there is no transfer of title. *McNeil* v. *The Tenth National Bank,* 46 N. Y. 325; *Knox* v. *Eden Musee Co.,* 148 N. Y. 441; *First National Bank* v. *Lanier,* 11 Wall. 369; *National Safe Deposit Savings & Trust Co.* v. *Hibbs,* 229 U. S. 391.

Under the foregoing authorities, the title which a purchaser obtains from the borrowing broker is not based upon a prior transfer of title to the borrowing broker, but is based upon an estoppel created against the lending broker—an estoppel which bars him from asserting his title. "Title by estoppel" by its very terms indicates that it is not a true title predicated upon an unbroken chain of legal title, but that it is based upon a transfer by a person who has not acquired legal title. The ability of the borrowing broker to transfer to his purchaser a better title than he himself has, is not peculiar to the transactions involved in this case. The situation in this respect is no different from that of a broker holding stocks belonging to his customer, either as margin or merely for safekeeping. It has been held repeatedly that, although title to the stocks is in the customer, and not in the broker,

whether or not the broker has a lien thereon, the broker may, nevertheless, transfer good title thereto to an innocent purchaser for value. In both cases, from the legal standpoint, title to securities in the possession of one may be vested in the other and yet the one holding possession is able to transfer title to a third person. A sale has been defined by this Court as "a transfer of property for a fixed price in money or its equivalent." *Iowa* v. *McFarland,* 110 U. S. 471. Can it be said that these two elements, to wit: a transfer of property or title and the payment of a price, or either of them, are present in the case of the transfer of a certificate of stock by one broker to another for the purposes indicated in this claim? No price is paid by the borrowing broker to the lending broker and the transaction, therefore, cannot be denominated a sale, whatever else it may be. Nor can we conceive of any logical explanation which could harmonize the hypothesis that the transaction is a sale with the fact that the lending broker pays interest upon the money which he receives at the time the stock is delivered and the fact that he continues to receive the benefit of any dividends and other increase of the stock, and conversely, continues to be liable for any assessments or other charges against the stock. Nor can such theory be harmonized with the fact that the lending broker gains the benefit of any increase in the market value and likewise bears any loss which may result from a decline in such market value.

Neither is the transaction a gift or trust. *Chambers* v. *McCreery,* 98 Fed. (affirmed 106 Fed. 364). The borrowing of stock, from the facts disclosed, is nearer to a bailment than any of the other forms of transfer which we have yet enumerated. Three elements are said to be necessary to constitute a contract or pledge, viz: (1) The possession of the pledged property must pass from the pledgor to the pledgee or to some one for him; (2) The legal title to the pledged property must remain in the

pledgor; (3) The pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person. An analysis of the methods by which stocks are "loaned" shows that all those various elements are present which are necessary to constitute the transaction a pledge as distinguished from the various other forms of transfer. One possible objection may be made here, viz., that a pledgee has no right to part with possession of the pledged property. Apart from the right of a pledgee of stocks to part with their possession, it is legally possible for such a pledgee to transfer good title thereto to a purchaser for value. It is firmly settled that a pledgee of stock is not required to retain in his possession the identical certificates of stock pledged with him. Such certificates are interchangeable, and the rights of the pledgor are not infringed by the transfer by the pledgee of the certificates of stock pledged. The status of the pledge is maintained so long as the pledgee has in his possession or under his control, a similar amount of similar stock. It is by virtue of this rule, peculiar to pledges of corporate stocks and bonds, that the borrowing broker not only is legally able to transfer good title to an innocent purchaser, but is enabled to do so without violating any of the rights of the lending broker and without being guilty of conversion. *Richardson* v. *Shaw,* 209 U. S. 365; *Skiff* v. *Stoddard,* 63 Conn. 216. By reason of the peculiar nature of a certificate of stock, the fact that the borrower of the stock may dispose of it and pass good title thereto is in no way repugnant to the transaction being a pledge of the stock. *Atkins* v. *Gamble,* 42 Cal. 86; *Douglas* v. *Carpenter,* 17 App. Div. 329; *Caswell* v. *Putnam,* 120 N. Y. 153. By the system of mark-ups and mark-downs which has been described in the stipulation of facts, the lending broker is fully protected with respect to the borrowing broker's performance, for the lending broker at all times holds an

amount of money equivalent to the market value of the securities. Because of this system, which protects each broker from loss by reason of default of the other, litigation is practically avoided and so the decisions are silent as to the liabilities of the respective parties in the event of a default on either part.

The opinion of the Attorney General, (31 Op. A. G. 225) upon which Treasury Decision 2685 was based, was rendered without a complete understanding of the facts and was based upon an erroneous assumption of the facts and a misapprehension of the law applicable to the transactions in question.

IV. The lending of stock is equivalent to the deposit of stock as collateral security for money loaned thereon, and is, therefore, exempt from tax under the first proviso of Paragraph 4 of Schedule A.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

The appellants are co-partners engaged in business as stock brokers with membership in the New York Stock Exchange. They brought suit in the Court of Claims to recover, as an illegally exacted tax, the cost of internal revenue stamps affixed by them in the period from 1917 to 1920 to "tickets" which were documentary evidence of transactions commonly known in the stock-brokerage business as the "loan" of shares of stock and the return by the borrower to the lender of shares of stock "borrowed." The case was tried upon agreed facts embodied in the findings of the court below, and from the judgment for the defendant in that court the case was brought here on appeal. Jud. Code, § 242, before amendment of 1925.

The applicable provisions of the statutes are to be found in War Revenue Act of 1917, Title VIII, Schedule A, par. 4, 40 Stat. 300, 322, which is printed in the margin * and in the similar provision of the Revenue Act of 1918, Title XI, Schedule A, par. 4, 40 Stat. 1057, 1135, which may, for the purposes of this case, be taken to be a re-enactment of the 1917 provision. Both acts imposed a stamp tax of two cents per share upon "all sales or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock." The question presented is whether the transfers of shares of corporate stock involved in the "loan" and "return" transactions in accordance with the rules and practice of the Stock Exchange, are taxable transfers within the meaning of the statute.

The loan of stock is usually, though not necessarily, incidental to a "short sale." As the phrase indicates, a short sale is a contract for the sale of shares which the

* Act of Oct. 3, 1917, c. 63, Title VIII, Schedule A, Paragraph 4, 40 Stat. 300, 322.

"4. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock in any association, company, or corporation, . . . whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares of stock are without par value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share, unless the actual value thereof is in excess of $100 per share, in which case the tax shall be 2 cents on each $100 of actual value or fraction thereof: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same,

seller does not own or the certificates for which are not within his control so as to be available for delivery at the time when, under the rules of the Exchange, delivery must be made. Under the rules of the New York Stock Exchange, applicable so far as the facts of this case are concerned, a broker who sells stock is required to make delivery of the certificates on the next business day. If he does not have them available, he must procure them for the purpose of making delivery. This he may do by purchasing or borrowing the required shares, delivery of the certificates to be made to the broker to whom he has already contracted to sell.

If he borrows them, he deposits with the lending broker their full market price; and until the loan is returned, this deposit is maintained, by means of daily payments back and forth between the borrower and the lender, at the varying level of the market value of the shares loaned.

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but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or things to which it refers. Any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons who shall make any such sale, or who shall in pursuance of any such sale deliver any stock or evidence of the sale of any stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto with intent to evade the foregoing provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both, at the discretion of the court."

The lender, who thus receives in money the full market value of the shares—much more than he would ordinarily realize by pledging them—usually pays interest on the money so received, at the current rate for demand loans. But the rate of interest is a matter of negotiation and agreement, and the deposit may, on occasion, carry no interest, or the borrower of the stock may pay a premium when the stock is greatly in demand.

During the continuance of the loan the borrowing broker is bound by the loan contract to give the lender all the benefits and the lender is bound to assume all the burdens incident to ownership of the stock which is the subject of the transaction, as though the lender had retained the stock. The borrower must accordingly credit the lender with the amount of any dividends paid upon the stock while the loan continues and the lender must assume or pay to the borrower the amount of any assessments upon the stock. The lender of the stock, concurrently with the receipt of the deposit, delivers to the borrower the certificates of the stock lent, and the transaction is evidenced by a "loan ticket," to which the broker lending the stock affixes the revenue stamps here in question. The stock thus borrowed then becomes available for delivery on the short sale.

The original short sale is thus completed and there remains only the obligation of the borrowing broker, terminable on demand, either by the borrower or the lender, to return the stock borrowed on repayment to him of his cash deposit, and the obligation of the lender to repay the deposit, with interest as agreed. The stock for this purpose, if not provided by the customer, must be obtained by borrowing stock of like kind and amount from other brokers, or by purchasing the stock in the open market and charging the customer for whose account the sale was originally made, with the purchase price. In that case the short sale transaction and the borrowing

transaction as well are brought to their conclusion by the actual purchase of stock of which the customer was short at the time when the sale was made and the delivery of the stock, thus purchased, to the lender.* The return transaction in every case is evidenced by a "borrowed stock return ticket" to which the borrowing broker affixes the revenue stamps. The claim of the appellants comprises the cost of stamps purchased by them and affixed to loan tickets or to borrowed stock return tickets pursuant to Treasury regulations.

It will be observed that the completed short sale transaction usually involves four separate steps in each of which there is either a sale or a complete transfer of all the legal elements of ownership. These are (1) the sale of the stock by the person effecting the short sale, followed by the transfer and delivery of the certificates for the borrowed stock to the purchaser's broker; (2) the transfer of the shares from the lender to the borrower, who uses them for delivery on the customer's short sale; (3) the purchase by the borrowing broker of the stock required to repay the loan; and (4) the transfer and delivery by the borrower to the lender of the certificates for the purchased shares to replace the shares borrowed. Each transfer may be accompanied by a physical delivery of certificates of the stock transferred; but the intermediate deliveries in (2) and (3) are usually eliminated by use of the Stock Exchange Clearing House.

It is conceded that the first and third transactions are taxable as "sales" or "agreements to sell" within the

* In practice on the New York Stock Exchange, deliveries on sales and on stock loaned and returned, evidenced by loan tickets and borrowed stock returned tickets, are usually cleared on balance through the Stock Exchange Clearing House, so that the certificates pass directly from the lender to the purchaser on the short sale when stock is borrowed, and from the seller to the lender when borrowed stock is returned.

meaning of the statute; but it is contended that the second and fourth are not subject to the tax, because they involve neither a transfer of the legal title to the stock loaned and returned, nor "deliveries" of the shares or certificates representing them within the meaning of the Acts of 1917 and 1918, and that taking into account the history and purposes of the two statutes, it was not intended to include these transactions among the taxable transfers described.

On the argument it was also earnestly urged that the lender of stock is in a position analogous to that of a pledgor of the stock which he lends; that in consequence there is no transfer of title to the stock within the meaning of the taxing provisions of the two acts, and that in any event the lender is in the position of a borrower of money and the transaction falls within the proviso of the acts exempting from the tax, deposits of stock certificates as collateral security for money loaned.

These arguments ignore the essential legal characteristics of the loan transaction. It may be agreed for the purpose of this discussion, as was argued at the bar, that it is the law of many jurisdictions, including New York, where these transactions occurred, that the relation of the customer and the broker with whom the customer deposits stock as security for advances, or who purchases securities for account of the customer, is technically that of pledgor and pledgee, with authority and power on the part of the broker to repledge to the extent of his advances. See *Richardson* v. *Shaw,* 209 U. S. 365, 374; *Gorman* v. *Littlefield,* 229 U. S. 19; *Duel* v. *Hollins,* 241 U. S. 523; *Skiff* v. *Stoddard,* 63 Conn. 198; *Markham* v. *Jaudon,* 41 N. Y. 235; *Lawrence* v. *Maxwell,* 53 N. Y. 19; *Taussig* v. *Hart,* 58 N. Y. 425; *Caswell* v. *Putnam,* 120 N. Y. 153. But that view of their legal relationship finds support in the agreement between the customer and the broker which contemplates, as the law requires, that the

broker should at all times have on hand specific securities for delivery to the customer on payment of the amount of the broker's advances for the customer's account. Although the broker has an implied authority to substitute other securities of the same kind and amount for the securities which he holds for his customer, and to repledge them to the extent of his advances, courts have not dispensed with the requirement that he should at least have, either in his own possession or lodged with his bank on the repledge, specific securities of the kind and amount purchased for his customer, available for delivery to the customer on payment of the balance due. *Richardson* v. *Shaw, supra; Skiff* v. *Stoddard, supra; Taussig* v. *Hart, supra; Lawrence* v. *Maxwell, supra; Caswell* v. *Putnam, supra;* see *Carlisle* v. *Norris,* 215 N. Y. 400. For breach of this duty he is liable, under the law of New York, for conversion (*Markham* v. *Jaudon, supra; Lawrence* v. *Maxwell, supra; Taussig* v. *Hart, supra; Mayer* v. *Monzo,* 221 N. Y. 442) and guilty of a criminal offense. N. Y. Penal Law, § 956.

But the borrower of stock holds nothing for account of the lender. The procedure adopted and the obligations incurred in effecting a loan of stock and its delivery upon a short sale neither contemplate nor admit of the retention by either the borrower or the lender of any of the incidents of ownership in the stock loaned. The seller, having contracted to sell securities which he does not own, is under the necessity of acquiring dominion over stock of the kind and amount which he has sold, with unrestricted power of disposition of it in order that he may fulfill his contract. Whether his broker acquires the stock by purchase or by giving to the lender of it the market value of the stock plus his personal obligation to acquire and return to the lender, on demand, a like kind and amount of stock, the legal effect of the transfer is the same. Upon the physical delivery of the certificates of

stock by the lender, with the full recognition of the right and authority of the borrower to appropriate them to his short sale contract, and their receipt by the purchaser, all the incidents of ownership in the stock pass to him.

When the transaction is thus completed, neither the lender nor the borrower retains any interest in the stock which is the subject matter of the transaction and which has passed to and become the property of the purchaser. Neither the borrower nor the lender has the status of a stockholder of the corporation whose stock was dealt in, nor any legal relationship to it. Unlike the pledgee of stock who must have specific stock available for the pledgor on payment of his loan, the borrower of stock has no interest in the stock nor the right to demand it from any other. For that reason he can be neither a pledgee, trustee nor bailee for the lender, and he is not one "with whom stock has been deposited as collateral security for money loaned." For the incidents of ownership, the lender has substituted the personal obligation, wholly contractual, of the borrower to restore him, on demand, to the economic position in which he would have been, as owner of the stock, had the loan transaction not been entered into.

When the borrower returns the borrowed stock, he acquires it by purchase or by borrowing again and in the process acquires and transfers to the lender all the incidents of legal ownership in securities which neither possessed before.

We therefore conclude that both the loan of stock and the return of borrowed stock involve "transfers of legal title to shares of stock" within the express terms of the statute; and while we are not called upon to define or enumerate the precise conditions which must attend the delivery of a certificate of stock, under other circumstances, to bring it within the taxing provisions of the Act, we think it clear that deliveries of indorsed cer-

tificates of stock, incidental to these transfers of legal title, are "deliveries of . . . shares or certificates of stock" within the language of the statute.

It follows that the borrowing of stock and the return of borrowed stock are both subject to the tax unless there is to be found in the legislation now under consideration or in its history, a purpose sufficiently definite and controlling to exclude the transactions in question from the operation of its applicable language.

In earlier revenue legislation, the Act of 1898 (30 Stat. 448, 458) and the Act of 1914 (38 Stat. 745, 759), a stamp tax was imposed on "all sales or agreements to sell or memoranda of sales or deliveries or transfers of shares or certificates of stock." No attempt appears to have been made under these statutes to impose a tax on loans of stock or returns of borrowed stock. In March, 1915, the Commissioner of Internal Revenue, in response to an inquiry which incorrectly stated that the transfer involved in borrowing and returning borrowed stock "does not represent a change of ownership," made a decision (T. D. 2182) that such transactions were not subject to the tax under the Act of 1914. Neither of these acts contains the words "or transfers of legal title to shares or certificates" which, as we have indicated, are of significance in the Acts of 1917 and 1918 because precisely applicable to the transfers under consideration.

The Act of 1917 became a law on October 3, 1917. On March 23, 1918, the Attorney General rendered an opinion (31 Op. 255) that the transfers of stock involved in loans of stock and returns of borrowed stock were subject to the tax under the Act. This opinion was adopted by the Treasury Department in its ruling of March 30, 1918. T. D. 2685. When the bill which became the Revenue Act of 1918 was pending, the attention of the Senate Committee on Finance was directed to the opinion of the Attorney General and the ruling of the Treasury Depart-

ment, and it was urged in public hearing (Sept. 11, 1918,) to amend the bill so as to include "mere loans of stock or the returns thereof" within the proviso exempting from the tax, deposits of certificates of stock as collateral security. The recommended change was not adopted. The provision of the Act of 1917 was re-enacted without substantial change and continued on the statute books until the adoption of the Revenue Act of November 23, 1921, (c. 136, 42 Stat. 227), when the proposed change was incorporated in it (Title XI, Schedule A, par. 3, 42 Stat. 304).

We can find in this history no substantial basis for the contention that there was a legislative adoption of any settled administrative construction of the statute adverse to the position now taken by the Government. On the contrary, the enactment of the Revenue Act of 1918 without material change of the provision in question must, we think, be taken as indicating a purpose to continue in force the existing law as interpreted by the Attorney General (*United States* v. *G. Falk & Bro.*, 204 U. S. 143); and when Congress adopted in the amended law of 1921 the very suggestion made and rejected two years before, it then intended to effect a change in the law as it had previously existed. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602.

Nor are we able to find in the statute any expression of a general purpose to exclude from the application of its express language the type of transactions now under consideration. It evidenced a purpose not only to tax all sales or agreements to sell which had been previously taxed, but to extend the taxing provision to all transfers of legal title to shares or certificates whether technical sales or not. It was not suggested at the argument that other forms of transfer, not sales and not expressly excepted from the operation of the Act by this proviso, such as gifts or transfers in trust for the benefit of the trans-

ferror, were not subject to the tax; and the Department has consistently ruled that they were. See T. D. Regulations 40.

As already indicated, the borrowing of stock and the returning of borrowed stock do not fall within the description of those classes of transactions expressly exempted from the tax. Nor do they so resemble them in a popular and non-technical sense as to warrant their inclusion among the exceptions. Even in a loose and colloquial sense it cannot be said that the loan of stock is a "deposit of stock certificates as collateral security for money loaned thereon." We therefore conclude that while there is no indication of a purpose to impose a discriminatory tax upon short sales or transactions necessarily involved in short sales, there was a general purpose to tax all transfers of legal ownership of shares of stock which includes those made necessary in order to complete a short sale. It follows that they are subject to the tax imposed upon the class of transactions in which they are included.

Judgment affirmed.

INDEPENDENT WIRELESS TELEGRAPH COMPANY *v.* RADIO CORPORATION OF AMERICA.

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

No. 87. Argued October 23, 1925.—Decided January 11, 1926.

1. A suit by an exclusive licensee under a patent to protect his rights against infringement by a stranger, without joining the patent-owner as plaintiff, does not arise under the patent laws (Rev. Stats. § 4921) but is based merely on contract rights, and is not maintainable in the federal court in the absence of diversity of citizenship. P. 466.
2. An exclusive licensee may bring suit under Rev. Stats. § 4921 by joining the patent-owner as a co-plaintiff, when the latter is out of the jurisdiction and declines to join, and when such suit is

necessary to protect the rights of the licensee against an infringer, so that a failure of justice might result if such joinder were not allowed. Pp. 467, 472.

3. This is analogous to the right of the licensee to bring an action on the case for damages in the patent owner's name, under Rev. Stats. § 4919, which is *in pari materia* with § 4921. Pp. 464, 472.
4. A patent-owner is under an equitable obligation to allow the use of his name and title to protect lawful exclusive licensees against infringers. P. 473.
5. A patent-owner can not thus be made a co-plaintiff in equity without having first been requested to become such voluntarily. P. 473.
6. When a patent-owner, though requested, declines to permit the use of his name in a proper case by an exclusive licensee in a suit against an infringer, but is nevertheless joined as co-plaintiff and duly notified of the suit, he will be bound by the decree. P. 474.

297 Fed. 521, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing on motion the bill in a suit to enjoin infringement of a patent, and for an accounting of profits and for damages. See 297 Fed. 518.

Mr. William H. Davis, for petitioner.

Mr. John W. Davis, with whom *Mr. James J. Cosgrove* was on the brief, for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Radio Corporation, a corporation of Delaware, filed a bill in equity in the Southern District of New York, joining with itself the De Forest Radio Telephone & Telegraph Company, also of Delaware, as co-plaintiff, against the Independent Wireless Telegraph Company, of Delaware, and the American Telephone & Telegraph Company, of New York. The case made in the bill was this:

Lee De Forest invented and received patents Nos. 841387 and 879532, dated in 1908 and 1909, for devices for amplifying feeble electric currents and certain new and useful improvements in space telegraphy. After giving limited licenses to the American Telephone & Telegraph Company, he assigned the patents to the De Forest Radio Telephone and Telegraph Company. On March 16, 1917, the De Forest Company, by writing duly recorded, gave an exclusive license to make, use and sell the devices for the life of the patents to the Western Electric Company, reserving to itself non-exclusive, non-transferable and personal rights to make, use and sell them for defined purposes. The Western Electric Company then assigned all that it thus received from the De Forest Company to the American Telephone and Telegraph Company. The American Telephone and Telegraph Company, on July 1, 1920, made a contract with the General Electric Company, by which they exchanged rights in various patents owned or controlled by each, including these rights in the De Forest patents. Some seven months prior, on November 20, 1919, the General Electric Company had granted to the Radio Corporation, the plaintiff, an exclusive license to use and sell for "radio purposes," i. e., "for transmission or reception of communication by what are known as electric magnetic waves except by wire," all inventions owned by the General Electric Company or thereafter acquired by it. The American Telephone and Telegraph Company subsequently confirmed in the Radio Corporation these after-acquired rights in the De Forest patents. Thus there came from the De Forest Company to the Radio Corporation, exclusive rights to use and sell in the United States, for radio purposes, apparatus for transmission of messages, and especially for use between ship and shore for pay.

The defendant, the Independent Wireless Company, has bought the same apparatus with the lawful right to use it in the amateur and experimental field only. The

apparatus thus bought bears a label with such a limitation on its use. The charge in the bill is that the Independent Company is using the apparatus, or the part of it called "radio tubes," in the commercial radio field between ship and shore for pay and thus is violating the Radio Corporation's rights in this field. An injunction is prayed and an accounting of profits and all damages to the plaintiffs and the American Telephone and Telegraph Company as their interests shall appear.

The twenty-fifth averment of the bill is that "the plaintiff, the De Forest Radio Telephone & Telegraph Company, as hereinbefore alleged, has certain rights in the patents in suit herein; that before filing this bill of complaint, said De Forest Radio Telephone & Telegraph Company, was requested to consent to join, as a co-plaintiff, herein, but declined; that said De Forest Radio Telephone & Telegraph Company is not within the jurisdiction of the Court and therefore can not be made a defendant herein; and that therefore to prevent a failure of justice, and to enable the plaintiff Radio Corporation of America to protect its exclusive rights under the patents in suit, said De Forest Radio Telephone & Telegraph Company, is made a plaintiff herein without its consent."

After securing an order for a bill of particulars, compliance with which disclosed the various agreements referred to in the bill and facts relevant thereto, the Independent Wireless Telegraph Company, defendant, moved that the court dismiss the bill of complaint, upon the following ground:

"That the De Forest Radio Telephone & Telegraph Company, the owner of the patent in suit, has not joined in this litigation as a party plaintiff by duly signing and verifying the bill of complaint herein, and the plaintiff Radio Corporation of America is not such a licensee under the patents as to permit it to sue alone in its own name, in the name of the owner of the patents in suit, or to

sue in the name of the owner of the patents joining itself as a licensee under the patents."

The District Court sustained the motion and dismissed the bill, in the view that it was bound by decisions of this Court to hold that the De Forest Company was the owner of the patent and an indispensable party and, being out of the jurisdiction, could not be made a party defendant by service or joined as a party plaintiff against its will. 297 Fed. 518. The Circuit Court of Appeals on appeal reversed the District Court, held that the De Forest Company was properly made co-plaintiff by the Radio Corporation, and remanded the case for further proceedings. 297 Fed. 521. We have brought the case here on certiorari. Section 240, Judicial Code.

The respondent in its argument to sustain the ruling of the Circuit Court of Appeals presses two points. The first is that by the contract between the De Forest Company and the Western Electric Company title to the patent was vested in the Western Electric Company and from it by assignment in the American Telephone & Telegraph Company; that the latter is a party defendant, having declined to be a plaintiff, and so satisfies the requirement of the presence in such a suit, as a party, of the owner of the patent. The difficulty the respondent meets in this suggestion is that its bill avers that what the American Telephone & Telegraph Company acquired from the De Forest Company was a license, so called in the contract creating it, and the making of the De Forest Company a party plaintiff to the bill was necessarily on the theory that it, and not the American Telephone and Telegraph Company, is the owner of the patent. The contracts between the corporations involved in the transfer of rights under the patent are long and complicated and in order to be fully understood require some knowledge of the new radio field. The Court is loath to depart, if it could, from the theory on which the bill was framed and both courts have acted, unless required to do so.

The question for our consideration then is, Can the Radio Company make the De Forest Company a co-plaintiff against its will under the circumstances of the case?

Section 4919, R. S., is as follows:

"Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."

In *Goodyear* v. *Bishop,* 10 Fed. Cases, 642, Case No. 5558, a suit for damages for infringement had been brought in the name of the patentee by a licensee under the 14th section of the Patent Act of 1836, c. 357, 5 Stat. 357, which contained language similar to § 4919. The defendant moved with the consent of the patentee to discontinue the suit. It was contended that, as the patentee had stipulated with the licensee to sue infringers, his remedy was on the covenant. Mr. Justice Nelson at the Circuit denied the motion. He said that a suit at law to protect the patent right was properly brought in the name of the patentee, that the license was sufficient to give the protection sought, and that the covenant by the patentee did not take from the licensee the remedy by use of the patentee's name to proceed directly against the wrongdoer. The same ruling was made in *Goodyear* v. *McBurney,* 10 Fed. Case 699, Case No. 5574.

These cases were decided in 1860 by a Justice of this Court, and no case is cited to us questioning their authority. Indeed the cases have been since referred to a number of times with approval by distinguished patent judges.

Mr. Justice Blatchford, while Circuit Judge, in *Nelson* v. *McMann,* 17 Fed. Cases, 1325, 1329, Case No. 10109; Mr. Justice Gray, while Chief Justice of the Supreme Judicial Court of Massachusetts, in *Jackson* v. *Allen,* 120 Mass. 64, 77; Judge Lowell in *Wilson* v. *Chickering,* 14 Fed. 917, 918; Judge Shipman in *Brush Swan Company* v. *Thompson Company,* 48 Fed. 224, 226. The terms "action on the case" and the phrase "in the name of the party in interest, either as patentee, assignee or grantee" in § 4919 were evidently construed to constitute a remedy at law like the suit at common law on a chose in action in the name of the assignor in which the assignment gave the assignee the right as attorney of the assignor to use the latter's name. Lectures on Legal History, Ames, 213. See also *Eastman* v. *Wright,* 6 Pick. 312, 316; *Pickford* v. *Ewington,* 4 Dowling P. C. 458; *McKinney* v. *Alvis,* 14 Ill. 33.

But § 4919 applied by its terms only to actions on the case at law to which the licensee was not a necessary and hardly a proper party. This is a bill in equity. The remedy for violation of an exclusive licensee's interest in equity under the patent laws is found in § 4921, R. S., which is as follows:

"The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages

found by verdicts in actions in the nature of actions of trespass upon the case." *

There is no express authority given to the licensee to use the name of the patent-owner in equity as we have seen that he can under § 4919 in suits at law. The presence of the patentee or his assignee in the equity suit however, it has been held, is just as essential to obtaining an injunction or an accounting of profits or damages under the patent laws as it is in an action on the case for damages at law. Indeed both the owner and the exclusive licensee are generally necessary parties in the action in equity. *Waterman* v. *Mackenzie,* 138 U. S. 252; *Littlefield* v. *Perry,* 21 Wall. 205, 223; *Paper Bag Cases,* 105 U. S. 766; *Birdsell* v. *Shaliol,* 112 U. S. 485, 486.

It is urged on behalf of the respondent that in equity the real party in interest, the exclusive licensee whose contract rights are being trespassed upon by the infringer, should be able without the presence of the owner of the patent to obtain an injunction and damages directly against the infringer. We recognize that there is a tendency in courts of equity to enjoin the violation of contract rights which are invaded by strangers in a direct action by the party injured, instead of compelling a roundabout resort to a remedy through the covenant, express or implied, of the other contracting party. But such a short cut, however desirable, is not possible in a case like this. A suit without the owner of the patent as a plaintiff if maintainable would not be a suit under § 4921 of the Revised Statutes but only an action in equity based on the contract rights of the licensee under the license and a

* Section 4921 was amended by Act of Mar. 3, 1897, 29 St. 694, c. 391, § 6, adding a six years' limitation on actions under it, and by Act of Feb. 18, 1922, 42 St. 392, c. 58, § 8, allowing expert evidence as to damages and requiring notice of litigation to Commissioner of Patents for record by endorsement on file wrapper of patents involved. The amendments do not affect the question here.

stranger's violation of them. There would be no jurisdiction in courts of the United States to entertain it unless by reason of diverse citizenship of the parties, which does not exist in this case. *Hill* v. *Whitcomb*, 12 Fed. Cases, 182, 185, Case No. 6502; *Wilson* v. *Sandford*, 10 How. 99, 101; *Albright* v. *Teas*, 106 U. S. 613, and cases cited.

What remedies then can equity afford in a case like this? *Waterman* v. *Mackenzie*, 138 U. S. 252, involved the question whether a grant from the owner of the patent of the exclusive right to make and sell but not to use was an assignment under the statute entitling the grantee in his own name to sue an infringer in equity, and it was held that it was not. Mr. Justice Gray, speaking for the Court, at page 255 said:

"In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. Stat. § 4921. *Littlefield* v. *Perry*, 21 Wall. 205, 223; *Paper Bag Cases*, 105 U. S. 766, 771; *Birdsell* v. *Shaliol*, 112 U. S. 485–487. And see *Renard* v. *Levinstein*, 2 Hem. & Mil. 628."

Littlefield v. *Perry*, 21 Wallace 205, was a suit for infringement by one to whom was granted an exclusive right to make, use, and vend by the patent owner. The Court held that it was an assignment under the statute, but further held that, even if it were only an exclusive license, the suit might be maintained under the patent laws, because the patentee who had been privy to the alleged

infringement had been made a party defendant with the infringer. This Court said at page 223:

"A mere licensee can not sue strangers who infringe. In such case redress is obtained through or in the name of the patentee or his assignee. Here, however, the patentee is the infringer, and as he can not sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name. A court of equity looks to substance rather than form. When it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer. He held the legal title to his patent in trust for his licensees. He has been faithless to his trust, and courts of equity are always open for the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction."

The presence of the owner of the patent as a party is indispensable not only to give jurisdiction under the patent laws but also, in most cases, to enable the alleged infringer to respond in one action to all claims of infringement for his act, and thus either to defeat all claims in the one action, or by satisfying one adverse decree to bar all subsequent actions.

If the owner of a patent, being within the jurisdiction, refuses or is unable to join an exclusive licensee as co-plaintiff, the licensee may make him a party defendant by process and he will be lined up by the court in the party character which he should assume. This is the necessary effect of the decision in *Littlefield* v. *Perry, supra.* See also *Brammer* v. *Jones,* 4 Fed. Cases 11, Case No. 1806; *Gamewell Telegraph Company* v. *Brooklyn,* 14 Fed. 255; *Waterman* v. *Shipman,* 55 Fed. 982, 986; *Libbey Glass Company* v. *McKee Glass Company,* 216

Fed. 172; affirmed 220 Fed. 672; *Hurd* v. *Goold,* 203 Fed. 998. This would seem to be in accord with general equity practice. *Waldo* v. *Waldo,* 52 Mich. 91, 94. A *cestui que trust* may make an unwilling trustee a defendant in a suit to protect the subject of the trust. *Porter* v. *Sabin,* 149 U. S. 473, 478; *Brun* v. *Mann,* 151 Fed. 145, 153; *Monmouth Company* v. *Means,* 151 Fed. 159, 165. *Eastman* v. *Wright,* 6 Pick. 312, 316.

It seems clear then on principle and authority that the owner of a patent who grants to another the exclusive right to make, use or vend the invention, which does not constitute a statutory assignment, holds the title to the patent in trust for such a licensee, to the extent that he must allow the use of his name as plaintiff in any action brought at the instance of the licensee in law or in equity to obtain damages for the injury to his exclusive right by an infringer or to enjoin infringement of it. Such exclusive licenses frequently contain express covenants by the patent-owner and licensor to sue infringers that expressly cast upon the former the affirmative duty of initiating and bearing the expense of the litigation. But without such express covenants, the implied obligation of the licensor to allow the use of his name is indispensable to the enjoyment by the licensee of the monopoly which by personal contract the licensor has given. Inconvenience and possibly embarrassing adjudication in respect of the validity of the licensor's patent rights, as the result of suits begun in aid of the licensee, are only the equitable and inevitable sequence of the licensor's contract, whether express or implied.

But suppose the patentee and licensor is hostile and is out of the jurisdiction where suit for infringement must be brought, what remedy is open to the exclusive licensee? The matter has been given attention by courts dealing with patent cases. In *Wilson* v. *Chickering, supra,* at p. 218, an exclusive licensee brought a bill in equity to

enjoin infringement without joining the owner of the patent. A demurrer was sustained with thirty days to amend. Judge Lowell, after saying that a mere licensee can not generally sue in equity without joining the patentee, said:

"I do not, however, intend to be understood that plaintiff will be without remedy if he can not find the patentee, or if the latter is hostile. The statute does not abridge the power of a court of equity to do justice to the parties before it if others who can not be found are not absolutely necessary parties, as in this case the patentee is not. At law the plaintiff could use the name of a patentee in an action and perhaps he may have the right in equity under some circumstances. The bill gives no explanation of his absence; but it was said in argument that he is both out of the jurisdiction and hostile. If so, no doubt there are methods known to a court of equity by which the suit may proceed for the benefit of the only person who is entitled to damages."

In *Renard* v. *Levinstein,* 2 Hem. & Mil. 628, before Vice Chancellor Page Wood, afterwards Lord Hatherly, an exclusive licensee brought suit to enjoin infringement by a stranger and made the patentees who were a foreign firm co-plaintiffs. There was no objection to this action. No specific authority for this appeared, but it seems to have been implied from the relation of the exclusive licensee and the owner of the patent. It has some significance here in the fact that it was apparently referred to by Mr. Justice Gray, in *Waterman* v. *Mackenzie, supra,* as indicating what could be done in an English court of equity to enable the licensee to secure protection in the name of the owner of the patent.

In the case of *Brush Swan Electric Company* v. *Thompson & Houston,* 48 Fed. 224, the Brush Swan Company in Connecticut sued the Thompson-Houston Company in equity for infringing the former's rights as an exclusive

licensee for the sale of a device made under a patent owned by the Brush Electric Company of Cleveland, Ohio. The Brush-Swan Company made the Brush Electric Company a co-plaintiff. The Cleveland company appeared for the purpose of asking that its name be stricken out as a party complainant, because the bill had been filed without its consent. The motion to strike out the co-plaintiff's name was denied by Judge Shipman, on the ground that, as the patent-owner, being without the jurisdiction, could not be served with process, there would otherwise be absolute failure of justice. The Judge said that *prima facie* there was an implied power in the exclusive licensee under such circumstances to make the patent-owner a party plaintiff. The same conclusion was approved by the Ninth Circuit Court of Appeals in *Brush Electric Company* v. *California Electric Company,* 52 Fed. 945, before McKenna and Gilbert, Circuit Judges, and Knowles, the District Judge, affirming the same case in 49 Fed. Rep. 73, and by the same court in *Excelsior Company* v. *Allen,* 104 Fed. 553, and in *Excelsior Company* v. *The City of Seattle,* 117 Fed. 140, 143, 144. In *Hurd* v. *Goold Co.,* 203 Fed. 998, before the Circuit Court of Appeals of the Second Circuit (Lacombe, Coxe and Noyes, Judges), Hurd, who was the exclusive licensee, joined with himself two corporations who held the legal title to the patent. The corporations had been enjoined in the Sixth Circuit from maintaining suits for infringement. The Second Circuit Court held that Hurd was entitled to present his licensors,—that is, the owners of the patent,—as co-plaintiffs, even against their will and in spite of their protests. This doctrine was approved by the same court in *Radio Corporation* v. *Emerson,* 296 Fed. 51, 54. See also *McKee Glass Co.* v. *Libbey Glass Co.,* 220 Fed. 672 (3rd C. C. A.), affirming same, 216 Fed. 172; *Chisholm* v. *Johnson,* 106 Fed. 191, 212; *Owatonna Mfg. Co.* v. *Fargo,* 94 Fed. 519, 520.

It is objected to the relevancy of these authorities that not one of them actually presents the case here. In all of them it is said the owner or patentee was within the jurisdiction of the court and could be served, or else had come into the jurisdiction voluntarily to move for leave to withdraw as a party. As the court had the owner before it, and the owner was in duty bound to become a party, the court could prevent the withdrawal. Here the owner is not in the jurisdiction and does not come in. It is the defendant, the alleged infringer, which objects to using the name of the owner as plaintiff without its consent.

We think the cases cited go beyond the defendant's interpretation of them and do hold that, if there is no other way of securing justice to the exclusive licensee, the latter may make the owner without the jurisdiction a co-plaintiff without his consent in the bill against the infringer. Equity will not suffer a wrong without a remedy. 1 Pomeroy's Equity Jurisprudence, 4th Ed., §§ 423, 424. While this maxim is of course not of universal application, it justifies the short step needed to hold that, in an equity suit under § 4921, where otherwise justice to the exclusive licensee would fail, he may make the owner of the patent a co-plaintiff in his bill under § 4921, in analogy to the remedy given him in an action on the case at law for damages under § 4919, for the two sections are plainly *in pari materia*.

In so doing, equity does no more than courts of law did, at one period in their history, as we have seen, in implying in the assignee of a chose in action, a power of attorney to maintain an action in the name of the assignor in order to assure to the assignee the benefits of his assignment. Where the assignor attempted to interfere with the exercise of the power of attorney by collection of the assignee's claim, or where for any technical reason the remedy through the exercise of implied power of attorney

was unavailable, equity intervened to lend its aid to the assignee and secure a recovery for his benefit. See *Lenox* v. *Roberts,* 2 Wheat. 373; *Hammond* v. *Messenger,* 9 Sim. 327; *Roberts* v. *Lloyd,* 1 DeG. & J. 208; *Hodge* v. *Cole,* 140 Mass. 116; *Hughes* v. *Nelson,* 29 N. J. Eq. 547; *Hayes* v. *Hayes,* 45 N. J. Eq. 461.

The objection by the defendant that the name of the owner of the patent is used as a plaintiff in this suit without authority is met by the obligation the owner is under to allow the use of his name and title to protect all lawful exclusive licensees and sub-licensees against infringers, and by the application of the maxim that equity regards that as done which ought to be done. *Camp* v. *Boyd,* 229 U. S. 530, 559; *United States* v. *Colorado Anthracite Company,* 225 U. S. 219, 223; *Craig* v. *Leslie,* 3 Wheat. 563, 578. The court should on these grounds refuse to strike out the name of the owner as co-plaintiff put in the bill under proper averment by the exclusive licensee.

The owner beyond the reach of process may be made co-plaintiff by the licensee, but not until after he has been requested to become such voluntarily. If he declines to take any part in the case, though he knows of its imminent pendency and of his obligation to join, he will be bound by the decree which follows. We think this result follows from the general principles of *res judicata.* In *American Bell Telephone Company* v. *National Telephone Company,* 27 Fed. 663, heard before Judges Pardee and Billings, the question was whether the National Telephone Company was bound by a decree in favor of the Bell Company for infringement against a Pittsburgh Company claiming under a license from the National Company. The National Company under a contract upon notice to defend its license took control of the case but, becoming dissatisfied with a preliminary ruling of the court, withdrew its counsel and evidence from the case. The National Company was held bound on the authority

of the case of *Robbins* v. *Chicago,* 4 Wall. 657. When Robbins was building a store in Chicago by an independent contractor, an area-way adjoining the street was left open. A passer-by fell in and was injured. He sued the city and recovered judgment for $15,000. Robbins had been previously warned by the city of the danger of the unprotected area and had notice of the accident and of the pendency of the suit but did not become a party. The city then sued Robbins and was given a judgment against him for the amount of the recovery against the city. This Court in sustaining the result held that parties bound by the judgment in such a case included all who were directly interested in the subject matter who had knowledge of the pendency of the suit and a right to take part therein, even if they refused or neglected to appear and avail themselves of this right. *Lovejoy* v. *Murray,* 3 Wall. 1, 19; *Plumb* v. *Goodnow,* 123 U. S. 560; *Robertson* v. *Hill,* 20 Fed. Cases, 944, Case No. 11925; *Miller* v. *Liggett,* 7 Fed. 91.

By a request to the patent-owner to join as co-plaintiff, by notice of the suit after refusal and the making of the owner a co-plaintiff, he is given a full opportunity by taking part in the cause to protect himself against any abuse of the use of his name as plaintiff, while on the other hand the defendant charged with infringement will secure a decree saving him from multiplicity of suits for infringement. Of course, a decree in such a case would constitute an estoppel of record against the patent-owner, if challenged, only after evidence of the exclusive license, the request to join as co-plaintiff and the notice of the suit.

There is nothing in the case of *Crown Company* v. *The Nye Tool Works,* 261 U. S. 24, which conflicts with this conclusion. That case was brought by the plaintiff, a licensee, to establish as a principle of patent practice that a transfer by an owner of a patent to another, conferring only the right to sue a third for past and future infringe-

ments of the patent, without the right to make, use and vend the patented article, was an assignment of the patent under § 4898 R. S. We declined so to hold. There was no offer to make the owner of the patent a party, nor were there any facts showing that the owner would not join as co-plaintiff or was not in the jurisdiction. The appellant stood solely upon his right to sue as an assignee of the patent and was defeated.

We hold that the De Forest Company was properly joined as a co-plaintiff by the Radio Corporation upon the 25th averment of the bill. This makes it unnecessary for us to consider the argument on behalf of the appellee that the American Telephone and Telegraph Company was the owner of the patent instead of the De Forest Company.

Decree affirmed.

TRUSLER *v.* CROOKS, AS COLLECTOR AND INDIVIDUALLY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 188. Argued November 17, 1925.—Decided January 11, 1926.

Section 3 of the "Future Trading Act," purporting to impose a tax of 20 cents per bushel upon all privileges or options for contracts of purchase or sale of grain, known to the trade as 'privileges,' 'bids,' 'offers,' 'puts and calls,' 'indemnities,' or 'ups and downs,' is unconstitutional. Its purpose is not to raise revenue but to inhibit, by a penalty, the transactions referred to, as part of the plan set up by the Act for regulating grain exchanges under guise of the federal taxing power, which was adjudged unconstitutional in *Hill* v. *Wallace*, 259 U. S. 44. P. 479.

300 Fed. 996, reversed.

ERROR to a judgment of the District Court for the defendant in an action brought to recover money paid under protest as a stamp tax.

Mr. E. R. Morrison for plaintiff in error.

The contracts referred to in § 3 do not constitute interstate commerce, and this is shown both from the agreed statement of facts and from the previous decisions of this Court dealing with subjects related to future trading in grain and cotton.

This section is not a taxing act, but is a regulation of intrastate commerce.

(A) This is shown from the title of the act as a whole, which recites that it is for the regulation of boards of trade.

(B) The report of the Committee on Agriculture in submitting this bill to the House, states that it will absolutely wipe out of existence these contracts, and this Court can resort to these congressional records to determine the purpose of this section.

(C) The exhorbitant character of the tax, considered in connection with the other evidences of the purpose of Congress, clearly shows the purpose was to destroy and not to tax, and that the section imposes nothing but a penalty.

(D) Aside from all other questions in the case, the fact alone that the purported tax amounts to 200 times the value of the contract which is the subject of the tax, in and of itself is sufficient to indicate that the purpose of Congress in enacting this section was to destroy contracts of this character, and to show that this section has no real relation to the taxing power of the Federal Government.

(E) Section 11 of the act, which provides that any provision shall be held valid, nothwithstanding any other provisions are held invalid, cannot change or alter the purpose of this section, inasmuch as the question to be determined here is not whether the section should be considered as complete when standing alone, but whether it was passed with the purpose of prohibiting the making of these contracts.

Solicitor General Mitchell and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, were on the brief, for the defendant in error.

While this Court has decided that § 4 and interwoven regulations of the Future Trading Act are unconstitutional, it has expressly said that that decision does not apply to the section involved in the present case. In *Hill* v. *Wallace,* 259 U. S. 44, the Court was able to see on the face of the act a purpose to enact by means of a tax law detailed regulation of business activities which were not within the control of Congress. *Child Labor Tax Case,* 259 U. S. 20. The act contains a saving clause which furnishes assurance that courts may properly sustain separate portions of the act even though other portions should be shown to be invalid.

The tax imposed in § 3 was imposed absolutely upon all transactions of a designated character. As the Court said, it does not seem to be associated with the tax which § 4 imposed conditionally upon sales by those who were neither owners of grain nor similarly situated. The condition was compliance with an elaborate system of regulations. It was the effort to enforce those regulations through the alternative of a heavy tax which rendered the tax unconstitutional. The tax imposed in § 3 is not tied up with any collateral regulations whatever. The reasons which led the Court to declare other portions of the act unconstitutional do not apply to § 3.

There is nothing in the Future Trading Act which shows that Congress enacted § 3 for any other purpose than to raise revenue. But even if it were clearly established that Congress intended that the tax should be destructive, that fact would not render the tax unconstitutional. It is clear that Congress did not enact § 3, as it did § 4, as a step in the detailed regulation of business activities which are not within the control of Congress. So far as appears in the act the tax imposed

in § 3 is just such a tax as this Court has sustained repeatedly. It appears to be of the same nature as the taxes on sales at exchanges or boards of trade which were sustained in *Nichol* v. *Ames,* 173 U. S. 509, and in *Thomas* v. *United States,* 192 U. S. 363, and on agreements to sell shares of stock, otherwise known as "calls," which were sustained in *Treat* v. *White,* 181 U. S. 264. Where there is a lawful power to impose a tax its imposition may not be treated as without the power because of the destructive effect of the exertion of the authority. *Austin* v. *The Aldermen,* 7 Wall. 694; *McCray* v. *United States,* 195 U. S. 56; *Knowlton* v. *Moore,* 178 U. S. 41; *License Tax Cases,* 5 Wall. 462; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Spencer* v. *Merchant,* 125 U. S. 345; *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *United States* v. *Doremus,* 249 U. S. 86; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44.

If Congress has power to regulate directly it has power to regulate through the imposition of a tax, not merely by a tax which regulates incidentally but by a tax which is unquestionably imposed primarily for the purpose of regulating. This case does not involve the question whether a tax imposed with that end clearly in view may be enforced in any other way than that which is usual in the collection of taxes. Protective tariffs are, however, enforced in precisely the same manner as a tariff for revenue only would be made effective.

It seems appropriate for the law officers of the United States, without regard to individual conviction, to submit the case for the usual consideration by the Court, and, since the arguments against the validity of the statute are adequately presented by the plaintiff in error, to file a brief in support of the statute. Our duty to sustain and enforce the acts of Congress does not outweigh the obligation to support and defend the Constitution, and

we feel under no obligation to conceal our opinion that in this case Congress under the guise of a revenue measure which can not produce a dollar of revenue (except that paid to make a test case) has attempted to completely prohibit transactions which it has no power under the Constitution to deal with.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Plaintiff in error seeks to recover two hundred dollars paid for internal revenue stamps which, after due protest, he affixed to a written "privilege or option for a contract for the sale of grain in the form commonly known as an indemnity," as required by § 3, "The Future Trading Act," approved August 24, 1921, c. 86, 42 Stat. 187. If, as he insists, that section is beyond congressional power and therefore invalid, he must prevail; otherwise the judgment below must be affirmed.

That statute is entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes."

Section 2 declares that the term "'contract of sale' shall be held to include sales, agreements of sale, and agreements to sell;" the word "'grain' shall . . . mean wheat, corn, oats, barley, rye, flax, and sorghum;" the words "'board of trade' shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment."

Section 3. "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or

option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as 'privileges,' 'bids,' 'offers,' 'puts and calls,' 'indemnities,' or 'ups and downs.'"

Sections 4 to 10 impose a charge of 20 cents per bushel upon all grain involved in sale contracts for future delivery, with two exceptions. But, as declared by *Hill* v. *Wallace,* 259 U. S. 44, 66, their real purpose was to regulate "the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General."

Section 11. "That if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Sections 4 to 10 were challenged in *Hill* v. *Wallace,* decided upon demurrer to the bill, and we held: "The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

We there said: "There are sections of the act to which under § 11 the reasons for our conclusion as to § 4 and the interwoven regulations do not apply. . . . Section 3, too, would not seem to be affected by our conclusion. . . . This is the imposition of an excise tax upon certain transactions of a unilateral character in grain markets which approximate gambling or offer full opportunity for it and does not seem to be associated with § 4. Such a tax without more would seem to be within the

congressional power. . . . But these are questions which are not before us and upon which we wish to express no definite opinion." Of course, the quoted statement concerning § 3 was intended to preclude any possible inference that we had passed upon a matter not directly in issue and to indicate that it remained open for discussion.

The present cause was tried upon an agreed statement of facts and it appears—

That at Emporia, Kans., October 23, 1923, plaintiff in error, a member of the Chicago Board of Trade, in consideration of one dollar, signed and delivered the following privilege or option, in the form commonly known as an "indemnity," addressed to R. F. Teichgraeber, for a contract for the sale of grain: "I will sell one thousand bushels of contract grade wheat at $1.11¼ per bushel, for delivery during May, 1924, same to be delivered in regular warehouses under the rules of the Board of Trade of the City of Chicago. This offer is made subject to acceptance by you until the closing hour for regular trading on October 24, 1923." The transaction was one of those described by § 3 as "privileges, bids, offers, puts and calls, indemnities, or ups and downs."

After duly advising the Collector that he denied validity of the tax, plaintiff in error affixed to this written instrument two hundred dollars of internal revenue stamps.

For many years prior to August 24, 1921, members of grain exchanges bought and sold in large quantities agreements for contracts for purchase or sale of grain subject to acceptance within a definite time thereafter, commonly known as "indemnities." When the holder of one of these elected to exercise his rights the specified amount of grain was bought or sold on the exchange indicated for future delivery, and the agreement was thus finally consummated.

By far the larger percentage of such agreements were subject to acceptance during the following day at a price

ordinarily within one-fourth to three-fourths of a cent of the price prevailing when the market closed on day of the agreement. During many years the uniform consideration paid was one dollar per thousand bushels.

When the holder elected to exercise the option the transaction could be carried out only through and by members of exchanges open to sales for future delivery.

The stipulated facts reveal the cost, terms and use of "indemnity" contracts together with their relation to boards of trade and indicate quite plainly that § 3 was not intended to produce revenue but to prohibit all such contracts as part of the prescribed regulatory plan. The major part of this plan was condemned in *Hill* v. *Wallace,* and § 3, being a mere feature without separate purpose, must share the invalidity of the whole. *Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552, 569.

This conclusion seems inevitable when consideration is given to the title of the Act, the price usually paid for such options, the size of the prescribed tax (20 cents per bushel), the practical inhibition of all transactions within the terms of § 3, the consequent impossibility of raising any revenue thereby, and the intimate relation of that section to the unlawful scheme for regulation under guise of taxation. The imposition is a penalty, and in no proper sense a tax. *Child Labor Tax Case,* 259 U. S. 20; *Lipke* v. *Lederer,* 259 U. S. 557, 561; *Linder* v. *United States,* 268 U. S. 5.

The judgment of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

BRAMWELL, SUPERINTENDENT, *v.* UNITED STATES FIDELITY & GUARANTY COMPANY.

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

No. 192. Argued November 23, 1925.—Decided January 11, 1926.

1. Indebtedness of a bank for Indian moneys, individual and tribal, deposited with it by the Superintendent of an Indian Reservation and secured by a bond given by the bank to the United States, is an indebtedness to the United States, within Rev. Stats. § 3466. P. 487.
2. Section 3466, Rev. Stats., is to be liberally construed in favor of the United States. *Id.*
3. The Priority Act extends to all debts due the United States from insolvent living debtors when their insolvency is shown in one of the ways specified in § 3466. P. 487.
4. The specified ways include all cases in which the insolvent debtor makes a voluntary assignment of his property, without regard to the purpose or manner of the assignment, and all in which an act of bankruptcy is committed under the laws of a State or a national bankruptcy law; and the Act does not expressly require that the debtor should be divested, or that the person on whom is imposed the duty to pay the United States first, shall have become invested, with the title to the debtor's property. P. 488.
5. An act may be "an act of bankruptcy" within § 3466, although the debtor, being a bank, is excepted from the operation of the Bankruptcy Law. P. 489.
6. Construed together, §§ 3466 and 3467 mean that a debt due the United States is required first to be satisfied when possession and control of the insolvent's estate are given to any person charged with the duty of applying it to payment of the debts of the insolvent as the rights and priorities of creditors may be made to appear. P. 490.
7. Where the property and business of an Oregon bank were placed, through a resolution of its directors, in the exclusive possession and control of the State Superintendent of Banks to be administered and disposed of for the benefit of creditors pursuant to Oregon Ls. §§ 6220–6223, under which the Superintendent performs the function of assignee, receiver, or trustee for the liquidation of the debts

of the insolvent, *held* that, within the meaning of the Priority Act, there was a voluntary assignment; and also an act of bankruptcy within the definition of the Bankruptcy Law. P. 490.

8. General expressions in an opinion are to be taken in connection with the case under consideration. P. 489.

299 Fed. 705, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (295 Fed. 331) in favor of the Guaranty Company in its suit to require the Oregon Superintendent of Banks to pay first, out of the assets of an insolvent bank, a debt to the United States which had been assigned to the plaintiff.

Mr. J. P. Kavanaugh, with whom *Mr. Jay Bowerman* was on the brief, for appellant.

The bank was not insolvent within the intention of § 3466 of the Revised Statutes. *United States* v. *Hooe,* 3 Cr. 72; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; *Beaston* v. *The Farmers' Bank of Delaware,* 12 Pet. 102; *United States* v. *Oklahoma,* 261 U. S. 253; *Strain* v. *U. S. Fidelity & Guaranty Co.,* 292 Fed. 694; *United States Fidelity & Guaranty Co.* v. *Strain,* 264 U. S. 570. A debtor is not insolvent within the sense of the statute unless he has taken some action which divested him of all his property and invested title in his assignee. The authorities reduce the controversy in this suit to this single point: Whether the resolution of the board of directors placing the affairs and assets of the bank under the control of the Superintendent of Banks, takes this case out of the established rule. The only difference between this suit and *United States Fidelity & Guaranty Co.* v. *Strain* is, that there the official took possession on his own initiative, and here he did it pursuant to the resolution of the board of directors. Unless that resolution, under the laws of Oregon, divested the bank of its property and invested the Superintendent with title, there is no right of priority. The resolution did not divest the bank of its property. Gen.

Laws Oreg. 1911, c. 171; 1913, c. 357; Tit. XXXV, §§ 6221, 6222, 6223.

The laws of Oregon prescribe the manner in which an assignment for the benefit of creditors shall be made. Oregon Laws, § 10,319; Gen. Laws 1885, p. 75, § 1. That the title to the property is not conveyed to the Superintendent of Banks, by either mode of transfer of possession and control, and that it remains in the bank until it is transferred to purchasers from time to time at sales authorized by the court in the liquidation proceedings, is established conclusively by the Supreme Court of Oregon in this case and *United States Fidelity & Guaranty Co.* v. *Bramwell,* 108 Ore. 261. *United States* v. *Oklahoma,* 261 U. S. 253.

An act of bankruptcy must divest title in order to support a priority. *Beaston* v. *The Farmers' Bank of Delaware,* 12 Pet. 102; *Conard* v. *Nicoll,* 4 Pet. 291; *Prince* v. *Bartlett,* 9 Cr. 430; *United States Fidelity & Guaranty Co.* v. *Bramwell,* 108 Ore. 287; *Davis* v. *Pringle,* 268 U. S. 315.

Messrs. Roscoe C. Nelson and *C. B. Ames,* with whom *Messrs. Joseph A. McCullough, Ben C. Dey, Alfred A. Hampson,* and *George L. Buland* were on the brief, for appellee.

Mr. M. W. McKenzie submitted a brief as *amicus curiae,* by special leave of Court.

Mr. Justice Butler delivered the opinion of the Court.

January 28, 1922, the superintendent of the Klamath Indian Reservation had on deposit with the First State and Savings Bank of Klamath Falls, Oregon, $96,000, Indian moneys, individual and tribal. The bank had given a bond to the United States, with appellee as surety, to secure the payment of the deposit. It was insolvent

and, on that day, suspended payment. Because of its condition, the board of directors passed a resolution giving full control of its affairs to appellant. Pursuant to the laws of the State, he took possession and control of its property and business for the purpose of liquidation. Appellee paid the amount of the deposit to the superintendent of the reservation, and received from the United States an assignment of its claim against the bank; and appellee has the priority, if any, that belonged to the United States. R. S. § 3468. It claimed that, under R. S. § 3466, it should be paid in full out of the bank's assets prior to any payment on account of unsecured or unpreferred claims. Appellant denied priority, but allowed the claim as one not preferred. Appellee brought this suit in the District Court of Oregon to enforce priority. The decree went in its favor (295 Fed. 331); and was affirmed by the Circuit Court of Appeals. 299 Fed. 705. The case is here on appeal. § 241, Judicial Code.

Section 3466 provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 provides: "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to

the United States, or for so much thereof as may remain due and unpaid."

It was admitted that the total value of the bank's assets was less than its debts, and that it was insolvent. § 6221, Oregon Laws. National Bankruptcy Act of July 1, 1898, c. 541, § 1, 30 Stat. 544. The lower courts rightly held that the amount owed by the bank on account of the deposit in question was a debt due to the United States.

Appellee is entitled to priority if, within the meaning of § 3466, the bank made a voluntary assignment of its property or committed an act of bankruptcy.

That section is to be liberally construed. In *Beaston* v. *Farmers' Bank,* 12 Pet. 102, Mr. Justice McKinley, speaking for the Court, said (p. 134): "All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used . . . . And it is manifest, that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions. . . . As this statute has reference to the public good it ought to be liberally construed. *United States* v. *The State Bank of North Carolina,* 6 Pet. 29. As this question has been fully decided by this court, other authorities need not be cited." The Bankruptcy Act does not give the United States priority as to debts, but that Act does not apply to banks; and there has been no Act of Congress indicating any change of purpose as to debts due from them to the United States. Cf. *Davis* v. *Pringle,* 268 U. S. 315, 317, 318; *Sloan Shipyards* v. *United States Fleet Corporation,* 258 U. S. 549, 574; *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152, 158. There exists now the same reasons for a liberal construction of the priority act as when the rule was laid down.

The Act applies to all debts due from deceased debtors whenever their estates are insufficient to pay all cred-

itors, and extends to all debts due from insolvent living debtors when their insolvency is shown in any of the ways stated in § 3466. The decisions of this court show that no lien is created by the statute; that priority does not attach while the debtor continues the owner and in possession of the property; that no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and that, "whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property." *Beaston* v. *Farmers' Bank, supra,* 133, and cases cited; *United States* v. *Oklahoma,* 261 U. S. 253, 259.

Appellant, emphasizing the view that the priority act does not apply unless insolvency is manifested in one of the modes there indicated, contends that the resolution of the board of directors was not a voluntary assignment and did not divest the bank of the title; that, as the Bankruptcy Act does not apply to banks, there was no act of bankruptcy committed; that, under the state law, title remains in the bank after the superintendent takes possession and until he disposes of the property in the course of liquidation. And to support the last contention, he cites *United States F. & G. Co.* v. *Bramwell,* 108 Ore. 261, 287. The question in that case was whether the State, as depositor in an insolvent bank taken over by the superintendent of banks, was entitled to priority as a sovereign right. The court held that it was; and that its right was not defeated by the taking of the property by an administrative officer of the State before the State asserted its claim for priority; and that the bank's title was not divested until the assets were sold in the course of liquidation.

The specified ways in which insolvency may be manifested include all cases in which an insolvent debtor makes

an assignment of his property; there is no exception, and no regard is had to the purpose or manner of the assignment; and they include all cases in which an act of bankruptcy is committed under the laws of a State or under a national bankruptcy law. *Conard* v. *Nicoll,* 4 Pet. 291, 307, 308; *United States* v. *Oklahoma, supra,* 262. The priority act does not expressly require that the insolvent debtor should be "divested" or that the person on whom is imposed the duty to pay the United States first shall become "invested" with the title. Appellant, arguing that such transfer of title is necessary, stresses general statements to that effect from opinions of this court. See *United States* v. *Hooe,* 3 Cranch, 73, 91; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 439; *Beaston* v. *Farmers' Bank, supra,* 133, 136; *United States* v. *Oklahoma, supra,* 259. None involved the legal effect of acts similar to those presented here. It is a rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration. *Cohens* v. *Virginia,* 6 Wheat. 264, 399. The language on which appellant relies was properly used in respect of the matters presented for decision in the cases cited by him. But, when the passages are read in the light of the facts considered and questions decided, they do not establish that the things done in this case did not in substance and effect amount to a voluntary assignment or to an act of bankruptcy.

Section 3a (4) of the Bankruptcy Act, as amended February 5, 1903, c. 487, 32 Stat. 797, provides: "Acts of bankruptcy by a person shall consist of his having . . . (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States." The fact that banks are not subject to that Act

is of no moment. The reference to an act of bankruptcy in § 3466 is general, and is for the purpose of defining one of the ways in which the debtor's insolvency may be manifested. The priority given does not depend on any proceeding under the bankruptcy laws of state or nation. There is nothing in the language of the section, and no reason has been suggested, to indicate a purpose to give priority in the case of a debt due the United States from a debtor subject to the Bankruptcy Act and to deny priority, under like circumstances, when the debt is due from an insolvent bank or other debtor to whom the Act does not apply. The specification in § 3466 of the ways insolvency may be manifested is aided by the designation in § 3467 of the persons made answerable for failure to pay the United States first from the inadequate estates of deceased debtors or from the insolvent estates of living debtors. The persons held are "every executor, administrator, or assignee, or *other person.*" The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear.*

The statutes of the State (§§ 6220–6223) provide for the handing over of the property of insolvent banks to the state superintendent of banks to be by him administered and disposed of for the benefit of creditors. By the resolution of the directors in this case, the bank was wholly divested of the possession and control of its property and

* Cf. *Davis* v. *Pullen,* 277 Fed. 650; *Equitable Trust Co.* v. *Connecticut Brass & Mfg. Corp.,* 290 Fed. 712, 723; *Davis* v. *Miller-Link Lumber Co.,* 296 Fed. 649; *Bramwell* v. *United States F. & G. Co.* (this case below), 299 Fed. 705; *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 194; *Liberty Mutual Insurance Co.* v. *Johnson Shipyards Corp.,* 6 Fed. (2d) 752.

business; and the exclusive possession and control of them passed to appellant for the purpose of liquidating the debts of the bank. And, under the state law, when he took possession of its assets, liens thereon, amounting in all to more than the value of the property, attached in favor of the depositors. § 6220(h). *Upham* v. *Bramwell,* 105 Ore. 597, 606–609, 613. He was empowered, and it became his duty, to collect all debts and claims belonging to the bank, to sell its property under the direction of the court, and to execute and deliver to purchasers deeds and other instruments to evidence the passing of title to them; and, if necessary to pay the bank's debts, he was authorized to enforce the individual liability, if any, of the stockholders. And it was his duty, out of the estate, to pay expenses, and from time to time, as directed by the court, to apply the funds remaining in his hands to the payment of the bank's creditors according to their rights and priorities. *United States F. & G. Co.* v. *Bramwell, supra,* 288. After 60 days had elapsed the bank could not regain the property. § 6223(c). The state law excludes all other methods for the liquidation of the debts of insolvent banks. Appellant's duties were in substance the same as those of a trustee having the legal title of property for the purpose of converting it into money to be paid over to specified persons. The state law required him to perform the functions of an assignee, receiver or trustee for the liquidation of the debts of an insolvent. See *Sargent* v. *American Bank and Trust Co.,* 80 Ore. 16, 26. Appellant had a power that for present purposes had the same effect as a title, and that is enough.

The effect of the resolution of the bank directors is the same as if it expressly granted and imposed upon appellant all the powers and duties in respect of the bank's property and the liquidation of its debts that are specified in the state law. The resolution authorized and was followed by the handing over of the possession and control

of all the bank's property to be converted into money to pay the bank's debts. The act of the directors made the bank's insolvency notorious. The established rule of liberal construction requires that the priority act be applied having regard to the public good it was intended to advance. Its application is not to be narrowly restricted to the cases within the literal and technical meaning of the words used. The things done in this case are not different in their substance from the things specified as the ways in which insolvency is required to be made manifest. It must be held that, within the meaning of the priority act, the bank made a voluntary assignment of its property; and that, because of the bank's insolvency, a trustee was put in charge of its property under a state law within the meaning of the Bankruptcy Act.

Decree affirmed.

PRICE, RECEIVER, *v.* UNITED STATES.

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

No. 454. Submitted November 23, 1925.—Decided January 11, 1926.

1. Taxes due the United States are "debts" within the meaning of Rev. Stats. § 3466, giving the United States priority in certain cases. P. 499.
2. Rev. Stats. § 3466 is to be construed liberally. P. 500.
3. The joining by a defendant corporation in securing a receivership in a suit by a simple contract creditor, to take over the defendant's property and business for the purpose of conserving them and paying creditors, amounts to a voluntary assignment, within the meaning of § 3466, Rev. Stats., where the business is in a failing condition and turns out to be insolvent so that the assets are a trust fund for the creditors according to their priorities. P. 502.

6 Fed. (2d) 758, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming an order of the District Court directing a

receiver to pay claims of the United States as priority claims. See *Liberty Mutual Co.* v. *Johnson Shipyards,* 6 Fed. (2d) 752; *Stripe* v. *United States, post,* p. 503.

Mr. Godfrey Goldmark, for petitioner.

The priority of the United States does not stand upon any sovereign prerogative, but exclusively upon the provisions of the statute. *United States* v. *Fisher,* 2 Cr. 358; *United States* v. *Bank of North Carolina,* 6 Pet. 29; *United States* v. *Canal Bank,* 3 Story, 79 Fed. Cas. No. 14, 715; *United States* v. *Oklahoma,* 261 U. S. 253.

An examination of the earlier statutes, now §§ 3466 and 3467, in the light of their underlying purpose, will reveal that they were intended primarily to secure the prior payment of revenue where the debtor was divested of his property in the methods provided, and only later were extended to secure prior payment of all obligations to the United States, whatever their nature, and were intended to impose a personal liability upon executors and trustees, in the event that the priority was ignored.

Whether revenues are collected through or without the exaction of a bond, in either case, the statute measures the extent of the priority. *United States* v. *Chamberlain,* 219 U. S. 250.

Lane v. *Oregon,* 7 Wall. 71 and *Meriwether* v. *Garrett,* 102 U. S. 472, distinguished.

In this case, the debtor has not been divested of its property in any of the methods which the statute prescribes. Therefore, the priority created by § 3466 is inapplicable.

Section 3466 does not create a priority for ordinary debts or for taxes, where the assets of a corporation are distributed in a judgment creditor's suit or equity receivership. *United States* v. *Oklahoma,* 261 U. S. 253; *United F. & G. Co.* v. *Strain,* 264 U. S. 570.

The appointment of a receiver on a judgment creditor's bill is not a divesting of the debtor's title to all his prop-

erty within the purview of the Act. *Beaston* v. *Farmers' Bank,* 12 Pet. 102; *Pa. Steel Co.* v. *N. Y. City Ry.* 198 Fed. 721; *Pusey Jones Co.* v. *Hanssen,* 261 U. S. 491; *Metropolitan St. Ry. Receivership,* 208 U. S. 90; *Luhrig Collieries* v. *Interstate Coal Co.,* 281 Fed. 265. The present suit is not the equivalent of a general assignment. *Laclede Bank* v. *Schuler,* 120 U. S. 511; *Empire Metallic Bedstead Co.,* 98 Fed. 981; *Quincy R. R.* v. *Humphreys,* 145 U. S. 82; *Great Western* v. *Harris,* 198 U. S. 561; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77; *Zacher* v. *Fidelity Trust Co.,* 106 Fed. 593.

The admission of the allegations of the bill and the consent to the appointment of a receiver are not the commission of acts of bankruptcy within the meaning of § 3466. The defendant has not committed an act of bankruptcy within the provisions of the Bankruptcy Act of 1898. There is no proof that insolvency existed at the time of the filing of the bill or that the bill was filed because of this condition. This being so, *United States* v. *Oklahoma* and *Strain* v. *United States, supra,* are conclusive to the effect that the receiver was not appointed because of insolvency. To the same effect are: *Matter of Spalding,* 139 Fed. 244; *Matter of Valentine Pohl Co.,* 224 Fed. 685; *Matter of William S. Butler & Co.,* 207 Fed. 705. The fact that the defendant consented does not make the suit collusive or other than the ordinary law suit in which the defendant corporation is the defendant and not the plaintiff. Even if the defendant did commit an act of bankruptcy under the 1898 Bankruptcy Act, the United States would not be entitled to priority, inasmuch as the defendant has not been divested of its property in any proceeding based upon the alleged act of bankruptcy.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and has provided for a lien and distraint; and as the provisions of Rev. Stats. §§ 3186, *et seq.* as amended in 1913,

were not complied with in this case prior to the receivership, a tax claim is not entitled to priority. The facts that the suit was instituted by one creditor on behalf of all, a judgment waived, and the other creditors enjoined from proceeding to judgment, cannot increase the rights of the United States. *American & British Securities Co.* v. *Mfg. Co.*, 275 Fed. 121.

This suit is a mere equitable levy in favor of all creditors, and they all have the same rights as if they were separate judgment creditors, namely, the right to satisfy their claims ahead of the Government, because the latter did not comply with § 3186 as amended in 1913. As the two common law prerogatives are embodied in §§ 3466 and 3186, *et seq.*, and as no priority exists under the terms of either, there can be no priority at all.

Solicitor General Mitchell and *Messrs. Jerome Michael, Henry Gale,* and *Ralph F. Fuchs,* Special Assistants to the Attorney General, for the United States.

By virtue of Rev. Stats. 3466 the Government is entitled to payment of its taxes in advance of the claims of general creditors in an equity receivership proceeding instituted with the defendant's consent.

The income tax involved in this case was entitled to priority of payment by virtue of the provisions of the Revenue Acts by which it was levied and under which it was assessed, by virtue of the provisions of Rev. Stats. 3186, and because, Congress having established an extrajudicial system for the collection of the internal revenue which was designed to insure, and which in the absence of judicial interference will normally result in, its prior payment, it is the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors. If further evidence is required that Congress intended the provisions of the Revenue Acts to apply

equally to all corporations, whether solvent or insolvent, whether in receivership or under the management of the corporate officers, it is to be found in those sections of the Revenue Acts which require a receiver who is operating the property or business of a corporation to make returns for such corporation, and provide that any tax due thereon is to be collected "in the same manner as if collected from the corporation." *Swarts* v. *Hammer,* 194 U. S. 441.

If receivership proceedings had not intervened, the Government would have acquired a lien upon all the property of the Gidding Company which would have been valid against its general creditors. It is equally clear that the appointment of a receiver can not render the Government impotent to assess or to demand the payment of taxes. But if the Government can demand the payment of a tax, it can also acquire a lien therefor in spite of a receivership, for the result of a demand followed by failure to pay is prescribed by statute. It can not be prescribed by the courts.

The argument that a statutory lien for taxes can and does attach after the appointment of a receiver is fortified by the fact that even before assessment and demand the Government's lien is inchoate. *Henderson* v. *Mayer,* 225 U. S. 631; *Kane & Co.* v. *Kinney,* 174 N. Y. 69; *Hildreth Granite Co.* v. *City of Watervliet* (N. Y.), 161 App. Div. 420; *Crane Co.* v. *Pneumatic Signal Co.* (N. Y.), 94 App. Div. 53. Neither the complainant, nor any other general creditor, nor the receiver, is a judgment creditor within the meaning of R. S. 3186.

There is nothing in the doctrine of equitable execution or in the character or purpose of a receivership proceeding initiated by general creditors, to prevent the creation or perfection of statutory liens, including tax liens, after the bill is filed. *Pennsylvania Steel Co.* v. *New York City Ry.,* 198 Fed. 721; *Filene's Sons Co.* v. *Weed,* 245

U. S. 597; *Stevens* v. *New York & O. M. R. Co.,* 13 Blatch. 104; *Central Trust Co.* v. *Wabash, St. L. & P. Ry.,* 26 Fed. 11.

If, as this Court held in *Re Tyler,* 149 U. S. 164, it is the duty of tax collectors to refrain from the seizure and sale of property in the custody of the courts, it would seem to be equally the duty of the courts to direct the prior payment of the Government's taxes. A receivership may justify a variation of the means; it can not justify a change in the result. The application of the doctrine that a court of equity must direct the prior payment of taxes in a receivership proceeding if it stops the executive machinery for their collection, extends as well to past as to current taxes, as well to taxes which have not become, as to taxes which are, liens on the property in the court's possession. *Ledoux* v. *La Bee,* 83 Fed. 761; *Coy* v. *Title Guarantee & Trust Co.,* 220 Fed. 90; *Bear River Co.* v. *City of Petosky,* 241 Fed. 53; *Greeley* v. *The Provident Sav. Bank,* 98 Mo. 458; *George* v. *St. Louis Ry. Co.,* 44 Fed. 117; *Gaither* v. *Stockbridge,* 67 Md. 222.

Independently of statute, the United States were entitled to priority of payment of both the customs duties and the income tax involved in this case, because priority of payment inheres in the very concept of a tax and the right to priority of payment of taxes is an attribute of the sovereignty of the Government. In levying taxes, the Government is exercising one of the most important of its sovereign powers. *Nicol* v. *Ames,* 173 U. S. 509. A tax is not a debt. It is an impost levied for the support of the Government. It operates *in invitum. Meriwether* v. *Garret,* 102 U. S. 472; *Crabtree* v. *Madden,* 54 Fed. 426; *City of Camden* v. *Allen,* 26 N. J. L. 398. Taxes are of higher order than debts, even than debts due the Government, and in respect to them the Government is not a creditor. *United States* v. *Eggleston,* Fed. Cas. No.

15027; *Food Controller* v. *Cork,* (1923) A. C. 647; *United States* v. *McHatton,* 266 Fed. 602; *State* v. *Rowse,* 49 Mo. 586. The claim for taxes is paramount to all other claims against the citizen. *Greeley* v. *The Provident Sav. Bank, supra*; *Coy* v. *Title Guarantee Co.,* 220 Fed. 90; *Springer* v. *United States,* 102 U. S. 586; *Liberty Ins. Co.* v. *Johnson Shipyards Corp.,* 6 Fed. (2d) 752; *Minnesota* v. *Central Trust Co.,* 94 Fed. 244.

While the Government does not claim to be possessed of the right to priority of payment of its taxes as a heritage from the British Crown, there is nevertheless a solid foundation for the proposition that the United States possess as sovereign rights those prerogatives of the kings of England which the latter enjoyed as representatives of the English people and which are not incongruous with our republican form of Government. *United States* v. *Thompson,* 98 U. S. 486; *Dollar Savings Bank* v. *United States,* 19 Wall. 227. The fact that the Government has no sovereign right to priority of payment of its debts is immaterial. *Food Controller* v. *Cork,* (1923) A. C. 647; *Comm'rs of Taxes* v. *Palmer* (1907) A. C. 179; *Baxter* v. *Baxter,* 23 S. C. 114; *State* v. *Rowse,* 49 Mo. 586. The fact that the Government has never adopted the common law is immaterial. Rev. Stats. 3466 does not measure the Government's right to priority for taxes.

Mr. Justice Butler delivered the opinion of the Court.

October 2, 1923, Charles H. Mears, a simple contract creditor, brought suit on behalf of himself and other creditors against J. M. Gidding & Company, a New York corporation. Among the facts alleged in the complaint are these. Defendant was engaged in the business of importing and selling wearing apparel at retail in New York and four other cities. It owed plaintiff $10,000 on a promissory note; its debts were large, and it was without money to pay those then due and shortly to become due.

If its assets could be sold in the usual course of business they would be in excess of its debts. Some of the creditors were pressing their claims, and others had commenced suit; and, if the assets were not taken into judicial custody, some creditors might obtain inequitable preferences as against plaintiff and other creditors; and the assets might not to be enough to pay all. And, averring no adequate remedy at law, the complaint prayed the court to determine the rights of all creditors, and to appoint a receiver to take possession and control of all defendant's assets, and that, when just and proper, the assets be ordered sold and the proceeds distributed to those entitled thereto. On the same day, defendant filed its answer admitting the allegations and joining in the prayer of the complaint. The court immediately entered its decree granting the relief prayed, and appointed appellant temporary receiver with authority to take possession and control of, and to make disbursements to preserve, the assets. January 9, 1924, the court appointed appellant permanent receiver. Thereupon, the assets were found insufficient to pay all the claims; general creditors will not recover more than 40 per cent.

The United States filed proof of claims for income taxes for the year 1920, and for unpaid customs duties. A special master sustained the claim of the United States to priority, and fixed the amount of the income tax at $11,331.07, and the amount of the duties at $1,086.70. The District Court directed appellant, out of the assets of defendant, to pay these amounts as priority claims. The Circuit Court of Appeals affirmed the decree on the authority of *Liberty Mutual Insurance Company* v. *Johnson Shipyards Corporation,* 6 Fed. (2d) 752. The case is here on writ of certiorari. § 240, Judicial Code.

The word "debts" as used in R. S. § 3466 includes taxes.

The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were

enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens. *United States* v. *The State Bank of North Carolina,* 6 Pet. 29, 35. And to that end, § 3466 is to be construed liberally. Its purpose is not to be defeated by unnecessarily restricting the application of the word "debts" within a narrow or technical meaning. Cf. *Miller* v. *Robertson,* 266 U. S. 243, 248. The meaning properly to be attributed to that word depends upon the connection in which it is used in the particular statute and the purpose to be accomplished.

In the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or readily may be made certain. *United States* v. *Chamberlain,* 219 U. S. 250, 262; *Savings Bank* v. *United States,* 19 Wall. 227, 239; *Stockwell* v. *United States,* 13 Wall. 531, 542; *Meredith* v. *United States,* 13 Pet. 486, 493; *United States* v. *Washington Mills,* 2 Cliff. 601, 607; *United States* v. *Pacific Railroad,* 4 Dill. 66.

Section 3466 of the Revised Statutes is derived from early statutes enacted for the collection of taxes.* The Act of 1789 permitted bonds to be given for payment of

* "An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States," approved July 31, 1789, § 21, c. 5, 1 Stat. 29, 42. "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels," approved August 4, 1790, § 45, c. 35, 1 Stat. 145, 169. "An Act for raising a farther sum of money for the protection of the frontiers, and for other purposes therein mentioned," approved May 2, 1792, § 18, c. 27, 1 Stat. 259, 263. "An Act to provide more effectually for the Settlement of Accounts between the United States, and Receivers of public Money," approved March 3, 1797, § 5, c. 20, 1 Stat. 512, 515. "An Act to regulate the collection of duties on imports and tonnage," approved March 2, 1799, § 65, c. 22, 1 Stat. 627, 676.

customs duties, and provided that in case of default the collector should prosecute suits for recovery, and that in all cases of insolvency, or where any estate in the hands of executors or administrators should be insufficient to pay all the debts of the deceased, the debt due to the United States on any such bonds should be first satisfied. The Act of 1790 superseded the earlier Act, but retained the same priority provision. The Act of 1792 gave to sureties the right of subrogation (see R. S. § 3468); and it limited priority to cases in which insolvency should be manifested in one of the modes stated. Prior to the passage of the Act of 1797, an internal revenue had been established and extensive transactions had taken place, in the course of which many persons had become indebted to the United States. *United States* v. *Fisher,* 2 Cr. 358, 392. Up to that time, the priority applied only to cases of default on customs bonds. By that Act, it was extended to cases involving " any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise." The Act of 1799 introduced the provision making every executor, administrator, assignee or other person answerable for failure to pay the United States first. See R. S. § 3467. The revision did not involve any substantial change of phraseology and did not work any change in the purpose or meaning of the priority acts. *Buck Stove Company* v. *Vickers,* 226 U. S. 205, 213. There is no reason for any distinction in respect of priority between taxes and other amounts owing to the United States. Indeed, it would be quite without reason to deny priority in case of claims for taxes due from taxpayers, and to give priority to claims against revenue officers and others on account of taxes collected by them.

Lane County v. *Oregon,* 7 Wall. 71, and *Meriwether* v. *Garrett,* 102 U. S. 472, are sometimes cited, and expressions found in the opinions are quoted, to show that taxes are not debts. But when regard is had to the questions

decided in these cases, it is clear that they do not sustain the view that, as used in § 3466, the word "debts" does not include taxes due the United States. The question in *Lane County* v. *Oregon* was whether under the Acts of Congress making United States notes "legal tender in payment of all debts," the State was bound to accept such notes in payment of taxes required by its own laws to be paid in gold and silver coin. The court held that the Acts had no reference to taxes imposed by state authority. There were two clauses which were intended to give currency to the notes. In one of them, taxes were plainly distinguished from debts; and it was held that the word "debts" in the other was not intended to include taxes. In *Meriwether* v. *Garrett,* it was held that taxes levied before the repeal of a city charter—other than those levied under lawful contract or judicial direction—could not be continued in force by the court after the repeal of the charter; that they had none of the elements of property and could not be seized by judicial process, and could only be collected under authority from the legislature.

Defendant made a voluntary assignment of its property within the meaning of § 3466.

By answering and joining in the prayer of the complaint, defendant coöperated with the plaintiff to secure the appointment of a receiver to whom it immediately handed over possession and control of all its property and business. While in effect the complaint alleged that defendant was solvent, the facts set forth indicate that it was in a failing condition. And it was found to be insolvent within a short time after the appointment of the receiver. When the assets turned out to be less than the debts, the creditors were entitled to have them dealt with as a trust fund and distributed among them according to their rights and priorities. Under the statute, claims of the United States must first be satisfied. *Bramwell* v.

United States Fidelity & Guaranty Company, ante, p. 483, and *United States* v. *Butterworth-Judson Corporation, post,* p. 504.

Decree affirmed.

STRIPE ET AL., RECEIVERS, *v.* UNITED STATES.

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

No. 496. Submitted November 23, 1925.—Decided January 11, 1926.

Decided upon the authority of *Price* v. *United States, ante,* p. 492, 6 Fed. (2d) 752, affirmed.

Messrs. Ben. A. Matthews and *Harold Harper,* for petitioners.

Solicitor General Mitchell and *Messrs. Jerome Michael, Henry Gale,* and *Ralph F. Fuchs,* Special Assistants to the Attorney General, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In this case there is presented the question whether, in the distribution of the assets of Johnson Shipyards Corporation among its creditors by receivers appointed in an equity suit, the United States under R. S. § 3466 is entitled to have its claim against the corporation for taxes first satisfied. The facts (300 Fed. 952) are in all respects similar to those in *Price* v. *United States, ante,* p. 492. The question of law involved is identical. The United States is entitled to priority.

Decree affirmed.

UNITED STATES *v.* BUTTERWORTH-JUDSON CORPORATION.

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

No. 503. Argued November 23, 1925.—Decided January 11, 1926.

Where the answer of an insolvent corporation, in a suit brought by a simple contract creditor for the conservation and disposition of its property for the benefit of its creditors, admitted the allegations of the bill and consented to a decree appointing receivers, *held* that this amounted to the handing over of all the property and business to be administered as a trust fund to pay debts, and was in substance a voluntary assignment within the meaning of Rev. Stats. § 3466, entitling the United States to priority in payment of its claims. P. 513.

9 Fed. (2d) 1018, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming an order of the District Court which dismissed a petition in intervention filed by the United States, seeking preferred payment of its claim, in a suit to administer and dispose of the assets of a corporation, through receivers, for the settlement of its debts. See also *Price* v. *United States, ante,* p. 492.

Mr. William Marshall Bullitt, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

On the allegations of the bill, the Butterworth-Judson Company was insolvent in the bankruptcy sense, to-wit: the aggregate of all its property was wholly insufficient to pay its debts. That is admitted as true on the motion to dismiss, and establishes the fact of insolvency in the bankruptcy sense required by § 3466, Rev. Stats. *United States* v. *Oklahoma,* 261 U. S. 253.

The "consent receivership" was a "voluntary assignment." What Congress had in mind was to secure a

priority of payment when an insolvent debtor's property was subject to involuntary seizure under the bankruptcy laws, or when the debtor voluntarily assigned it to another. The term "voluntary assignment" denotes not only the instrument by which property is conveyed, but also the act of transfer; and in these different senses, i. e., means and results, it is variously applied in law. Burrill on Assignments, 6th Ed. § 1. There are many cases where transactions have been held to be general assignments without the execution of a formal instrument. *In re Green,* 106 Fed. 313; *Moody* v. *Clinton Wire Cloth Co.,* 246 Fed. 653; *In re Hersey,* 171 Fed. 998; *In re Salmon & Salmon,* 143 Fed. 395; *Gill* v. *Farmers Bank,* 189 Mo. App. 401.

The Company's action was voluntary, in every possible sense of the word. No receiver could have been appointed at the instance of a simple contract creditor. *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371. All that the company had to do, to secure a dismissal of the bill and prevent the receivership, was to move to dismiss on the ground that the plaintiff had an adequate remedy at law. *Id; American Mills Co.* v. *American Surety Co.,* 260 U. S. 360. Instead of resisting the effort to transfer all of its property to receivers for application and distribution to the claims of creditors, the Company voluntarily waived its right to object, affirmatively consented to the receivership, and thereby voluntarily enabled the receivers to be appointed, without which acquiescence no court could or would have appointed them. The appointment of the receivers divested the Company from the possession and control of all its property.

The modern "consent receivership" is the plan by which bank creditors and a failing corporation usually coöperate to accomplish the following results, which could not be accomplished except by such coöperation and the voluntary consent of the debtor: (1) Avoidance of

bankruptcy proceedings. (2) Securing the benefit of an equity receivership under which there can be the broadest and most flexible operation of the business as a going concern, absolutely free from harassment or annoyance from creditors seeking to collect their debts. (3) A protective bankruptcy proceeding (frequently).

It is a commonplace of corporate practice that an equity receivership, combined with a protective bankruptcy, enables a reorganization committee to delay indefinitely non-assenting creditors, to operate the property as a going concern, and to take their own time about the reorganization. This can only be done, however, when there is complete agreement between certain creditors and the insolvent debtor. All this goes to show that the "consent receivership" is a "voluntary assignment" and also an "act of bankruptcy" which it is attempted to camouflage, in order to prevent winding up in bankruptcy. The Government is the one creditor who suffers by this arrangement, as it gets neither (1) its priority for taxes in the bankruptcy proceedings nor (2) its priority under § 3466.

Under the original Bankruptcy Act of 1898, a general assignment was an "act of bankruptcy," even if the debtor was solvent. Therefore, if a "consent receivership" had been held equivalent to a general assignment, such "consent receivership" would have been an act of bankruptcy, though the debtor were perfectly solvent, but only temporarily embarrassed; and solvent concerns could have been thrown into bankruptcy and wound up. Such a construction of the Bankruptcy Act would have stopped all "consent receiverships," and the courts frequently held that as the Bankruptcy Act was passed for the benefit of debtors, and was in derogation of the common law, it should be strictly construed and that "consent receiverships" were not equivalent to a general assignment, and hence not acts of bankruptcy.

On the other hand, the priority statute was based on public policy, was declaratory of the common law, and was passed for the benefit of the United States. It should be liberally construed. *United States* v. *State Bank of North Carolina,* 6 Pet. 29. Under § 3466 it is necessary, not only that there should be a "voluntary assignment," i. e., a "consent receivership," but there must be also insolvency in the bankruptcy sense. The courts should give a liberal construction to the phrase "voluntary assignment," so as to hold that a "consent receivership" is the equivalent to a "voluntary assignment." The Circuit Courts of Appeals of the First, Fifth and Ninth Circuits hold that a "consent receivership" is the equivalent of a "voluntary assignment;" and the Fifth and Ninth Circuits hold that it also constitutes an "act of bankruptcy." *Davis* v. *Pullen,* 277 Fed. 650; *Davis* v. *Miller-Link Lumber Co.,* 296 Fed. 649; *Bramwell* v. *U. S. F. & G. Co.,* 299 Fed. 705; *United States* v. *Oklahoma,* 261 U. S. 253; *United States* v. *Parker,* 120 U. S. 89; *Equitable Trust Co.* v. *Conn. Brass & Mfg. Co.,* 290 Fed. 712; *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 194.

The "consent receivership" was an "act of bankruptcy" committed by the Company, and hence Rev. Stats. § 3466 became operative and the Government was entitled to a priority of payment. As there was no national bankruptcy act in existence during the years 1790–1799, the repeated use of the phrase "act of bankruptcy" or "act of legal bankruptcy" in these priority statutes, referred, not to acts of bankruptcy under the English law (*Conard* v. *Nicoll,* 4 Pet. 291; 1 Kent Com. 343, note 1,) but to acts of bankruptcy under the then existing state statutes, or under any future bankruptcy laws that might be passed by Congress. *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 194. Under the original Bankruptcy Act of 1898, there was no provision by which the appointment of a receiver for a debtor could be considered an "act

of bankruptcy." To remedy that situation, Congress amended the Bankruptcy Act in 1903 (32 Stat. 797) by adding to § 3a (4) a provision defining it as an act of bankruptcy where a person, "being insolvent, *applied* for a Receiver or Trustee for his property, or *because* of insolvency, a Receiver or Trustee *has been put in charge* of his property under the laws of a State, of a territory, or of the United States."

The operation of § 3466 is certainly defeated, if a debtor, insolvent in the bankruptcy sense, can, by agreement with a creditor, have the creditor file a suit for a receiver, with an allegation of a lesser kind of insolvency, obtain the appointment of a receiver by consent and then successfully claim that no act of bankruptcy has been committed—when the only reason for the receivership was that the debtor was actually insolvent in the bankruptcy sense. The question presented is whether the Government's priority under § 3466 can be defeated by an agreement, between a creditor and a debtor, to call the debtor's financial condition one thing when the receiver is appointed, whereas, in point of fact, the debtor's condition is something very different; and if that different condition had been truthfully alleged, it would have been an act of bankruptcy and § 3466 would have come into play. The later authorities hold that if a receiver is appointed upon the ground that the debtor is simply unable to pay his debts in the ordinary course of business, when it later develops that the debtor was in fact then insolvent in the bankruptcy sense, such appointment constitutes an "act of bankruptcy." *Hilb* v. *Am. Smelting & Refining Co.*, 235 Fed. 384; *Re Sedalia Farmers Produce Co.*, 268 Fed. 898; *Davis* v. *Michigan Trust Co.*, 2 Fed. (2d) 194. The theory of those cases is that if it subsequently develops that, at the time of the application for a receiver, the debtor was insolvent in the bankruptcy sense, then it was insolvency, whether recognized at the time or not,

which brought about the receivership. The Bankruptcy Act provides that an "act of bankruptcy" by any person shall consist of his having, "being insolvent, *applied* for a receiver or trustee for his property." Although the Company did not, in one sense, apply for a receiver, yet, in substance, that is exactly what it did. The Court would never have appointed the receivers, if the debtor had objected on the ground that the creditor had an adequate remedy at law. It was only by their affirmative co-operation that the court appointed a receiver.

Mr. H. G. Pickering, with whom *Messrs. Eldon Bisbee, Henry Root Stern* and *Bertram F. Shipman* were on the brief, for respondents.

The insolvency of a debtor which gives rise to priority in favor of debts due to the United States under § 3466 Rev. Stats. is limited to insolvency manifested in one of the modes specified in the statute. *United States* v. *Bank of North Carolina,* 6 Pet. 29; *United States* v. *Canal Bank,* 3 Story 79; *United States* v. *Oklahoma,* 261 U. S. 253; *United States* v. *Hooe,* 3 Cr. 73; *Prince* v. *Bartlett,* 8 Cr. 431; *Thelusson* v. *Smith,* 2 Wheat. 396; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; *Conard* v. *Nicoll,* 4 Pet. 291; *Beaston* v. *Farmers Bank,* 12 Pet. 102; *United States* v. *McLellan,* 3 Sumner 3466; *Gallagher* v. *Davis,* 2 Yeates 548; *Watkins* v. *Otis,* 2 Pick. 88; *Commonwealth* v. *Phoenix Bank,* 11 Metc. (Mass.) 129.

As applied to the case at bar the modes in which insolvency must be manifested are all comprehended in the term "act of bankruptcy," as defined in the Bankruptcy Act. *Conard* v. *Atlantic Ins. Co., supra; Conard* v. *Nicoll, supra; Beaston* v. *Farmers Bank, supra; United States* v. *Clark,* 1 Paine 629; *United States* v. *King,* 26 Fed. Cas. No. 15,536; *United States* v. *McLellan, supra; United States* v. *Hooe, supra; United States* v. *Howland,* 4 Wheat. 108; *Field* v. *United States,* 9 Pet. 182; *In re Empire*

Metallic Bedstead Co., 98 Fed. 981; *Vaccaro* v. *Security Bank of Memphis*, 103 Fed. 436; *In re Crum*, 214 Fed. 207; *In re Ambrose Matthews & Co.*, 229 Fed. 309; *United States* v. *Oklahoma, supra.*

In order to give rise to priority under § 3466 in the case at bar, the act of bankruptcy must be such as to divest the debtor of title to its property. *United States* v. *Hooe, supra; Conard* v. *Alantic Ins. Co.*, 1 Pet. 386; *Conard* v. *Nicoll*, 4 Pet. 291; *Beaston* v. *Farmers Bank, supra; United States* v. *Oklahoma, supra; Commonwealth* v. *Phoenix Bank, supra.*

The respondent has not committed an act of bankruptcy and has not been divested of title to its property. *Vaccaro* v. *Security Bank of Memphis, supra; In re Empire Metallic Bedstead Co., supra; Beaston* v. *Farmers Bank, supra; Quincy, M. & P. R. Co.* v. *Humphreys*, 145 U. S. 82; *Great Western Co.* v. *Harris*, 198 U. S. 561; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491; *In re Edw. Ellsworth Co.*, 173 Fed. 699; *In re Morosco Holding Co.*, 296 Fed. 516; *In re Conn. Brass Corp.*, 257 Fed. 445; *Moss Nat. Bank* v. *Arend*, 146 Fed. 351; *Missouri Valley Cattle Loan Co.* v. *Alexander*, 276 Fed. 266; *In re Wm. S. Butler & Co.*, 207 Fed. 705; *In re Gold Run Mining Co.*, 200 Fed. 162; *In re Billy's Ice Cream Co.*, 295 Fed. 502; *United States* v. *Oklahoma, supra; In re Valentine Bohl Co.*, 224 Fed. 685; *In re Spalding*, 139 Fed. 244; *Russell* v. *Place*, 94 U. S. 608; *Davis* v. *Brown*, 94 U. S. 428; *Badger Co.* v. *Arnold*, 282 Fed. 115; *Zugalla* v. *Int. Merc. Agency*, 142 Fed. 927; *Maplecroft Mills* v. *Childs*, 226 Fed. 415; *Anderson* v. *Myers*, 296 Fed. 101; *In re Golden Malt Cream Co.*, 164 Fed. 326; *Exploration Co.* v. *Pacific Co.*, 177 Fed. 825; *U. S. F. & G. Co.* v. *Strain*, 264 U. S. 570; *In re Harper & Bros.*, 100 Fed. 266; *Davis* v. *Stevens*, 104 Fed. 235; *In re Gilbert*, 112 Fed. 951; *In re Zeltner Brewing Co.*, 117 Fed. 799; *In re Burrell*, 123 Fed. 414; *Commonwealth* v. *Phoenix Bank, supra.*

The authoritative construction of the statute and the declared legislative policy with respect to Government priority preclude any extension of § 3466 by construction as contended for by the Government. *Grasellis Chem. Co.* v. *Aetna Explosives Co.,* 252 Fed. 456; *Re Metropolitan Ry. Receivership,* 208 U. S. 90; *Davis* v. *Pringle,* 268 U. S. 315; *United States* v. *McLellan, supra; Conard* v. *Atl. Ins. Co., supra; United States* v. *Bank of North Carolina, supra; Watkins* v. *Otis,* 2 Pick. 88.

The cases in the Circuit Courts of Appeals relied upon by the Government are erroneously decided and do not vitiate the conclusions here reached. *Equitable Trust Co.* v. *Conn. Brass Corp.,* 290 Fed. 712; *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.,* 6 Fed. (2d) 194; *Davis* v. *Pullen,* 277 Fed. 650; *United States* v. *Oklahoma, supra; U. S. F. & G. Co.* v. *Strain, supra; In re Wm. S. Butler & Co., supra; Badger & Co.* v. *Arnold,* 282 Fed. 115; *Davis* v. *Miller Link Lumber Co.,* 296 Fed. 649; *Moody-Horman-Boelahuew* v. *Clinton Co.,* 246 Fed. 653; *Bramwell* v. *U. S. F. & G. Co.,* 299 Fed. 705; *Beaston* v. *Farmers Bank, supra.*

Under the provisions of § 3466 Rev. Stats. debts due the United States are not entitled to priority in consent receiverships.

Mr. Justice Butler delivered the opinion of the Court.

April 22, 1922, respondent, a New York corporation, was insolvent within the meaning of R. S. § 3466, and as defined by the Bankruptcy Act. Its debts amounted to approximately $3,000,000, and included $1,154,450 due to the United States. The value of its assets was not in excess of $1,500,000. On that day, the Hay Foundry and Iron Works, a simple contract creditor, on behalf of itself and other creditors, brought suit against the respondent in the District Court for the Southern District of New York. Among the facts alleged are these: Respondent

owed plaintiff $7,988.43 for labor and materials furnished, and was without money to pay its debts then due. The value of its property, if properly and prudently realized on, would be more than enough to pay its obligations. Some of its creditors were threatening to bring suits on their claims; and resulting forced sales of the property would cause great loss to the creditors. Plaintiff believed that the property could be preserved for equitable distribution among those entitled thereto only upon the granting of equitable relief including the appointment of receivers, and that, unless the court would deal with the property as a trust fund for the payment of creditors, it would be sacrificed to the great loss of creditors. More would be realized from a sale if the business was being carried on. The prayer was for the appointment of receivers, and that when found to be just and proper the properties be sold and the proceeds distributed among those entitled thereto. By its answer filed on the same day, respondent admitted all the allegations of the complaint, and, with its consent, the court thereupon made an crder appointing receivers. The order recited that it was necessary for the protection of the respective rights and equities of creditors that the property and business be administered through receivers, and gave to them the exclusive possession, custody and control; they were authorized to continue the business until the further order of the court, to make disbursements necessary to preserve the property, and to pay debts entitled to priority.

September 1, 1922, the United States filed proof of the debt due from respondent and claimed priority under § 3466, and later filed its intervening petition, setting forth the facts above stated, and prayed to be adjudged entitled to priority. Respondent moved to dismiss. The District Court granted the motion. Its decree was affirmed by the Circuit Court of Appeals. The case is here on certiorari under § 240, Judicial Code.

The question is whether § 3466 applies. That section and § 3467, *in pari materia,* are quoted in *Bramwell* v. *United States Fidelity & Guaranty Company, ante,* p. 483. The intervening petition shows that respondent was insolvent when the creditor's suit was begun, and the question of priority is to be determined on that basis, notwithstanding the complaint alleged and the answer admitted that respondent was solvent. Respondent's answer admitting the allegations of the complaint and its consent to the court's order constituted a necessary step in the proceedings for the appointment of receivers. *Re Metropolitan Railway Receivership,* 208 U. S. 90, 109, 110; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 500. So, with the consent and coöperation of the insolvent debtor, the possession and control of all its property were handed over to be administered by the court through the receivers for the benefit of those whom the court found entitled to it. *Porter* v. *Sabin,* 149 U. S. 473, 479. To induce the action taken by the court, the complaint represented that, if respondent's property was not dealt with as a trust fund for the payment of creditors, they would suffer great loss. It is established that, when a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that in equity they belong to the creditors and shareholders rather than to the corporation itself. See *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 383; *Graham* v. *Railroad Company,* 102 U. S. 148, 161. Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities.

Taken in connection with its insolvency, now conceded, respondent's answer admitting the allegations of the complaint and its consent to the decree appointing receivers amounted to the handing over of all its property and busi-

ness to the receivers to be administered, under the direction of the court, as a trust fund to pay respondent's debts. In substance, the things done by respondent amounted to a voluntary assignment of all its property within the meaning of § 3466. The United States is entitled to priority. *Bramwell* v. *United States Fidelity & Guaranty Company, supra,* affirming 299 Fed. 705; *Davis* v. *Pullen,* 277 Fed. 650; *Davis* v. *Miller-Link Lumber Co.,* 296 Fed. 649. Cf. *Equitable Trust Co.* v. *Connecticut Brass & Mfg. Corp.,* 290 Fed. 712; *Davis* v. *Michigan Trust Co.,* 2 Fed. (2d) 194.

Decree reversed.

METCALF & EDDY *v.* MITCHELL, ADMINISTRATRIX.

MITCHELL, ADMINISTRATRIX, *v.* METCALF & EDDY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 183 and 376. Submitted November 30, 1925.—Decided January 11, 1926.

1. Upon a writ of error to the District Court based on a constitutional question, the jurisdiction of this Court is not limited to that question but extends to the whole case. P. 518.
2. A consulting engineer engaged as such by a State or local subdivision for work not permanent or continuous in character on public water supply and sewage disposal projects, whose duties are prescribed by his contract, and who takes no oath of office and is free to accept other, concurrent employment, is neither an officer nor an employee within the meaning of § 201 (a) of the War Revenue Act of 1917, exempting from income tax the compensation or fees of officers and employees under any State or local subdivision thereof. P. 519.
3. The constitutional limitation forbidding the federal Government and the State to tax each other's agencies must receive a practical

construction permitting each government to function with the minimum of interference from the other. P. 523.

4. One who is not an officer or employee of a State does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the State, when it does not appear that the tax impairs in any substantial manner his ability to discharge his obligations to the State or the ability of the State or its subdivisions to procure the services of private individuals to aid them in their undertakings. P. 524.

299 Fed. 812, affirmed.

ERROR to review a judgment of the District Court in a suit brought against a former Collector to recover money paid under protest as income tax. The judgment allowed some of the items claimed and rejected others. Both sides sued out writs of error. That of the Collector (No. 376) was not pressed at the argument in this Court and was dismissed.

Messrs. Philip Nichols and *Joseph A. Boyer* were on the brief, for plaintiffs in error in No. 183 and defendants in error in No. 376.

The State immunity extends to all appropriate instrumentalities which the States may select, without distinction between permanent and regular officers and employees on the one hand and other human instrumentalities on the other. It is not limited to such instrumentalities as may be arbitrarily selected by Congress. *United States* v. *Baltimore &c. R. R.,* 17 Wall. 322; *Freedman* v. *Sigel,* 10 Blatchf. 327; *Bettman* v. *Warwick,* 108 Fed. 46. It rests upon the same foundation and is quite as broad and important as the reciprocal limitation in favor of the United States. *Texas* v. *White,* 7 Wall. 700; *Hammer* v. *Dagenhart,* 247 U. S. 251. The exemption exists regardless of statute. *Biscoe* v. *Tax Commissioner,* 236 Mass. 201.

Beginning with *McCulloch* v. *Maryland,* 4 Wheat. 316, it has been consistently held that a State could not tax

the instrumentalities of the United States, whatever their character. *Allen* v. *The Assessors,* 3 Wall. 573; *Farmers' &c. Bank* v. *Minnesota,* 232 U. S. 516; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180; *Federal Land Bank* v. *Crosland,* 261 U. S. 374. A tax on persons passing through a State cannot be imposed on officers of the United States in the performance of their duties, *Crandall* v. *Nevada,* 6 Wall. 40; and a tax on persons engaged in sending telegraph messages which makes no exemption in favor of official messages of the United States is unconstitutional. *Williams* v. *Talladega,* 226 U. S. 404. A State cannot tax the franchise of a transcontinental railroad company chartered by Congress, *California* v. *Central Pacific R. R.,* 127 U. S. 1; nor lands in possession of an Indian tribe, *New York Indians,* 5 Wall. 761; *Choate* v. *Trapp,* 224 U. S. 665; nor the income derived from such lands by a lessee, *Gillespie* v. *Oklahoma,* 257 U. S. 501. Both the United States and the States are free to select such instrumentalities as they see fit. *McCulloch* v. *Maryland,* 4 Wheat. 316; *South Carolina* v. *United States,* 199 U. S. 437; *Osborn* v. *United States Bank,* 9 Wheat. 738.

In addition to officers and employees, independent contractors have been definitely recognized as such appropriate instrumentalities. *Osborn* v. *United States Bank, supra; Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181; *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292; *Indian &c. Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460; *Williams* v. *Talladega,* 226 U. S. 404.

It is thus clear that, whether the plaintiffs were officers, employees, or independent contractors, they were in any event not disqualified from acting as instrumentalities of government by reason of the methods adopted by the various States and municipalities in acquiring

their services, whether by election, appointment, or contract. The essential fact here is that their services were acquired by a method and in a capacity satisfactory to the sovereignty which acquired them. The cases which limit the power of the States to tax federal instrumentalities draw no distinction between income from personal services on the one hand and income from property or from the use of capital on the other. The present case does not, however, require a decision that income from any source other than from personal services to a State or political subdivision is exempt from federal taxation. A tax on compensation for personal service is in substance and effect a tax on gross receipts. It may be that here the distinction lies. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321. There is no sound basis for any distinction between income from personal services resulting from an official appointment and income from personal services resulting from a contractual employment, and still less basis for a distinction between " regular and permanent " officers and employees, and those whose services are acquired, whether by appointment or by contract, to perform a specific task. The compensation of such instrumentalities is inseparably connected with the instrumentalities.

The plaintiffs may be held to be free from taxation on the items of income involved here without a decision that the statute is unconstitutional. Upon a not unreasonable construction the plaintiffs were " employees " of States and political subdivisions of States. Even if the plaintiffs were not " officers " or " employees," but were other appropriate instrumentalities used in the exercise of strictly governmental functions, the statute may be treated as inapplicable to them.

The income of the plaintiffs does not cease to be exempt because the United States has seen fit to tax it to them jointly.

Solicitor General Mitchell, Assistant Attorney General Letts and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, were on the brief, for Mitchell, former Collector.

Mr. Lewis M. Isaacs, submitted a brief as *amicus curiae,* by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

Metcalf & Eddy, the plaintiffs below, were consulting engineers who, either individually or as co-partners, were professionally employed to advise states or subdivisions of states with reference to proposed water supply and sewage disposal systems. During 1917 the fees received by them for these services were paid over to the firm and became a part of its gross income. Upon this portion of their net income they paid, under protest, the tax assessed on the net income of co-partnerships under the War Revenue Act of 1917 (Act of October 3, 1917, c. 63, § 209, 40 Stat. 300, 307). They then brought suit in the United States District Court for Massachusetts to recover the tax paid on the items in question, on the ground that they were expressly exempted from the tax by the Act itself, and on the further ground that Congress had no power under the Constitution to tax the income in question.

The District Court found that two of the items were within the statutory exemption; that the remaining eighteen were not exempt from taxation, either by the provisions of the statute or under the Constitution, and entered judgment accordingly. 299 Fed. 812.

The former Collector sued out the writ of error in No. 376 as to the two items on which a recovery was allowed. In No. 183 the writ of error is prosecuted by the plaintiffs below as to the remaining items. Jud. Code, § 238, before amendment of 1925.

As the case comes directly from the District Court to this Court on a constitutional question, the jurisdiction

of this Court is not limited to that question alone, but extends to the whole case. *Horner* v. *United States, No. 2,* 143 U. S. 570; *Greene* v. *Louisville, etc., R. R. Co.,* 244 U. S. 499.

All of the items of income were received by the taxpayers as compensation for their services as consulting engineers under contracts with states or municipalities, or water or sewage districts created by state statute. In each case the service was rendered in connection with a particular project for water supply or sewage disposal, and the compensation was paid in some instances on an annual basis, in others on a monthly or daily basis, and in still others on the basis of a gross sum for the whole service.

The War Revenue Act provided for the assessment of a tax on net income; but § 201(a) (40 Stat. at 303) contains a provision for exemption from the tax as follows:

"This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—

"(a) In the case of officers and employees under the United States, or any State, Territory, or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees . . ."

The court found that the two items of income involved in No. 376 were received by one of the plaintiffs in error as compensation for his services as the incumbent of an office created by statute; in one case as chief engineer of the Kennebec Water District, a political subdivision of the State of Maine, and in the other as a member of the Board of Engineers of the North Shore Sanitary District, a political subdivision of the State of Illinois. The Collector does not press his writ of error in this case, and we therefore dismiss the writ.

We think it clear that neither of the plaintiffs in error occupied any official position in any of the undertakings

to which their writ of error in No. 183 relates. They took no oath of office; they were free to accept any other concurrent employment; none of their engagements was for work of a permanent or continuous character; some were of brief duration and some from year to year, others for the duration of the particular work undertaken. Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute. We therefore conclude that plaintiffs in error have failed to sustain the burden cast upon them of establishing that they were officers of a state or a subdivision of a state within the exception of § 201(a).

An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation. *United States* v. *Hartwell,* 6 Wall. 385; *Hall* v. *Wisconsin,* 103 U. S. 5. The term "officer" is one inseparably connected with an office; but there was no office of sewage or water supply expert or sanitary engineer, to which either of the plaintiffs was appointed. The contracts with them, although entered into by authority of law and prescribing their duties, could not operate to create an office or give to plaintiffs the status of officers. *Hall* v. *Wisconsin, supra; Auffmordt* v. *Hedden,* 137 U. S. 310. There were lacking in each instance the essential elements of a public station, permanent in character, created by law, whose incidents and duties were prescribed by law. See *United States* v. *Maurice,* 2 Brock. 96, 102, 103; *United States* v. *Germaine,* 99 U. S. 508, 511, 512; *Adams* v. *Murphy,* 165 Fed. 304.

Nor do the facts stated in the bill of exceptions establish that the plaintiffs were "employees" within the meaning of the statute. So far as appears, they were in the position of independent contractors. The record does

not reveal to what extent, if at all, their services were subject to the direction or control of the public boards or officers engaging them. In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor. *Chicago, Rock Island & Pacific Ry. Co.* v. *Bond,* 240 U. S. 449, 456; *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 227; and see *Casement* v. *Brown,* 148 U. S. 615; *Singer Mfg. Co.* v. *Rahn,* 132 U. S. 518, 523.

We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government. See, as to federal taxation on state instrumentalities, *Collector* v. *Day,* 11 Wall. 113; *United States* v. *Railroad Co.,* 17 Wall. 322; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 585, 586; *Ambrosini* v. *United States,* 187 U. S. 1; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; see cases holding that the Sixteenth Amendment did not extend the taxing power to any new class of subjects, *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Peck & Co.* v. *Lowe,* 247 U. S. 165, 172; *Eisner* v. *Macomber,* 252 U. S. 189; *Evans* v. *Gore,* 253 U. S. 245, 259. And, as to state taxation on federal instrumentalities, see *McCulloch* v. *Mary-*

land, 4 Wheat. 316; *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435; *The Banks* v. *The Mayor,* 7. Wall. 16; *Weston* v. *The City Council of Charleston,* 2 Pet. 449, 467; *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292; *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (*Collector* v. *Day; Dobbins* v. *Commissioners of Erie County, supra*), its obligations sold to raise public funds (*Weston* v. *The City Council of Charleston, supra; Pollock* v. *Farmers' Loan & Trust Co., supra*), its investments of public funds in the securities of private corporations, for public purposes (*United States* v. *Railroad Co., supra*), surety bonds exacted by it in the exercise of its police power (*Ambrosini* v. *United States, supra*), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (*Pollock* v. *Farmers' Loan & Trust Co.; Gillespie* v. *Oklahoma, supra,*) and forbids an occupation tax imposed on its use. *Choctaw & Gulf R. R. Co.* v. *Harrison, supra;* and see *Dobbins* v. *Commissioners of Erie County, supra.*

When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his

property is an instrumentality of government within the meaning of the rule. *Thomson* v. *Pacific Railroad,* 9 Wall. 579; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371; *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319; *Choctaw, O. & G. R. R. Co.* v. *Mackay,* 256 U. S. 531.

As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. *McCulloch* v. *Maryland, supra; Collector* v. *Day; Dobbins* v. *Commissioners of Erie County, supra.*

In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and *vice versa.* Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practi-

cal construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co., supra,* at 172,) or the appropriate exercise of the functions of the government affected by it. *Railroad Co.* v. *Peniston, supra,* 31.

While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function, (*Gillespie* v. *Oklahoma, supra,*) is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed

to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. *Railroad Co.* v. *Peniston; Gromer* v. *Standard Dredging Co.; Baltimore Shipbuilding Co.* v. *Baltimore; Fidelity & Deposit Co.* v. *Pennsylvania; Choctaw, O. & G. R. R. Co.* v. *Mackey, supra.*

As was said by this Court in *Baltimore Shipbuilding Co.* v. *Baltimore, supra,* in holding that a state might tax the interest of a corporation in a dry dock which the United States had the right to use under a contract entered into with the corporation:

"It seems to us extravagant to say that an independent private corporation for gain created by a State, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." (p. 382.)

And as was said in *Fidelity & Deposit Co.* v. *Pennsylvania, supra,* in holding valid a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials:

"But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control." (p. 323.)

These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with government from which they derive a profit. We do not suggest that there may not be interferences with such a contract relationship by means other than taxation which are prohibited. *Railroad Co.* v. *Peniston, supra,* at p. 36, recognizes that there may. Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the

functions of government and thus be held to be void. See *Railroad* v. *Peniston, supra,* page 36; *Farmers Bank* v. *Minnesota, supra,* p. 522; *Choctaw & Gulf Railway Co.* v. *Harrison, supra,* p. 272.

But we do decide that one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state; and when we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the state or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. *Central Pacific Railroad* v. *California,* 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

No. 183, judgment affirmed.
No. 376, writ of error dismissed.

DECISIONS PER CURIAM, FROM OCTOBER 5, 1925, TO AND INCLUDING JANUARY 11, 1926, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No.—, original. Ex Parte in the Matter of the City of Monterey, October 12, 1925. Motion for leave to file petition for a writ of mandamus denied by the court in the exercise of its discretion, without prejudice to the petitioner's other remedies. *Messrs. Argyll Campbell, Golden W. Bell* and *Herman J. Hughes* for the City of Monterey.

No. 421. The City of Tulsa et al. *v.* Oklahoma Natural Gas Company et al. Appeal from the District Court of the United States for the Eastern District of Oklahoma. Motion to dismiss or affirm submitted October 5, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Company,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Newark* v. *New Jersey,* 252 U. S. 192, 196. *Messrs. Russell G. Lowe, David A. Richardson* and *E. S. Ratliff* for appellees, in support of the motion. *Messrs. Finis E. Riddle* and *Ira J. Underwood* for appellants, in opposition thereto.

No. 236. George E. Bowling et al. *v.* Frank Beaver et al. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted October 5, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Dick Rice* for defendants in error, in support of the

motion. *Messrs. Vern E. Thompson* and *Halbert H. McCluer* for plaintiffs in error, in opposition thereto.

No. 144. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* MRS. ABI JANNEY. Error to the Court of Appeal, Second Circuit, of the State of Louisiana. Motion to dismiss or affirm submitted October 5, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Messrs. Richard S. Doyle, Merritt Starr* and *Albert L. Hopkins* for defendant in error, in support of the motion. *Mr. Thomas S. Buzbee* for plaintiff in error, in opposition thereto.

No. 186. HENRY F. DUPONT *v.* CORNELIUS R. MILLER, AS DIRECTOR OF PUBLIC WORKS AND BUILDINGS, ETC. Error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted June 1, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for failure to apply for writ of error in time as required by section 6 of the act of September 6, 1916, c. 448, 39 Stat. 727. *Messrs. Edward J. Brundage, Clyde L. Day, Ednyfed H. Williams, Rufus T. Robinson, Oscar E. Carlstrom* and *John J. Beilman* for defendant in error, in support of the motion. *Mr. Angust Roy Shannon* for plaintiff in error, in opposition thereto.

No. 48. DAISY M. SCOTT ET AL. *v.* THE CITY OF COLUMBUS, OHIO. Error to the Supreme Court of the State of Ohio. Motion to dismiss submitted October 5, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon authority of *Erie Railroad*

v. *Solomon*, 237 U. S. 427, 431. *Mr. Charles A. Leach* for defendant in error, in support of the motion. *Messrs. Timothy S. Hogan* and *John S. Hogan* for plaintiffs in error, in opposition thereto.

No. 197. THE ARKANSAS RIVER GAS COMPANY *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL. Error to the Supreme Court of the State of Kansas. Motion to dismiss submitted October 5, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Erie R. R.* v. *Purdy*, 185 U. S. 148; *Layton* v. *Missouri*, 187 U. S. 356; *Louisville & Nashville R. R.* v. *Woodford*, 234 U. S. 46, 51. *Mr. I. N. Williams* for defendants in error, in support of the motion. *Messrs. Joseph S. Clark* and *Thomas C. Wilson* for plaintiff in error, in opposition thereto.

No. 17. STANLEY P. HALL ET AL., ADMINISTRATORS *v.* F. ALEXANDER CHANDLER ET AL., RECEIVERS. Appeal from the Circuit Court of Appeals for the First Circuit. Argued October 8, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon authority of *Begg* v. *New York City*, 262 U. S. 196, 198; *Shultes* v. *McDougal*, 225 U. S. 561, 568. *Mr. Stanley P. Hall*, with whom *Messrs. Walter B. Grant* and *Arthur V. Harper* were on the brief, for appellants. *Mr. Judd Dewey* for appellees.

No. 23. PRINCE TYNER *v.* HENRY BUFFINGTON ET AL. Error to the Supreme Court of the State of Oklahoma. Argued October 8, 9, 1925. Decided October 12, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as

amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. Petition for writ of certiorari herein denied. *Mr. William Neff,* with whom *Messrs. Robert M. Rainey* and *Streeter B. Flynn* were on the brief, for plaintiff in error. *Mr. Carter Smith,* with whom *Mr. George S. Ramsey* was on the brief, for appellees.

No. 10. Charlotte Anita Whitney *v.* The People of the State of California. Error to the District Court of Appeal, First Appellate District, Division One, of the State of California. Argued October 6, 1925. Decided October 19, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726. *Mr. Walter H. Pollak,* with whom *Messrs. Walter Nelles* and *John Francis Neylan* were on the brief, for plaintiff in error. *Mr. John H. Riordan,* with whom *Mr. U. S. Webb* was on the brief, for defendant in error. See *post,* p. 538.

No. 18. John W. Murphy, Attorney General of the State of Arizona, et al. *v.* A. Sardell. Appeal from the District Court of the United States for the District of Arizona. Argued October 8, 1925. Decided October 19, 1925. *Per Curiam.* The judgment of the District Court is affirmed upon the authority of *Adkins* v. *Children's Hospital,* 261 U. S. 525. Mr. Justice Holmes requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins* v. *Children's Hospital.* Mr. Justice Brandeis dissents. *Mr. Earl Anderson,* with whom *Messrs. James P. Lavin* and *John W. Murphy* were on the brief, for appellants. *Messrs. Thomas G. Nairn* and *Challen B. Ellis,*

with whom *Messrs. Louis Henry Chalmers, Alexander Britton* and *Leslie C. Hardy* were on the brief, for appellee.

No. 43. APALACHICOLA LAND & DEVELOPMENT COMPANY ET AL. *v.* W. A. MCRAE, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL. Error to the Supreme Court of the State of Florida. Submitted October 12, 1925. Decided October 19, 1925. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Messrs. Fred H. Davis* and *E. Tillman Davis,* for plaintiffs in error. *Messrs. Rivers Buford* and *Fred T. Myers,* for defendants in error.

No. 35. FRANK L. SMITH ET AL. *v.* ILLINOIS BELL TELEPHONE COMPANY. Appeal from the District Court of the United States for the Northern District of Illinois. Argued October 13, 1925. Decided October 19, 1925. *Per Curiam.* Affirmed upon the authority of *Chicago & Great Western Ry. Co.* v. *Kendall,* 266 U. S. 96, 100. *Mr. Stephen A. Foster,* with whom *Messrs. E. Barrett Prettyman, Oscar E. Carlstrom* and *Karl D. Loos* were on the brief, for appellants. *Messrs. John W. Davis* and *Charles M. Bracelen,* with whom *Messrs. N. T. Guernsey* and *Philip B. Warren* were on the brief, for respondent.

No. 45. M. FRANK DONOHUE *v.* THE STATE OF MAINE; and

No. 46. FRANK C. POWER *v.* THE STATE OF MAINE. Error to the Supreme Judicial Court of the State of Maine. Submitted October 15, 1925. Decided October 19, 1925. *Per Curiam.* Dismissed for want of jurisdic-

tion upon the authority of (1) section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; (2) *United States* v. *Lanza,* 260 U. S. 377, 382; *Twining* v. *New Jersey,* 211 U. S. 78, 93; *Barron* v. *Baltimore,* 7 Pet. 243. *Messrs. Herbert E. Holmes* and *E. N. Pike* for plaintiffs in error. *Messrs. Ransford W. Shaw* and *Edward W. Wheeler* for defendant in error.

No. 118. J. O'Neal Sandel, Administrator, *v.* The State of South Carolina. Error to the Supreme Court of the State of South Carolina. Motion to dismiss or affirm submitted October 19, 1925. Decided October 26, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Rawlins* v. *Georgia,* 201 U. S. 638; *Burt* v. *Smith,* 203 U. S. 129, 136; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281; *DeBearn* v. *Safe Deposit Co.,* 233 U. S. 24, 34; *McDonald* v. *Oregon R. R. & Navigation Co.,* 233 U. S. 665, 669–670; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369, 370. *Messrs. Samuel M. Wolfe* and *A. M. Lumpkin* for the defendant in error, in support of the motion. *Mr. William N. Graydon* for plaintiff in error, in opposition thereto.

No. 52. Iver Olbers *v.* U. S. Shipping Board Emergency Fleet Corporation et al. Error to the Circuit Court of Appeals for the Second Circuit. Argued October 15, 16, 1925. Decided October 26, 1925. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Ry. Co.,* 222 U. S. 222, 224; *Boehmer* v. *Pennsylvania R. R. Co.,* 252 U. S. 495, 498. *Mr. S. B. Axtell* for plaintiff in error. *Mr. J. Frank Staley,* Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney General Letts* were on the brief, for defendants in error.

No. 72. CLARA SHOWALTER *v.* GEORGIA VALLIERE HAMPTON. Error to the Supreme Court of the State of Oklahoma. Argued October 19, 1925. Decided October 26, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448; sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrolton,* 252 U. S. 1, 5–6. *Mr. Halbert H. McCluer* for plaintiff in error. *Messrs. L. A. Wetzel* and *F. D. Adams* for defendant in error.

No. 61. LOUISVILLE BEDDING COMPANY *v.* UNITED STATES; and

No. 62. THE HUDSON BAY KNITTING COMPANY, LIMITED *v.* UNITED STATES. Appeals from the Court of Claims. Argued October 19, 1925. Decided October 26, 1925. *Per Curiam.* These two appeals, allowed before the going into effect of the act of February 13, 1925, revising the jurisdiction of this court, abolishing appeals from the Court of Claims and requiring that review may be had of its judgments only by certiorari, abundantly show the wisdom of the change. They invoke no substantial question of law, they did not merit and did not elicit a formal opinion from the Court of Claims, and they do not call for one here. The appeals are accordingly dismissed and the judgment of the Court of Claims is affirmed. *Mr. Raymond M. Hudson* for appellants. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 63. WILLIAM MEIER *v.* THE STATE OF FLORIDA. Error to the Supreme Court of the State of Florida. Argued October 19, 1925. Decided October 26, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended

by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Henry C. Clark* with whom *Messrs. Oscar O. McCollum, Charles Cook Howell* and *Austin Miller* were on the brief, for plaintiff in error. *Messrs. Rivers Buford* and *Marvin Crosby McIntosh* for defendant in error submitted.

No. 64. Fidelity & Deposit Company of Maryland *v.* The City of Cleburne et al. Appeal from the Circuit Court of Appeals for the Fifth Circuit. Argued October 19, 1925. Decided October 26, 1925. *Per Curiam.* Affirmed with costs upon the authority of *Texas & Pacific Ry. Co.* v. *Railroad Commission of Louisiana,* 232 U. S. 338, 339; *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Baker* v. *Scholfield,* 243 U. S. 114, 118; *Piedmont & G. C. Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 13. *Mr. Washington Bowie, Jr.,* with whom *Mr. Albert B. Hall* was on the brief, for appellant. *Messrs. Alex W. Spence* and *E. B. Stroud, Jr.,* with whom *Mr. E. B. Perkins* was on the brief, for appellees.

No. 69. Joseph Hodgson *v.* The Midwest Oil Company et al. Error to the District Court of the United States for the District of Wyoming. Argued October 21, 1925. Announced October 26, 1925. *Per Curiam.* Transferred to the Circuit Court of Appeals for the Eighth Circuit upon the authority of the act of September 6, 1916, c. 448, sec. 3, 39 Stat. 726, and section 238 of the Judicial Code as amended by section 238 (a), act of September 14, 1922, c. 305; *Smith* v. *Apple,* 264 U. S. 274. Order that case be transferred entered October 21, 1925. *Mr. J. M. Hodgson,* with whom *Messrs. Floyd E. Pendell* and *Robert P. Stewart* were on the brief, for plaintiff in

error. *Messrs. Tyson Dynes, Jr., Tyson S. Dynes, Peter H. Holme* and *Harold D. Roberts* for defendants in error.

No. 75. UNITED GAS & ELECTRIC ENGINEERING CORPORATION *v.* UNITED STATES. Appeal from the Court of Claims. Argued October 22, 1925. Decided October 26, 1925. *Per Curiam.* Judgment affirmed upon the authority of *Baltimore and Ohio Railroad Co.* v. *United States,* 261 U. S. 592, 597; *Baltimore and Ohio Railroad Co.* v. *United States,* 261 U. S. 385. *Mr. Raymond M. Hudson* for appellant. *Solicitor General Mitchell, Assistant to the Attorney General Donovan,* and *Mr. John E. Hoover,* Special Assistant to the Attorney General, for the United States.

No. 89. THORVALD BERG ET AL. *v.* UNITED STATES. Appeal from the Court of Claims. Submitted October 23, 1925. Decided October 26, 1925. *Per Curiam.* Dismissed upon the authority of *Omnia Commercial Co.* v. *United States,* 261 U. S. 502. *Mr. Paul Cooksey* for appellants. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. J. Frank Staley,* Special Assistant to the Attorney General, for the United States.

No. 465. ST. PAUL & TACOMA LUMBER COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted October 12, 1925. Decided November 16, 1925. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of *Southern Pacific Ry. Co.* v. *Stewart,* 254 U. S. 359; *Barnett* v. *Kunkel,* 264 U. S. 16. *Messrs. Alexander Britton, Charles W. Bunn, L. B. da Ponte* and *Dennis F. Lyons* for the appellee, in support of the motion. *Mr. Benjamin S. Grosscup* for the appellant, in opposition thereto.

No. 13. Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In Equity. Order entered November 16, 1925.

The boundary commissioners having this day presented their third report showing further compliance with the decree of March 12, 1923, and particularly that they have run, located and marked upon the ground portions of the boundary line between the States of Texas and Oklahoma from the one hundredth meridian of longitude to the eastern limit of Lamar County, Texas, other than the Big Bend and Fort Augur areas covered by two reports heretofore presented and confirmed;

It is ordered that the report be filed, and that the parties have thirty days from this date within which severally to present any objections which they may have to the report.

No. 738. NEW ORLEANS PUBLIC BELT RAILROAD *v.* JAMES DAVIS. Error to the Supreme Court of the State of Louisiana. Motion to dismiss submitted October 26, 1925. Decided November 23, 1925. Dismissed for the want of jurisdiction upon the authority of *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112; *Tracy* v. *Ginzberg,* 205 U. S. 170, 178; *Bonner* v. *Gorman,* 213 U. S. 86, 91; *Milwaukee Electric Ry. Co.* v. *Milwaukee,* 253 U. S. 100, 106. *Messrs. W. L. Gleason* and *E. M. Miner* for defendant in error, in support of the motion. *Mr. Percy S. Benedict* for plaintiff in error, in opposition thereto.

No. 411. THE NEW YORK & PORTO RICO STEAMSHIP COMPANY *v.* RAFAEL CINTRON LASTRA, ET AL., ETC. Appeal from the Circuit Court of Appeals for the First Circuit. Motion to dismiss submitted November 16, 1925. Decided November 23, 1925. Dismissed for the want of jurisdiction upon the authority of *El Banco Popular De*

Economias y Prestamos de San Juan, P. R., v. *Wilcox*, 255 U. S. 72. *Mr. Archibald King* for appellees, in support of the motion. *Mr. Ray Rood Allen* for appellant, in opposition thereto.

No. 276. HATTIE ROWE *v.* ROBERT L. SARTAIN ET AL. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted November 16, 1925. Decided November 23, 1925. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 5, 6. *Messrs. C. B. Ames, John Sander, E. T. Noble, A. D. Cochran* and *B. W. Griffith, Jr.*, for defendants in error, in support of the motion. *Mr. John Tomerlin* for plaintiff in error, in opposition thereto.

No. —, original. THE COMMONWEALTH OF PENNSYLVANIA *v.* THE STATE OF NEW JERSEY. November 23, 1925. Motion for leave to file a bill of complaint herein granted; and process ordered to issue returnable on Monday, January 25 next. *Messrs. George W. Woodruff* and *William A. Schnader* for complainant. *Messrs. Edward L. Katzenbach* and *John R. Hardin* for defendant.

No. 242. THE PASCAGOULA NATIONAL BANK OF MOSS POINT AND PASCAGOULA, MISSISSIPPI *v.* THE FEDERAL RESERVE BANK OF ATLANTA ET AL. Appeal from the District Court of the United States for Northern District of Georgia. Argued November 24, 25, 1925. Decided November 30, 1925. *Per Curiam.* Transferred to the Circuit Court of Appeals for the Fifth Circuit, upon the authority of the act of September 6, 1916, c. 448, sec. 3, 39 Stat. 727,

and section 238 of the Judicial Code as amended by section 238 (a), act of September 14, 1922, c. 305, 42 Stat. 837; act of February 13, 1925, sec. 14; *Heitler* v. *United States,* 260 U. S. 438. *Mr. Alexander W. Smith, Jr.,* with whom *Mr. Alexander W. Smith* was on the brief, for appellant. *Messrs. Hollins N. Randolph, Montgomery Angell, Newton D. Baker, Robert S. Parker and F. H. Watkins* were on the brief, for appellees.

No. —, original. Ex Parte In the matter of James A. Wood. December 7, 1925. Motion for leave to file a petition for a writ of habeas corpus herein denied. *James A. Wood, pro se.*

No. 562. Alexander Sedgwick *v.* Thomas E. Wing, Trustee. Error to the Circuit Court of Appeals for the First Circuit. Motion to dismiss submitted November 16, 1925. Decided December 7, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 568; *Hull* v. *Burr,* 234 U. S. 712, 720; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439, 444; *Barnet* v. *Kunkel,* 264 U. S. 16. *Mr. Philip W. Russell* for defendant in error, in support of the motion. *Messrs. Hector M. Hitchings* and *Hugh W. Ogden* for plaintiff in error, in opposition thereto.

No. 10. Charlotte Anita Whitney *v.* The People of the State of California. December 14, 1925. The petition for rehearing in this cause, which was heretofore dismissed for lack of jurisdiction, having been considered by the court, is hereby granted, and the cause is set down for further hearing on Monday, March 15 next, when the issue as to the jurisdiction of this court and the merits of the case will be reargued. See *ante,* p. 530.

No. 13, original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In Equity. Orders entered January 4, 1926. Announced by Mr. Justice Van Devanter.

The report of the boundary commissioners of the work done, time employed and expenses incurred in the survey, marking and mapping of the boundary between the States of Texas and Oklahoma, along the Red River from the One Hundredth meridian of longitude to the eastern limit of Lamar County, Texas, other than the Big Bend and Fort Augur areas, pursuant to the decree of March 12, 1923 (261 U. S. 340), is approved and adopted. The compensation of the commissioners for the work done by them, as shown in the report, is fixed at amounts stated in the order. The expenses incurred, as shown in the report, and the compensation here allowed shall be charged as part of the costs in this cause and shall be borne and paid by the three parties to the cause in the proportions specified in said decree. The parties severally shall be credited with the amounts advanced by them, as shown in the report; and they shall advance additional amounts to pay the compensation of the commissioners, as here allowed, and the balance due for expenses, as shown in the report.

No. 739. MRS. IDA HUGHES *v.* THE STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. January 4, 1926. *Per Curiam.* Application for further proceedings in forma pauperis herein denied, for the reason that the court has examined the typewritten record and found that the writ of error presents no substantial federal question. *Messrs. Charles Clark* and *R. R. Jackson* for plaintiff in error. No appearance for defendant in error.

No. 504. H. B. Crone *v.* John W. Snook, Warden. Appeal from the District Court of the United States for the Northern District of Georgia. January 11, 1926. *Per Curiam.* Petition for leave to proceed in forma pauperis denied, for the reason that the court has examined the petition for a writ of habeas corpus, for which this is an appeal, has found the question therein presented frivolous, and dismisses the appeal. *Mr. William Schley Howard* for appellant. No appearance for appellee.

No. 227. Beatrice J. Weston et al. *v.* The City of Tulsa et al. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted January 4, 1926. Decided January 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co. v. Carrollton,* 252 U. S. 1, 5, 6. *Messrs. R. C. Allen* and *I. J. Underwood* for defendants in error, in support of the motion. *Messrs. Louis W. Pratt* and *James M. Springer* for plaintiffs in error, in opposition thereto.

No. 787. Chesapeake & Ohio Railway Company *v.* Williams Slate Company. Error to the Special Court of Appeals of the State of Virginia. Motion to dismiss submitted January 4, 1926. Decided January 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co. v. Carrollton,* 252 U. S. 1, 5, 6. Petition for certiorari denied, and, there appearing to be no reasonable ground for granting the petition, a penalty of $25 is awarded respondent and against the

petitioner as reasonable damages for the delay under the proviso in section C of section 237 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937. *Messrs. Samuel A. Anderson* and *Arden Howell* for defendant in error, in support of the motion. *Messrs. David H. Leake* and *Walter Leake* for plaintiff in error, in opposition thereto.

No. 174. J. L. Lancaster et al., Receivers of the Texas & Pacific Railway *v.* H. L. Smith et al. Error to the Supreme Court of the State of Texas. Submitted January 4, 1926. Decided January 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co. v. Carrollton,* 252 U. S. 1, 5, 6. Petition for certiorari denied. *Messrs. T. D. Gresham* and *Robert L. W. Thompson* for plaintiffs in error. *Mr. Thornton Hardie* for defendants in error.

No. 101. J. L. Lancaster et al., Receivers *v.* Bernice S. Graham. Error to the Court of Civil Appeals, 4th Supreme Judicial District, of the State of Texas. Submitted January 4, 1926. Decided January 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Messrs. F. H. Prendergast, T. D. Gresham, George Thompson* and *Robert L. W. Thompson* for plaintiffs in error. *Mr. J. C. George* for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 5, 1925, TO AND INCLUDING JANUARY 11, 1926.

No. 529. NORTHERN RAILWAY COMPANY *v.* DONALD PAGE ET AL., ADMINISTRATORS. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Robert G. Dodge* for petitioner. *Mr. Charles F. Perkins* for respondents.

No. 555. JAMES McDONALD, JR., ET AL., ETC., *v.* LAWRENCE MAXWELL ET AL., EXECUTORS. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Charles V. Imlay, M. M. Allison* and *John J. Hamilton* for petitioners. No appearance for respondents.

No. 558. UNITED STATES *v.* STONE & DOWNER COMPANY ET AL. October 12, 1925. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *Solicitor General Mitchell* and *Assistant Attorney General Hoppin* for the United States. *Mr. Edward P. Sharretts* for respondents.

No. 604. HUGHES BROS. TIMBER COMPANY *v.* THE STATE OF MINNESOTA. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Messrs. W. D. Bailey* and *Oscar Mitchell* for petitioner. *Messrs. Clifford L. Hilton, G. A. Youngquist* and *H. H. Phelps* for respondent.

No. 614. CARL FRANZ ADOLPH OTTO INGENOHL *v.* WALTER E. OLSEN & COMPANY, INC. October 12, 1925.

Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Joseph C. Meyerstien* and *James M. Beck* for petitioner. *Mr. Allison D. Gibbs* for respondent.

No. 623. YU CONG ENG AND CO LIAM, FOR THEMSELVES AND FOR THE BENEFIT OF OTHER PERSONS SIMILARLY SITUATED AND AFFECTED *v.* W. TRINIDAD, COLLECTOR OF INTERNAL REVENUE, ET AL. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Frederic R. Coudert, Mahlon P. Doing, Allison D. Gibbs* and *Frederic R. Coudert, Jr.*, for petitioners. *Messrs. J. Kennedy White, A. R. Stallings, Mark E. Guerin* and *Charles S. Brice* for respondents.

No. 653. ELIZABETH F. SHUKERT ET AL., EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED, *v.* ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Arthur F. Mullen* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for respondent.

No. 680. JOSEPH SEEMAN ET AL., ETC., *v.* PHILADELPHIA WAREHOUSE COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Samuel F. Frank, W. W. Spalding* and *M. D. Hildreth* for petitioners. *Messrs. Owen J. Roberts* and *Charles A. Riegelman* for respondent.

No. 683. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* A. D. SCHENDEL, AS SPECIAL ADMINISTRA-

TOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Messrs. M. L. Bell, W. F. Dickinson, Thomas D. O'Brien, Edward S. Stringer, Daniel Taylor* and *Alex E. Horn* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent.

No. 684. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* FRED A. ELDER. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Messrs. M. L. Bell, W. F. Dickinson, Thomas D. O'Brien, Edward S. Stringer, Daniel Taylor* and *Alex E. Horn* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent.

No. 686. WILLIAM A. RHEA *v.* THOMAS C. SMITH. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Mr. Thomas Hackney* for petitioner. *Mr. W. R. Robertson* for respondent.

No. 694. ROBERT L. MESSEL *v.* FOUNDATION COMPANY. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana granted. *Mr. J. F. Pierson* for petitioner. *Messrs. P. M. Milner* and *William A. Porteous* for respondent.

No. 712. NEW YORK LIFE INSURANCE COMPANY *v.* WILLIAM H. EDWARDS, COLLECTOR. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. James H. McIntosh* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for respondent.

No. 713. DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE *v.* UNITED STATES EX REL. G. THOMAS BIRKENSTOCK ET AL., EXECUTORS. October 26, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for petitioner. *Messrs. James Craig Peacock* and *John W. Townsend* for respondents.

No. 714. FEDERAL TRADE COMMISSION *v.* ALFRED KLESNER, DOING BUSINESS UNDER THE NAME, "SHADE SHOP." October 26, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell* for petitioner. No appearance for respondent.

No. 716. UNITED STATES *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. October 26, 1925. Petition for a writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States. *Mr. Alex H. Elder* for respondent.

No. 718. EDWARD F. GOLTRA *v.* JOHN W. WEEKS, SECRETARY OF WAR, ET AL. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Joseph T. Davis* and *Douglas W. Robert* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. J. Frank Staley* for respondents.

No. 719. UNITED STATES *v.* WILLIAM F. BRIMS ET AL. October 26, 1925. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Mitchell, Assistant to the Attorney General Donovan, Messrs. Roger Shale* and *Ralph C. Williamson,* Special Assistants to the Attorney General, for the United States. *Messrs. Charles Maitland Beattie, Robert W. Childs, Hope Thompson* and *Albert Fink* for respondents.

No. 721. THATCHER MANUFACTURING COMPANY *v.* FEDERAL TRADE COMMISSION. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles Henry Butler* for petitioner. *Solicitor General Mitchell* for respondent.

No. 725. FEDERAL TRADE COMMISSION *v.* EASTMAN KODAK COMPANY ET AL. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell* for petitioner. *Messrs. Clarence P. Moser* and *John W. Davis* for respondents.

No. 740. ELLAMAR MINING COMPANY *v.* ALASKA STEAMSHIP COMPANY. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. George de Steiguer* and *John H. Powell* for petitioner. *Messrs. W. H. Bogle* and *Lane Summers* for respondent.

No. 741. PUBLIC UTILITIES COMMISSION OF RHODE ISLAND ET AL. *v.* ATTLEBORO STEAM & ELECTRIC CO. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Rhode Island granted. *Messrs. Arthur M. Allen, Charles P. Sisson, Roland W.*

Boyden and *Frank D. Comerford* for petitioners. *Messrs. Robert G. Dodge, Archibald C. Matteson* and *Harold S. Davis* for respondent.

No. 580. SEWARD K. LOWE ET AL. *v.* ALEXANDER J. DICKSON. November 16, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. Claude Nowlin* for petitioners. No appearance for respondent.

No. 764. DIE DEUTSCHE BANK FILIALE NURNBERG *v.* CHARLES FRANKLIN HUMPHREY. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Amos J. Peaslee* for petitioner. *Mr. William Grant* for respondent.

No. 768. BURNRITE COAL BRIQUETTE COMPANY *v.* EDWARD G. RIGGS ET AL., RECEIVERS. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Robert H. McCarter* and *James J. Lynch* for petitioner. *Mr. Merritt Lane* for respondents.

No. 774. NEW YORK DOCK COMPANY *v.* STEAMSHIP POZNAN, HER ENGINES, ETC., ET AL. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Joseph S. Auerbach* and *Charles H. Tuttle* for petitioner. *Messrs. George Whitfield Betts* and *Mark W. Maclay* for respondents.

No. 761. VICTOR TALKING MACHINE COMPANY *v.* BRUNSWICK-BALKE-COLLENDER COMPANY ET AL. November 23, 1925. Petition for a writ of certiorari to the Cir-

cuit Court of Appeals for the Third Circuit granted. *Messrs. Charles E. Hughes, William Clarke Mason, George W. Schurman* and *William Houston Kenyon* for petitioner. *Messrs. Melville Church* and *George W. Case, Jr.* for respondents.

No. 778. THE STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK. *v.* TERRY AND TENCH COMPANY, INC., ET AL. November 23, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Messrs. Albert Ottinger,* Attorney General of New York, and *E. Clarence Aiken* for petitioner. *Mr. William W. Dimmick* for respondents.

No. 781. SWIFT & COMPANY *v.* FEDERAL TRADE COMMISSION. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Albert H. Veeder, Henry Veeder* and *James M. Sheean* for petitioner. *Solicitor General Mitchell* and *Mr. Adrien F. Busick* for respondent.

No. 783. AMERICAN RAILWAY EXPRESS COMPANY ET AL. *v.* JACOB KRIGER. November 23, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee granted. *Messrs. Clinton H. McKay, Charles N. Burch, H. D. Minor, H. S. Marx* and *A. M. Hartung* for petitioners. *Mr. Auvergne Williams* for respondent.

No. 800. UNITED STATES SUGAR EQUALIZATION BOARD, INC., *v.* P. DERONDE & COMPANY, INC. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Wil-*

liam A. Glasgow, Jr., and *Charles F. Curley* for petitioner. *Messrs. Robert H. Richards* and *Joseph M. Hartfield* for respondent.

No. 809. Frederick C. Hicks, as Alien Property Custodian, et al. *v.* Mercantile Trust Company. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. Dean Hill Stanley,* Special Assistant to the Attorney General, for petitioners. *Messrs. Samuel W. Fordyce* and *Douglas W. White* for respondent.

No. 810. United States *v.* Mercantile Trust Company. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. Dean Hill Stanley,* Special Assistant to the Attorney General, for the United States. *Mr. Samuel W. Fordyce* for respondent.

No. 789. International Stevedoring Company *v.* R. Haverty. November 30, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Washington granted. *Mr. Stephen V. Carey* for petitioner. *Mr. Mark M. Letchman* for respondent.

No. 804. William H. Edwards, Collector, *v.* New York Life Insurance Company. November 30, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, and cause assigned for argument with No. 712, heretofore assigned for March 1, as one case. *Solicitor General Mitchell* and *Assistant General Willebrandt* for petitioner. *Mr. James H. McIntosh* for respondent.

No. 791. LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION, *v.* CHIN BOW. December 7, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Luhring* for petitioner. *Messrs. Clement L. Bouve* and *A. Warner Parker* for respondent.

No. 820. THE STATE OF MINNESOTA *v.* FIRST NATIONAL BANK OF ST. PAUL. December 14, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Messrs. Clifford L. Hilton, G. A. Youngquist* and *Patrick J. Ryan* for petitioner. *Messrs. Thomas D. O'Brien, Alexander E. Horn, Edward S. Stringer* and *Edward M. Smart* for respondent.

No. 813. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. *v.* PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO. January 4, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Idaho granted. *Messrs. F. G. Dorety, Thomas Balmer, L. B. da Ponte, F. M. Dudley* and *O. W. Dynes* for petitioners. *Mr. C. E. Elmquist* for respondent.

No. 814. D. H. BRASFIELD ET AL. *v.* UNITED STATES. January 4, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *John W. Preston* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 816. CLARENCE C. CULVER *v.* UNITED STATES. January 11, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. George A. King, Wil-*

liam B. King and *George R. Shields* for petitioner. *Solicitor General Mitchell* for the United States.

No. 834. BEECH-NUT PACKING COMPANY *v.* P. LORILLARD COMPANY. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Charles E. Hughes, Walter A. Scott, James R. Offield* and *H. McClure Johnson* for petitioner. *Messrs. John W. Davis* and *William R. Perkins* for respondent.

No. 838. COLOGERO FASULO *v.* UNITED STATES. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Benjamin L. McKinley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM OCTOBER 5, 1925, TO AND INCLUDING JANUARY 11, 1926.

No. 508. A. L. HARTLINE *v.* UNITED STATES. See *post*, p. 589.

No. 582. JOHN B. BAILEY *v.* UNITED STATES. See *post*, p. 589.

No. 616. THE INTERSTATE COOPERAGE COMPANY *v.* RONALD S. SWAIN. See *post*, p. 590.

No. 1. AUDITORE CONTRACTING COMPANY, INC., ET AL. *v.* FOREIGN TRADE BANKING CORPORATION. See *post*, p. 591.

No. 335. CONTINENTAL CASUALTY COMPANY ET AL. *v.* ALFRED W. AGEE, ADMINISTRATOR. October 12, 1925. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. Ordered that the order of June 8, 1925, granting a writ of certiorari herein be revoked because of the receipt of a certified copy of the opinion of the Supreme Court of the State of Utah in the case of *Carter* v. *Standard Accident Insurance Company.* Petition dismissed. *Messrs. James C. Jones, Lon O. Hocker* and *Frank H. Sullivan* for petitioners. *Messrs. James A. Howell, James H. De Vine* and *Charles R. Hollingsworth* for respondent.

No. 395. THOMAS E. BUFORD *v.* NORTH AMERICAN ACCIDENT INSURANCE COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. W. Howth* for petitioner. No appearance for respondent.

No. 546. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY *v.* JOSEPH W. ISHERWOOD, ETC., TRUSTEE. See *post,* p. 592.

No. 757. SWIFT AND COMPANY *v.* FEDERAL TRADE COMMISSION. See *post,* p. 593.

No. 412. N. M. BALDWIN *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry S. Hall* for petitioner. No appearance for respondent.

No. 460. DON CHAFIN *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James H.*

Holt for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 466. Giuseppe Napolitano *v.* United States. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Raymond S. Oakes* for petitioner. *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for the United States.

No. 474. The Texas & Pacific Railway Company *v.* Z. L. Jarrett. October 12, 1925. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied. *Messrs. F. H. Prendergast* and *T. D. Gresham* for petitioner. No appearance for respondent.

No. 475. M. Scheuer et al., Trustees, *v.* St. Paul Fire & Marine Insurance Company. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William H. Watson* and *Samuel Pasco* for petitioners. *Messrs. Daniel MacDougald* and *J. E. D. Yonge* for respondent.

No. 476. The State of Montana *v.* Sunburst Refining Company. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied. *Mr. L. A. Foote* for petitioner. *Messrs. George E. Hurd* and *H. C. Hall* for respondent.

No. 478. Salvadore Larrocca *v.* C. J. Everett, Trustee. October 12, 1925. Petition for a writ of certiorari

to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Donelson Caffery* for petitioner. No appearance for respondent.

No. 479. PAN-AMERICAN BANK & TRUST COMPANY ET AL. *v.* NATIONAL CITY BANK OF NEW YORK. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ralph S. Rounds, Francis E. Neagle* and *Eugene Congleton* for petitioners. *Mr. John A. Garver* for respondent.

No. 483. H. ELY GOLDSMITH, CERTIFIED PUBLIC ACCOUNTANT, *v.* WILLIAM CLABAUGH ET AL. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. H. Ely Goldsmith* and *Edward G. Griffin* for petitioner. No appearance for respondents.

No. 484. C. H. HODGKINSON *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Carlos Bee* for petitioner. No appearance for respondent.

No. 485. F. M. WITHERS *v.* WILLIAM E. WHITE, TRUSTEE;

No. 486. F. M. WITHERS *v.* WILLIAM E. WHITE, TRUSTEE;

No. 487. WITHERS BROS. *v.* WILLIAM E. WHITE, TRUSTEE; and

No. 488. WITHERS BROS. *v.* WILLIAM E. WHITE, TRUSTEE. October 12, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. I. Henry Harris* for petitioners. *Mr. H. E. Barbour* for respondent.

No. 489. J. L. CHAPMAN, COMMISSIONER OF BANKING OF THE STATE OF TEXAS, ET AL. *v.* R. M. CLAYTON, JR., ET AL. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Perry G. Dedman* and *B. L. Agerton* for petitioners. *Mr. S. C. Rowe* for respondents.

No. 490. AMERICAN SMELTING & REFINING COMPANY *v.* GEORGE CAMPBELL CARSON. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frederick P. Fish, William K. White, Elihu Root, Albert M. Austin* and *George Donworth* for petitioner. *Messrs. George W. Wickersham, Frank H. Hitchcock* and *John H. Miller* for respondent.

No. 492. EDMOND C. FLETCHER *v.* PERCY KELLOGG, EXECUTOR. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edmond C. Fletcher, pro se.* No appearance for respondent.

No. 507. HERMAN PETERSON *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. Sullivan* for petitioner. No appearance for respondent.

No. 511. FEDERAL TRADE COMMISSION *v.* THE JOHN C. WINSTON COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Beck* for petitioner. No appearance for respondent.

No. 514. FEDERAL TRADE COMMISSION *v.* CHICAGO PORTRAIT COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Beck* for petitioner. *Messrs. John T. Evans* and *John Lewis Smith* for respondent.

No. 516. MARY ELLEN DICKSON ET AL. *v.* A. C. NEAL ET AL. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. A. Oldfield* for petitioners. *Mr. W. P. Strait* for respondents.

No. 524. R. McCOLGAN *v.* CHARLES H. CLARK. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioner. No appearance for respondent.

No. 526. SAMUEL SANDAY ET AL. *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Russell T. Mount* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. J. Frank Staley,* Special Assistant to the Attorney General, for respondent.

No. 527. THE AMERICAN AUTOMOBILE ACCESSORIES COMPANY *v.* JEROME H. REMICK COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alfred M. Allen* for petitioner. No appearance for respondent.

No. 530. WILLIAM F. FALLIGAN *v.* CITIZENS TRUST & SAVINGS BANK. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. F. Gilbert* and *James E. Fenton* for petitioner. *Messrs. Oscar Lawler, William J. Hunsaker, E. W. Britt* and *T. B. Cosgrove* for respondent.

No. 531. JOHN F. HERR *v.* CITIZENS TRUST & SAVINGS BANK. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. F. Gilbert* and *James E. Fenton* for petitioner. *Messrs. Oscar Lawler, William J. Hunsaker, E. W. Britt* and *T. B. Cosgrove* for respondent.

No. 532. GIORGIO BORELLI, AS ADMINISTRATOR, *v.* INTERNATIONAL RAILWAY COMPANY. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Hamilton Ward* for petitioner. *Mr. William S. Rann* for respondent.

No. 534. THE PULLMAN COMPANY *v.* JACOB S. WALN ET AL. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ira Jewel Williams* for petitioner. *Mr. John Lewis Evans* for respondents.

No. 537. DOMENICO LAZZARO *v.* LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. Sullivan* for petitioner. *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for respondent.

No. 538. Alexander Sedgwick *v.* Thomas E. Wing, Trustee. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Hector M. Hitchings* and *Hugh W. Ogden* for petitioner. *Mr. Philip W. Russell* for respondent.

No. 539. The Baltimore & Ohio Railroad Company *v.* Charles Tittle. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. S. H. Tolles* and *W. T. Kinder* for petitioner. *Mr. Edward Davidson* for respondent.

No. 540. Kock Shing *v.* John P. Johnson, Commissioner of Immigration; and

No. 541. Kock Tung *v.* John P. Johnson, Commissioner of Immigration. October 12, 1925. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Everett Flint Damon* and *Walter Bates Farr* for petitioners. No appearance for respondent.

No. 542. Alfred T. White *v.* United States. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. William H. Gorham* and *James Kiefer* for petitioner. No appearance for respondent.

No. 544. James Skipitar *v.* United States. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Skipitar, pro se.* No appearance for respondent.

No. 545. MISSISSIPPI CENTRAL RAILROAD COMPANY ET AL. *v.* ERNEST KNIGHT. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. Thomas Brady* for petitioners. *Messrs. J. W. Cassidy* and *E. L. Dent* for respondent.

No. 547. UNITED STATES EX REL. WILBUR H. ROCK *v.* CUNO H. RUDOLPH ET AL., COMMISSIONERS, ETC. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wilton J. Lambert* and *R. H. Yeatman* for petitioner. No appearance for respondents.

No. 560. ISADORE LUVISCH *v.* W. I. BIDDLE, WARDEN, ETC. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. I. J. Ringolsky* and *L. S. Harvey* for petitioner. *Solicitor General Mitchell* and *Assistant to the Attorney General Donovan* for respondent.

No. 563. AMERICAN CENTRAL LIFE INSURANCE COMPANY *v.* AMERICAN TRUST COMPANY, GUARDIAN, ETC. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas J. Tyne* and *Charles E. Cox* for petitioner. No appearance for respondent.

No. 569. FANNIE B. JONES ET AL., ADMINISTRATORS *v.* PEARL MOSIER ET AL., ETC. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Preston A. Shinn* for petitioners. *Mr. C. K. Templeton* for respondents.

No. 571. MARY ANN PARRAMORE ET AL., ETC. *v.* DENVER & RIO GRANDE WESTERN RAILROAD COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. Harry Covington, Spencer Gordon, Mahlon E. Wilson* and *R. B. Webster* for petitioners. *Mr. Waldemar Van Cott* for respondent.

No. 572. W. D. KYNERD *v.* JOHN A. HULEN, RECEIVER, ETC. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. M. McCormick* and *Paul Carrington* for petitioner. *Mr. Joseph Hudson Barwise, Jr.,* for respondent.

No. 573. LEONG DON *v.* WILLIAM T. CHRISTY, COMMISSIONER OF IMMIGRATION. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. *Solicitor General Mitchell* for respondent.

No. 575. MYSTIC STEAMSHIP COMPANY *v.* DIAMOND-O NAVIGATION COMPANY. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. D. A. Neal* and *Harry B. Beckett* for petitioner. *Mr. Erskine Wood* for respondent.

No. 576. WILLIAM F. YOUNG *v.* J. E. STILLWELL. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Messrs. F. Dumont Smith* and *W. I. Gilbert* for petitioner. *Messrs. Leslie R. Hewitt* and *F. C. Price* for respondent.

No. 577. W. MARTIN JONES, JR. *v.* THOMAS MIDGLEY ET AL. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. W. Martin Jones, Jr., pro se. Mr. Edward C. Taylor* for respondents.

No. 581. HERMAN MIELKE *v.* JAMES B. SCHERMERHORN. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Webster Ballinger* for petitioner. *Mr. R. J. Powell* for respondent.

No. 583. O. K. EYSENBACH ET AL. *v.* SAMMIE NAHARKEY. October 12, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Charles B. Stuart* for petitioners. *Mr. Edmund Lashley* for respondent.

No. 585. GEORGE DAIL, TRUSTEE, ETC. *v.* H. A. HART & BROTHER. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. T. D. Warren* for petitioner. *Mr. L. I. Moore* for respondent.

No. 586. SAMUEL SCHECHTER *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. S. Drescher* for petitioner. No appearance for respondent.

No. 587. W. S. MCCRAY *v.* SAPULPA PETROLEUM COMPANY ET AL. October 12, 1925. Petition for a writ of

certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Finis E. Riddle* for petitioner. *Mr. Jerre P. O'Meara* for respondents.

No. 588. JOSEPH LEVIN ET AL. *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ellwood P. Morey* and *John L. McNab* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. Sewall Key* for the United States.

No. 591. THE DISTRICT OF COLUMBIA *v.* HOWE TOTTEN. October 12, 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. *Mr. Henry E. Davis* for respondent.

No. 598. FREDERICK N. LITTLETON *v.* UNITED STATES. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Preston* and *Annette Abbott Adams* for petitioner. *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for the United States.

No. 600. UNITED STATES EX REL. TROY LAUNDRY MACHINERY COMPANY, LIMITED, *v.* THOMAS E. ROBERTSON, COMMISSIONER OF PATENTS. October 12, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George L. Wilkinson, Henry M. Huxley* and *Ralph Munden* for petitioner. *Solicitor General Mitchell, Messrs. Theodore A. Hostetler* and *H. E. Knight* for respondent.

No. 602. Road District No. 4 of Shelby County, Texas, *v.* Home Bank and Trust Company. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hampson Gary* for petitioner. *Mr. H. M. Garwood* for respondent.

No. 605. The City of South Houston et al. *v.* John L. Carman. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lewis R. Bryan* for petitioners. *Mr. Robert L. Cole* for respondent.

No. 607. United States, Owner of the Steamship Sagaporack, *v.* Norfolk Dredging Company. October 12, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. J. Frank Staley,* for the United States. *Mr. Henry H. Little* for respondent.

No. 310. Carter Lynch, Trustee in Bankruptcy of the Tennessee River Coal Company, *v.* Nashville Chattanooga & St. Louis Railway Company et al. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Charles C. Moore* for petitioner. *Messrs. Mark E. Guerin, Pablo G. Corinsta* and *Guillermo B. Guevara* for respondents.

No. 455. James Scott *v.* Morris National Bank of Morris. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Lewis C. Lawson* for petitioner. *Mr. Charles A. Dickson* for respondent.

No. 617. THE NEW YORK CENTRAL RAILROAD COMPANY *v.* FRANK SANDERS. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. William S. Rann* and *F. D. McKenney* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 618. LEWIS & CONGER ET AL. *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Court of Customs Appeals denied. *Mr. John Gibbon Duffy* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Hoppin* for the United States.

No. 619. S. WILLIAM LEVINSON *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Miller Outcalt, Dudley C. Outcalt* and *Joseph W. Huntzman* for petitioner. *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for the United States.

No. 620. THE MEAD FIBRE COMPANY *v.* W. H. VARN ET AL., COPARTNERS AS VARN BROTHERS COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. F. B. Grier* for petitioner. *Mr. J. M. Moorer* for respondents.

No. 622. S. BLATTNER, DOING BUSINESS AS UNITED PRODUCE COMPANY *v.* A. H. LAMBORN ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George C. Bedell* for petitioner. *Messrs W. M. Toomer, W. T. Stockton, Herman Ulmer* and *A. B. Lovett* for respondents.

No. 627. THE CITY OF SEATTLE *v.* PUGET SOUND POWER AND LIGHT COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas J. L. Kennedy* for petitioner. *Mr. James B. Howe* for respondent.

No. 632. WILLIAM E. MOORE ET AL. *v.* LINCOLN HOSPITAL ASSOCIATION ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. C. Flansburg* for petitioners. No appearance for respondents.

No. 633. J. H. BUNNELL & COMPANY, INC., ET AL., *v.* RADIO CORPORATION OF AMERICA. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter H. Pumphrey* for petitioners. *Mr. L. F. H. Betts* for respondent.

No. 637. CHARLES H. MOORE ET AL. *v.* LINCOLN HOSPITAL ASSOCIATION ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. C. Flansburg* for petitioners. No appearance for respondents.

No. 638. LAWRENCE MOORE BYERLY *v.* LINCOLN HOSPITAL ASSOCIATION ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry H. Wilson* and *Elmer J. Burkett* for petitioner. *Mr. C. Petrus Peterson* for respondents

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No. 639. THE CITY OF SOUR LAKE ET AL *v.* VERNON H. BRANCH. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wil-*

liam D. Gordon for petitioners. *Messrs. Chester I. Long, Austin M. Cowan, J. D. Houston, Claude I. Depew* and *W. E. Stanley* for respondent.

No. 640. CHARLES H. UNVERZAGT *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Tracy L. Jeffords* and *Edwin C. Dutton* for petitioner. *Solicitor General Mitchell* for the United States.

No. 641. CHARLES H. UNVERZAGT *v.* E. B. BENN, AS UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF WASHINGTON. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Tracy L. Jeffords* and *Edwin C. Dutton* for petitioner. *Solicitor General Mitchell* for the United States.

No. 642. PINKIE E. MOORE ET AL. *v.* LINCOLN HOSPITAL ASSOCIATION ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. C. Flansburg* for petitioners. No appearance for respondents.

No. 643. PIERCE WRAPPING MACHINE COMPANY *v.* TERKELSEN MACHINE COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Frederick P. Fish, Harrison F. Lyman* and *Albert L. Ely* for petitioner. *Mr. George P. Dike* for respondent.

No. 644. THE FISHERIES PRODUCTS COMPANY ET AL., RECEIVERS OF THE FISHERIES PRODUCTS COMPANY *v.* ABRAHAM S. SEE & DEPEW, INC. October 19, 1925. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. D. Warren* for petitioners. *Messrs. Robert H. Elder* and *Otho S. Bowling* for respondent.

No. 656. GEORGE OWEN SQUIER *v.* AMERICAN TELEPHONE & TELEGRAPH COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. R. Randolph Hicks* and *George F. Canfield* for petitioner. *Mr. Charles Neave* for respondent.

No. 657. OLOF L. BRUCE ET AL. *v.* DUDLEY K. WOODWARD, JR., AS RECEIVER OF THE NORTHERN OIL AND GAS COMPANY. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. H. V. Mercer* for petitioners. *Mr. George S. Grimes* for respondent.

No. 659. PETROLEUM IRON WORKS COMPANY, INC., *v.* WILLIS C. WRIGHT. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harry Preston Lawther* for petitioner. No appearance for respondent.

No. 660. F. M. (BEE) ADAMS ET AL. *v.* THE STATE OF KANSAS. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Messrs. James A. Cobb* and *Elisha Scott* for petitioners. No appearance for respondent.

No. 661. ERIE IRON & METAL COMPANY *v.* UNITED STATES. October 19, 1925. Petition for a writ of certio-

rari to the Court of Claims denied. *Mr. John B. Brooks* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 664. CHARLES A. STONEHAM *v.* WALTER A. CLIFFORD ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max D. Steuer* for petitioner. *Messrs. William M. Chadbourne* and *Francis L. Kohlman* for respondents.

No. 720. ALBERT H. BENHARD ET AL. *v.* CHARLES A. STONEHAM. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William M. Chadbourne* for petitioners. *Mr. Max D. Steuer* for respondent.

No. 665. JOHN BROWNING *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. H. P. White* and *Allen W. Comstock* for petitioner. *Solicitor General Mitchell* for the United States.

No. 666. THE CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* JOHN T. DIEDERICH, ADMINISTRATOR OF THE ESTATE OF LEONARD CALLIHAN, DECEASED. October 19, 1925. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied. *Messrs. LeWright Browning* and *Stanley Reed* for petitioner. *Mr. John F. Hager* for respondent.

No. 667. W. P. BLACK ET AL. *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Cir-

cuit Court of Appeals for the Sixth Circuit denied. *Mr. Norman B. Morrell* for petitioners. No appearance for respondent.

No. 668. PANAMA RAILROAD COMPANY *v.* SIMON THEOKTISTOU. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. Edward Mitchell* for petitioner. *Mr. Chauncey P. Fairman* for respondent.

No. 669. JOHN W. ELLENBERG *v.* BIRMINGHAM BELT RAILROAD COMPANY. October 19, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. Hugo L. Black* for petitioner. No appearance for respondent.

No. 671. MICHAEL T. NAUGHTON *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Alonzo H. Ranes* and *Corinne L. Rice* for petitioner. *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for the United States.

No. 672. NORMAN T. WHITAKER *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Norman T. Whitaker, pro se. Solicitor General Mitchell* and *Mr. Harry S. Ridgely* for the United States.

No. 673. EX PARTE ERNEST STOFFREGEN. October 19, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Melville Church, William G. Johnson* and *Charles E. Tullar*

for petitioner. *Solicitor General Mitchell* and *Mr. H. E. Knight,* Special Assistant to the Attorney General, for the United States.

No. 676. UNITED STATES AT THE RELATION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL. *v.* INTERSTATE COMMERCE COMMISSION. October 19, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. S. W. Moore, F. H. Moore* and *T. P. Littlepage* for petitioners. *Mr. P. J. Farrell* for respondent.

No. 677. SUGARLAND INDUSTRIES ET AL. *v.* OLD COLONY TRUST COMPANY. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. M. Garwood* for petitioners. *Mr. Henry C. Coke* for respondent.

No. 678. EDMOND VAN DYK *v.* WILLIAM A. YOUNG. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William G. Cooke* for petitioner. *Mr. Godfrey Goldmark* for respondent.

No. 682. JACOB L. FISHER ET AL. *v.* JAMES F. A. CLARK ET AL. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman S. Hertwig* for petitioners. *Mr. Clarence J. Shearn* for respondents.

No. 685. E. J. FITZGERALD *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs.*

Herbert Pope and *Frank E. Harkness* for petitioner. *Solicitor General Mitchell* and *Assistant to the Attorney General Donovan* for the United States.

No. 688. HERMAN D. RUHM *v.* HERSCHEL C. OGDEN. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Richard B. Cavanaugh* for petitioner. *Mr. Merritt Lane* for respondent.

No. 689. GENERAL FIRE EXTINGUISHER COMPANY *v.* GEORGE I. ROCKWOOD. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Neave, Frederick P. Fish* and *Everett E. Kent* for petitioners. *Messrs. Louis W. Southgate* and *O. Ellery Edwards* for respondent.

No. 690. THOMAS MCDONNELL *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert N. Golding* and *Charles A. Williams* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 691. WASHINGTON MARKET COMPANY *v.* UNITED STATES. October 19, 1925. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Charles A. Douglas, Hugh H. Obear* and *Alexander Wolf* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 695. EBERHART STEEL PRODUCTS COMPANY, INC., *v.* UNITED STATES. October 19, 1925. Petition for a

writ of certiorari to the Court of Claims denied. *Messrs. William D. Harris* and *Mitchell Staples* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. R. R. Koch,* Special Assistant to the Attorney General, for the United States.

No. 394. EASTERN PRODUCTS CORPORATION ET AL. *v.* TENNESSEE COAL, IRON & RAILROAD COMPANY. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Messrs. Carlyle S. Littleton, James J. Lynch* and *E. Bright Wilson* for petitioners. *Messrs. Frank Spurlock* and *Augustus Benners* for respondent.

No. 654. MERCHANTS BANK & TRUST COMPANY *v.* J. FRANK PFLUG ET AL. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph E. Alexander* and *C. T. Bundy* for petitioner. *Mr. Irvine T. Gilruth* for respondents.

No. 452. LAURA SMITH, ADMINISTRATRIX, ETC., *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. October 26, 1925. Petition for a writ of certiorari to the Appellate Court of the State of Illinois denied. *Mr. Cyrus A. Geers* for petitioner. No appearance for respondent.

No. 497. JOE H. TIGER *v.* WILLIAM M. FEWELL ET AL. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. William Neff* for petitioner. *Mr. William O. Beall* for respondents.

No. 509. FRANK C. MEBANE, AS RECEIVER, *v.* STATEN ISLAND RAILWAY COMPANY ET AL. Error to the Supreme

Court of the State of New York. October 26, 1925. Petition for a writ of certiorari herein denied. *Messrs. Benjamin Catchings* and *Merle F. St. John* for petitioner. *Messrs. Joseph W. Welch, John F. Hughes, A. S. Gilbert, Royal E. T. Riggs, Morgan J. O'Brien* and *Albert Ottinger* for respondents.

No. 566. THE GULF AND SHIP ISLAND RAILROAD COMPANY *v.* C. G. HENDRICKS. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. T. J. Wills* for petitioner. *Mr. W. H. Watkins* for respondent.

No. 570. JAMES C. DAVIS, AGENT, *v.* LOUIS PHILLIPS ET AL. October 26, 1925. Petition for a writ of certiorari to the Superior Court of Bristol County, State of Massachusetts, denied. *Mr. Arthur W. Blackman* for petitioner. *Mr. David R. Radovsky* for respondents.

No. 621. WILLIE CONNER ET AL *v.* H. U. BARTLETT ET AL. Error to the Supreme Court of the State of Oklahoma. October 26, 1925. Petition for a writ of certiorari herein denied. *Mr. William Neff* for petitioners. *Mr. B. B. Blakeney* for respondents.

No. 658. ROBERT GALLAGHER ET AL. *v.* JOHN E. HANNIGAN, TRUSTEE. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Lowell A. Mayberry* for petitioners. *Mr. John E. Hannigan* for respondent.

No. 703. MAX POTTASH AND HARRY POTTASH, COPARTNERS, ETC., *v.* BIRDS, HEILGERS, IRONSIDES, INC. October

26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ira Jewel Williams* for petitioners. *Mr. George B. Covington* for respondent.

No. 704. Louis Underleider et al. *v.* United States. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Bernard Handlan* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 705. Albert Eick *v.* United States. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Bernard Handlan* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 706. Mary C. H. Frenzer et al. *v.* Arthur J. Frenzer, etc., et al. October 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Will H. Thompson* for petitioners. *Mr. Arthur R. Wells* for respondents.

No. 707. Ephraim A. Schwarzenberg *v.* United States. October 26, 1925. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Edward F. McClennan* and *Walter S. Hilborn* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 708. Harry Nadl *v.* United States. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frans E.*

Lindquist for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 709. Salvador Serra *v.* The Estate of the Deceased Lazaro Mota et al. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. F. C. Fisher* and *Edwin S. Puller* for petitioner. No appearance for respondents.

No. 711. Creamery Package Manufacturing Company *v.* H. H. Miller Industries Company. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Lincoln B. Smith* and *W. Clyde Jones* for petitioner. *Mr. Glen E. Smith* for respondent.

No. 715. Ng Lin Go *v.* Luther Weedin, as Commissioner of Immigration. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John J. Sullivan* and *Roger O'Donnell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 717. Buenaventura Lopez et al. *v.* El Hogar Filipino, etc., et al. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. George E. Wallace* and *Pedro Guevara* for petitioners. *Mr. Clyde A. DeWitt* for respondents.

No. 723. The Wabash Railway Company v. Hugh L. Britton, An Infant, etc. October 26, 1915. Petition

for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Clarke E. Baldwin* for petitioner. *Mr. B. D. Chandler* for respondent.

No. 724. SUSQUEHANNA STEAMSHIP COMPANY, INC. *v.* A. O. ANDERSON & COMPANY, INC. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles R. Hickox* for petitioner. *Messrs. John A. McManus* and *H. S. Hertwig* for respondent.

No. 732. EDMOND FENSTERMACHER *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ETC. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Platt Hubbell* for petitioner. *Messrs. M. L. Bell, W. F. Dickinson, Luther Burns* and *John B. Dolman* for respondent.

No. 733. GEORGE D. HARTER BANK *v.* RICHARD INGLIS. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 734. GEORGE D. HARTER BANK *v.* MARY P. CHARLES. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 735. GEORGE D. HARTER BANK *v.* HOWARD L. DOMIGAN. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Cir-

cuit denied. *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 736. GEORGE D. HARTER BANK *v.* J. E. BRATE. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 737. GEORGE D. HARTER BANK *v.* MRS. F. U. LEMAY. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 742. CHARLES DEWITT *v.* UNITED STATES. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Wallace Bryan* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 744. MASHIE BERENSON *v.* H. G. VOGEL COMPANY, INC. October 26, 1925. Petition for a writ of certiorari to the Superior Court of Suffolk County, State of Massachusetts, denied. *Mr. Francis P. Garland* for petitioner. No appearance for respondent.

No. 745. PATRICK O'DONOGHUE *v.* MARY JAEGER. October 26, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George E. Sullivan* for petitioner. *Mr. W. Gwynn Gardner* for respondent.

No. 746. The Bank of the Philippine Islands *v.* Wenceslao Trinidad, Collector. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Jesse C. Adkins* for petitioner. *Mr. Mark E. Guerin* for respondent.

No. 747. Coast Steamship Company et al. *v.* William S. Brady. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph C. Rich* for petitioners. *Mr. Palmer Pillans* for respondent.

No. 748. Edgar P. Bledsoe, County Treasurer, etc., *v.* St. Louis-San Francisco Railway Company. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John B. Dudley* for petitioner. *Messrs. E. T. Miller, C. B. Stuart, J. F. Sharp* and *M. K. Cruce* for respondent.

No. 749. National Surety Company *v.* Salt Lake County et al. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ray Van Cott* for petitioner. *Mr. John Jensen* for respondents.

No. 752. The American Surety Company of New York *v.* The Springfield National Bank et al. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Henry J. Booth* and *James I. Boulger* for petitioner. *Mr. J. E. Bowman* for respondents.

No. 755. Central of Georgia Railway Company *v.* Lillie May Davis, as Administratrix. October 26, 1925.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Sadler, Jr.*, for petitioner. *Mr. Fred Fite* for respondent.

No. 758. MEREDITH HANNA, GUARDIAN OF THE ESTATE OF NORRIS W. H. HAUPT, A MINOR, *v.* THE PENNSYLVANIA COMPANY FOR INSURANCE OF LIVES AND GRANTING ANNUITIES ET AL. October 26, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Meredith Hanna,* for petitioner. No appearance for respondents.

No. 759. NATIONAL TRANSIT COMPANY *v.* JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS. October 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James M. Beck, Frank L. Crawford, Myron Harris* and *Hugh C. Donworth* for petitioner. *Mr. John E. Walker* for respondent.

No. 807. JOHN SCOTT BARKER *v.* UNITED STATES. Motion for leave to proceed in forma pauperis and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. November 16, 1925. *Per Curiam.* Application for further proceeding herein in forma pauperis is denied, for the reason that the court, having examined the typewritten record and having found the petition for writ of certiorari without merit, hereby denies the same. *John Scott Barker, pro se. The Attorney General* for the United States.

No. 459. LUCY FISHER *v.* E. J. CRIDER. November 16, 1925. Error to the Supreme Court of the State of Okla-

homa. Petition for writ of certiorari herein denied. *Mr. William Neff* for petitioner. No appearance for respondent.

No. 469. L. J. SCHWAUB & SONS, INC., *v.* TENNESSEE EGG COMPANY. November 16, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Charles C. Moore* for petitioner. *Mr. John B. Hyde* for respondent.

No. 662. EMPIRE ENGINEERING COMPANY *v.* WHITE, GRATWICK & MITCHELL, INC. November 16, 1925. Petition for a writ of certiorari herein denied. *Mr. Adelbert Moot* and *Helen Z. M. Rodgers* for petitioner. *Mr. Laurence E. Coffey* for respondent.

No. 728. Dr. B. W. CRABB *v.* WARREN H. KERBY ET AL. November 16, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Eustace Smith* for petitioner. *Mr. Charles B. Griffith* for respondents.

No. 754. S. L. LEATHERMAN ET AL. *v.* A. J. MAYSE ET AL. November 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John F. Reilly* and *James G. Wilson* for petitioners. No appearance for respondents.

No. 769. JOSEPH WHELESS *v.* ANDREW W. MELLON, SECRETARY ETC., ET AL. November 16, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph Wheless, pro se. Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. William T. Offley* for respondents.

No. 771. BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY ET AL. *v.* JACOB POLAK. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles W. Beall* for petitioners. *Mr. Lawrence H. Brown* for respondent.

No. 772. ROXANA PETROLEUM CORPORATION *v.* ROBERT WATCHORN. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Truman Post Young* for petitioner. *Mr. George W. Morgan* for respondent.

No. 773. J. S. BACHE & COMPANY *v.* THOS. W. HINDE ET AL. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William Marshall Bullitt, Helm Bruce* and *Henry Woolman* for petitioner. *Messrs. Colin C. H. Fyffe* and *William W. Spalding* for respondents.

No. 775. BRUNSWICK-BALKE-COLLENDER COMPANY *v.* VICTOR TALKING MACHINE COMPANY. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Melville Church* and *George W. Case, Jr.,* for petitioner. *Messrs. Charles E. Hughes, William H. Kenyon* and *William Clark Mason* for respondent.

No. 777. CORNELIUS ANDERSON, ETC., *v.* SHIPOWNERS ASSOCIATION OF THE PACIFIC COAST ET AL. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioner. *Mr. Frederick Clayton Peterson* for respondents.

No. 779. Banner Milling Company *v.* The State of New York. November 23, 1925. Petition for a writ of certiorari to the Court of Claims of the State of New York denied. *Mr. Henry W. Hill* for petitioner. *Mr. Albert Ottinger* for respondent.

No. 780. Meyer E. Kaplan et al. *v.* United States. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob J. Podell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 784. Passaic Valley Sewerage Commissioners *v.* Holbrook, Cabot & Rollins Corporation. November 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis* and *Frederick M. P. Pearce* for petitioner. *Messrs. John W. Griggs, John W. Harding, Thomas P. Conway, Joseph A. Kellogg* and *Thomas E. O'Brien* for respondent.

No. 792. Chicago, Rock Island & Pacific Railway Company *v.* Nellie Kidd, Administratrix. November 30, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Luther Burns, Henry S. Conrad, M. L. Bell* and *W. F. Dickinson* for petitioner. *Mr. Platt Hubbell* for respondent.

No. 796. Fred L. Kriebel *v.* United States. November 30, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Weymouth Kirkland* and *Robert N. Golding* for

petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 797. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* THE CITY OF TACOMA. November 30, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. O. W. Dynes* and *George W. Korte* for petitioner. *Mr. E. K. Murray* for respondent.

No. 802. THE UNITED STATES FIDELITY & GUARANTY COMPANY *v.* WORTHINGTON & COMPANY, A PARTNERSHIP, ETC. November 30, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph A. McCullough* for petitioner. *Mr. Augustus Benners* for respondent.

Nos. 794 and 795. THE FARMERS' LOAN & TRUST COMPANY, ETC., *v.* FREDERICK C. HICKS, ALIEN PROPERTY CUSTODIAN, ET AL. December 7, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward H. Blanc* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts* and *Mr. Dean Hill Stanley* for respondent.

No. 798. HENRY POMMERY *v.* UNITED STATES. December 7, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. David D. Stansbury* and *Thomas H. Mahony* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 799. JOHN A. MURPHY *v.* UNITED STATES. December 7, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Myer Nusbaum* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 806. JAMES V. MARTIN *v.* HON. FREDERICK L. SIDDONS, JUDGE, ETC. December 14, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioner. *Messrs. Joseph W. Cox* and *William H. White* for respondent.

No. 808. SEABOARD AIR LINE RAILWAY COMPANY *v.* MRS. LOUISE E. GEROW, ADMINISTRATRIX. December 14, 1925. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Murray Allen* for petitioner. *Messrs. William C. Douglass, Clyde R. Douglass* and *Robert N. Simms* for respondent.

No. 815. JAMES B. KELLY ET AL. *v.* THE CITY OF BEGGS, OKLAHOMA, ET AL. December 14, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. Louis W. Pratt* and *James M. Springer* for petitioners. *Messrs. R. C. Allen* and *I. J. Underwood* for respondents.

No. 793. JOHN RUSSO, ALIAS MASSIMINO PISSANELLO, *v.* THE PEOPLE OF THE STATE OF NEW YORK. January 4, 1926. Petition for a writ of certiorari to the Court of Appeals of the State of New York denied. *Mr. Thomas E. Nolan* for petitioner. *Messrs. Joab H. Banton* and *Felix C. Benvenga* for respondent.

No. 818. RALPH NAKUTIN, ALIAS RALPH NATKIN, *v.* UNITED STATES. January 4, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob Levy* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 819. CHICAGO AND NORTH WESTERN RAILWAY COMPANY *v.* EDWARD OTT. January 4, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Wyoming denied. *Messrs. R. N. Van Doren, Nelson J. Wilcox* and *Thomas P. Littlepage* for petitioner. *Mr. Ray E. Lee* for respondent.

No. 868. WILLIAM A. LAWRENCE *v.* THE STATE OF ARIZONA. Application for certiorari to the Supreme Court of the State of Arizona. January 4, 1926. *Per Curiam.* This is a petition for a writ of certiorari to the Supreme Court of Arizona to review the validity of a judgment of that court affirming the judgment of the Superior Court of Maricopa County of that State sentencing the petitioner to death for the crime of murder. There is also a motion by petitioner to be allowed to proceed in this court in forma pauperis and for a stay of the sentence which by its terms is to be executed on January 8th next. We have considered the petition, and all the papers accompanying it, and the brief of counsel for the petitioner setting forth the grounds upon which it is claimed that this court should take jurisdiction of the cause. After full examination we find that there is no Federal question disclosed upon which we properly could grant the writ of certiorari and review the case. The petition for certiorari is therefore denied, and so also of course are the motions for leave to proceed in forma pauperis and for a stay of the sentence. The clerk will issue certificate of our action forth-

with to the clerk of the Supreme Court of Arizona, and in addition will advise by telegram the Governor of Arizona, the clerk of its Supreme Court, and the counsel for the petitioner. *Mr. John W. Ray* for petitioner. No appearance for respondent.

No. 821. Pacific Steamship Company *v.* Margaret Sutton, by Harwood Hall, her Guardian ad litem. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Benjamin Grosscup, W. Carr Morrow* and *Charles A. Wallace* for petitioner. *Mr. C. K. Poe* for respondent.

No. 822. Pacific Steamship Company *v.* Ella Cackette. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Benjamin Grosscup, W. Carr Morrow* and *Charles A. Wallace* for petitioner. No appearance for respondent.

No. 826. Wade Larramore et al. *v.* United States. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Bennett* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 829. J. C. Owens *v.* United States. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph E. Morrison* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 830. EVELYN BROWN *v.* UNITED STATES. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph E. Morrison* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 832. EDWARD F. CULLOM ET AL., TRUSTEES, *v.* E. B. KEARNS. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. E. Alexander* for petitioners. *Mr. Louis M. Swink* for respondent.

No. 833. M. F. JONES *v.* IRVING PAGE, RECEIVER, ETC. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John B. Dudley* for petitioner. *Messrs. B. D. Shear* and *E. E. Blake* for respondent.

No. 835. W. S. WHITING *v.* MARK SQUIRES, TRUSTEE. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alfred S. Barnard* for petitioner. *Mr. Mark Squires, pro se.*

No. 837. GEORGE B. WILSON *v.* ELK COAL COMPANY. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John F. Dore, F. C. Reagan* and *Abner H. Ferguson* for petitioner. *Messrs. George Donworth, Elmer E. Todd, John C. Higgins* and *Charles T. Donworth* for respondent.

No. 841. KURT KLING ET AL. *v.* UNITED STATES. January 11, 1926. Petition for a writ of certiorari to the Cir-

cuit Court of Appeals for the Sixth Circuit denied. *Mr. Ferdinand Henry Wurzer* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 848. JOHN W. LANGLEY *v.* UNITED STATES. January 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry E. Davis* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 5, 1925, TO AND INCLUDING JANUARY 11, 1926.

No. 77. UNITED STATES *v.* UNION ELECTRIC LIGHT & POWER COMPANY. Error to the District Court of the United States for the Eastern District of Missouri. October 5, 1925. Judgment reversed; and cause remanded for further proceedings, on joint motion submitted by *Solicitor General Mitchell* in that behalf. *Messrs. Jerry A. Matthews, Thomas Bond* and *Josephus C. Trimble* for defendant in error.

No. 132. UNITED STATES *v.* BRILLIANT COAL COMPANY. Appeal from the Court of Claims. October 5, 1925. Dismissed, on motion of *Solicitor General Mitchell* for the United States. *Mr. John London* for appellee.

No. 176. C. C. BELKNAP GLASS COMPANY *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of Washington. October 5, 1925. Decree reversed; and cause remanded for fur-

ther proceedings, on confession of error submitted by *Solicitor General Mitchell* for the United States. *Mr. George W. Korte* for appellant.

No. 20. CAPITAL CITY WATER COMPANY *v.* THE PUBLIC SERVICE COMMISSION OF MISSOURI. Error to the Supreme Court of the State of Missouri. October 5, 1925 Dismissed, per stipulation. *Messrs A. Z. Patterson* and *Robert A. Brown* for plaintiff in error. *Mr. L. H. Breur* for defendant in error.

No. 21. WILLIAM B. THOMPSON *v.* THE CITY OF ST. LOUIS ET AL. Error to the Supreme Court of the State of Missouri. October 5, 1925. Dismissed, per stipulation. *Messrs. W. B. Thompson* and *Ford W. Thompson* for plaintiff in error. *Mr. William K. Koerner* for defendants in error.

No. 323. FEDERAL RESERVE BANK OF ATLANTA *v.* LEO J. DRUM ET AL. Error to the District Court of the United States for the Northern District of Georgia. October 5, 1925. Dismissed with costs, on motion of *Messrs. Hollins N. Randolph* and *Robert S. Parker,* for plaintiff in error. *Mr. Sanders McDaniel* for defendants in error.

No. 508. A. L. HARTLINE *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. October 5, 1925. Dismissed, on motion of *Mr. J. L. Howard* for petitioner. The *Attorney General* for the United States.

No. 582. JOHN B. BAILEY *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Fifth Circuit. October 5, 1925. Dismissed, on motion of *Messrs. John J. Bonhan, A. A. Lawrence* and *E. H. Abrahams* for petitioner. The *Attorney General* for the United States.

No. 616. The Interstate Cooperage Company *v.* Ronald S. Swain. On petition for a writ of certiorari to the Supreme Court of the State of North Carolina. October 5, 1925. Dismissed, on motion of *Mr. John H. Small* for petitioner. *Mr. P. W. McMullen* for respondent.

No. 5, original. The State of New York *v.* The Bulls Ferry Chemical Company. October 5, 1925. Dismissed, per stipulation. *Messrs. F. LaGuardia* and *Edgar Bromberger* for complainant. *Mr. Julian A. Gregory* for defendant.

No. 6, original. The State of New York *v.* Valvoline Oil Company. October 5, 1925. Dismissed, per stipulation. *Messrs. F. LaGuardia* and *Edgar Bromberger* for complainant. *Mr. Henry B. Twombly* for defendant.

No. 7, original. The State of New York *v.* Midland Linseed Products Company of New Jersey. October 5, 1925. Dismissed, on authority of *Messrs. F. LaGuardia* and *Edgar Bromberger* for complainant. *Mr. Albert C. Wall* for defendant.

No. 8, original. The State of New York *v.* Corn Products Refining Company. October 5, 1925. Dismissed, per stipulation. *Messrs. F. LaGuardia* and *Edgar Bromberger* for complainant. *Mr. Frank H. Hall* for defendant.

No. 9, original. THE STATE OF NEW YORK *v.* BARRETT MANUFACTURING COMPANY. October 5, 1925. Dismissed, per stipulation. *Messrs. F. LaGuardia* and *Edgar Bromberger* for complainant. *Mr. Clark McKercher* for defendant.

No. 10, original. THE STATE OF SOUTH DAKOTA *v.* THE STATE OF MINNESOTA. October 5, 1925. Dismissed, per stipulation. *Messrs. Clarence C. Caldwell, M. H. Boutell, John Lind, Byron S. Payne* and *Oliver E. Sweet* for complainant. *Messrs. John E. Palmer, Charles R. Pierce, Charles E. Houston* and *Clifford L. Hilton* for defendant.

No. 1. AUDITORE CONTRACTING COMPANY, INC., ET AL. *v.* FOREIGN TRADE BANKING CORPORATION. October 5, 1925. Certiorari to the Circuit Court of Appeals for the Second Circuit. Dismissed, per stipulation. *Mr. Alvin C. Cass* for petitioner. *Messrs. John M. Woolsey* and *Delbert M. Tibbetts* for respondent.

No. 2. RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA ET AL. *v.* DULUTH STREET RAILWAY COMPANY. October 5, 1925. Appeal from the District Court of the United States for the District of Minnesota. Dismissed, per stipulation. *Messrs. Clifford L. Hilton, Henry C. Flannery* and *John B. Richards* for appellants. *Messrs. W. D. Bailey* and *Oscar Mitchell* for appellee.

No. 9. CHRISS LANDSBERG, PETITIONER, *v.* THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY. October 5, 1925. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Dismissed for want of prosecution. *Mr. Chriss Landsberg, pro se.* No appearance for respondent.

No. 12. JOHN L. ANDERSON *v.* THE CITY OF MACON ET AL. October 6, 1925. Error to the Supreme Court of the State of Georgia. Dismissed with costs, on motion of *Mr. Warren Grice* for plaintiff in error. *Messrs. Harry S. Stozier* and *H. D. Russell* for defendant in error.

No. 19. ROAD IMPROVEMENT DISTRICT No. 1 OF CLARK COUNTY, ARKANSAS, ET AL., ETC., *v.* CHARLES S. THORNTON ET AL. October 7, 1925. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Dismissed, subject to a motion to restore showing satisfactory evidence of cause for delay to be submitted within 10 days. *Messrs. James P. Lavin* and *John W. Murphy* for appellants. *Messrs. Thomas G. Nairn, Louis Henry Chalmers, Alexander Britton, Challen B. Ellis* and *Leslie C. Hardy* for appellees.

No. 28. THE PIQUA HOSIERY COMPANY *v.* UNITED STATES. October 8, 1925. Appeal from the Court of Claims. Dismissed per stipulation. *Messrs. Frank Davis, Jr.,* and *W. B. Stewart* for appellant. *The Attorney General* for the United States.

No. 17. STANLEY P. HALL ET AL., ADMINISTRATORS, ETC. *v.* F. ALEXANDER CHANDLER ET AL., ETC. October 8, 1925. Appeal from the Circuit Court of Appeals for the First Circuit. Dismissed for the want of jurisdiction. *Messrs. Walter B. Grant, Arthur V. Harper* and *Stanley P. Hall* for appellants. *Mr. Judd Dewey* for appellees.

No. 546. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY *v.* JOSEPH W. ISHERWOOD, ETC., TRUSTEE. October 9, 1925. On petition for writ of certiorari to the

Circuit Court of Appeals for the Fourth Circuit. Dismissed on motion of *Messrs. Junius Parker* and *G. S. Ferguson, Jr.*, for petitioner. *Messrs. C. V. Meredith, F. P. Fish, Hubert Howson* and *Charles N. Howson* for respondent.

No. 757. SWIFT AND COMPANY *v.* FEDERAL TRADE COMMISSION. October 9, 1925. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Dismissed per stipulation. *Messrs. Albert H. Veeder, Henry Veeder* and *James M. Sheean* for petitioner. No appearance for respondent.

No. 344. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY *v.* JOHN ROOSEVELT SNEED ET AL. October 19, 1925. Error to the Circuit Court of Appeals for the Fifth Circuit. Dismissed with costs, on motion of *Mr. R. M. Hudson* on behalf of *Mr. Samuel B. Dabney* for the appellant.

No. 155. ROBERT S. LEE ET AL. *v.* THE PEOPLE OF THE STATE OF ILLINOIS EX REL. LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS. October 19, 1925. Error to the Supreme Court of the State of Illinois. Dismissed with costs, pursuant to the eleventh rule. *Mr. Robert Stewart Lee* for plaintiffs in error. *Mr. Edward J. Brundage* for defendant in error.

No. 300. MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY OF BUFFALO, N. Y. *v.* PHEBE M. BENNETT, AS ADMINISTRATRIX, ETC. October 19, 1925. Error to the Supreme Court of the State of New York. Dismissed with costs, pursuant to the eleventh rule. *Mr.*

Anthony J. Ernest for plaintiff in error. No appearance for defendant in error.

No. 321. UNITED STATES EX REL. MARY STRUP *v.* GEORGE WILLIAMS, CRIMINAL SHERIFF FOR THE PARISH OF ORLEANS, LOUISIANA. October 19, 1925. Appeal from the District Court of the United States for the Eastern District of Louisiana. Dismissed with costs, pursuant to the eleventh rule. *Mr. Girault Farrar* for appellant. No pearance for appellee.

No. 519. HENDERSON-WAITS LUMBER COMPANY *v.* W. F. CROFT, FOR THE USE AND BENEFIT OF THE FIRST NATIONAL BANK OF DE FUNIAK SPRINGS, FLORIDA. October 19, 1925. Error to the Supreme Court of the State of Florida. Dismissed with costs, pursuant to the eleventh rule. *Mr. W. W. Flournoy* for plaintiff in error. No appearance for defendant in error.

No. 78. CARRIE E. ROWLEY *v.* THE STATE OF IOWA. October 20, 1925. Error to the Supreme Court of the State of Iowa. Dismissed with costs, on motion of *Mr. John E. Mulvaney* for plaintiff in error. *Mr. Ben J. Gibson* for defendant in error.

No. 82. J. EDMUND MICHAEL *v.* UNITED STATES. October 21, 1925. Appeal from the Court of Claims. Dismissed on motion of *Mr. Horace S. Whitman* for appellant. *The Attorney General* for the United States.

No. 83. W. CARL HOLLOWAY *v.* UNITED STATES. October 21, 1925. Appeal from the Court of Claims. Dismissed, on motion of *Mr. Horace S. Whitman* for appellant. *The Attorney General* for the United States.

No. 84. FRANK SCHATZ, ADMINISTRATOR OF MICHAEL H. FISHER, *v.* UNITED STATES. October 21, 1925. Appeal from the Court of Claims. Dismissed, on motion of *Mr. Horace S. Whitman* for appellant. *The Attorney General* for the United States.

No. 86. MILES W. GIBBONS *v.* UNITED STATES. October 22, 1925. Appeal from the District Court of the United States for the Northern District of Ohio. Decree reversed, on confession of error, on motion of *Mr. Alfred A. Wheat* for the appellee; and cause remanded for further proceedings. *Mr. Joseph C. Breitenstein* for appellant.

No. 140. PATRICK JOYCE *v.* UNITED STATES. October 26, 1925. Appeal from the District Court of the United States for the Northern District of Ohio. Judgment reversed, on confession of error; and cause remanded for further proceedings, on motion of *Solicitor General Mitchell* for the appellee. *Mr. Joseph C. Breitenstein* for appellant.

No. 760. INTERSTATE REFINERIES, INC., *v.* KAW BOILER WORKS COMPANY. October 26, 1925. On petition for a certiorari to the Supreme Court of the State of Kansas. Dismissed, on motion of *Messrs. James M. Johnson* and *Donald W. Johnson* for petitioner. *Messrs. Edwin S. McAnany* and *Clyde Taylor* for respondent.

No. 136. THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* GEORGE ARTHUR CLAUSEN ET AL. November 16, 1925. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Frederick C. Hicks, present Alien Property Custodian, ordered substituted as a party ap-

pellant herein, on motion of *Solicitor General Mitchell* for the appellants. Dismissed, on motion of *Solicitor General Mitchell* for the appellants; and mandate granted. No appearance for appellees.

No. 392. FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, ET AL. *v.* ADOLF J. BECKER. November 16, 1925. Appeal from the Circuit Court of Appeals for the Second Circuit. Dismissed, on motion of *Solicitor General Mitchell* for the appellants; and mandate granted. No appearance for appellee.

No. 8. HARRY GLASSMAN *v.* ROBERT C. RAND, TEMPORARY RECEIVER, ETC. November 16, 1925. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Dismissed for want of prosecution. *Dorothy Frooks* and *Mr. S. Leighton Frooks* for petitioner. No appearance for respondent.

No. 13. RILEY SMITH *v.* THE STATE OF NEBRASKA. November 16, 1925. Error to the Supreme Court of the State of Nebraska. Dismissed for want of prosecution. *Messrs. E. D. O'Sullivan* and *C. J. Southard* for plaintiff in error. No appearance for defendant in error.

No. 14. RAY A. LOWER *v.* THE STATE OF NEBRASKA. November 16, 1925. Error to the Supreme Court of the State of Nebraska. Dismissed for want of prosecution. *Messrs. E. D. O'Sullivan* and *C. J. Southard* for plaintiff in error. No appearance for defendant in error.

No. 15, original. THE STATE OF ARKANSAS *v.* THE STATE OF MISSISSIPPI. November 16, 1925. Bill of complaint

dismissed, on motion of counsel for the complainant. *Messrs. William J. Driver* and *J. S. Utley* for complainant. *Mr. John W. Cutrer* for defendant.

No. 803. AMERICAN FEATURE FILM COMPANY *v.* JOHN H. TRUMBULL, GOVERNOR OF THE STATE OF CONNECTICUT, ET AL. November 17, 1925. Appeal from the District Court of the United States for the District of Connecticut. Dismissed, per stipulation. *Mr. George W. Wickersham* for appellant. No appearance for appellees.

No. 681. THE STATE OF OHIO EX REL. JOSEPH HANSON *v.* JAMES W. CALDWELL, RECEIVER, ET AL. November 30, 1925. Error to the Court of Appeals for the Sixth Appellate District of the State of Ohio. Dismissed with costs, on motion of *Mr. Oliver B. Snider* for plaintiff in error. No appearance for defendants in error.

No. 756. GULF & SHIP ISLAND RAILROAD COMPANY *v.* F. L. RILEY MERCANTILE COMPANY ET AL. December 7, 1925. Error to the Circuit Court of Jefferson Davis County, State of Mississippi. Dismissed with costs, on motion of *Mr. T. J. Wills* for plaintiff in error. No appearance for defendants in error.

No. 277. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ETC., ET AL. *v.* THE LOUISIANA WATER COMPANY. December 9, 1925. Appeal from the District Court of the United States for the Western District of Missouri. Dismissed, per stipulation. *Mr. L. H. Breuer* for appellants. *Messrs. Frank H. Mason* and *North F. Gentry* for appellee.

No. 182. UNITED FUEL GAS COMPANY *v.* THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL. January 4, 1926. Appeal from the District Court of the United States for the Southern District of West Virginia. Dismissed with costs, on motion of *Mr. Harold A. Ritz* for appellant. *Messrs. Robert S. Spilman* and *C. W. Strickling* for appellees.

No. 350. THE NEW YORK CENTRAL RAILROAD COMPANY *v.* THE LAKEWOOD ENGINEERING COMPANY. January 4, 1926. Error to the District Court of the United States for the Northern District of Ohio. Dismissed, per stipulation. *Mr. S. H. West* for plaintiff in error. *Mr. Mark A. Copeland* for defendant in error.

No. 131. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* THE STATE OF KANSAS EX REL., THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL. January 11, 1926. Error to the Supreme Court of the State of Kansas. Dismissed with costs, on motion of *Messrs. Alexander Britton, Alfred A. Scott, Alfred G. Armstrong* and *Gardiner Lathrop* for plaintiff in error. *Mr. C. B. Griffith* for defendants in error.

APPENDIX.

The following summary of the argument of *Messrs. Frederick R. Coudert, Howard Thayer Kingsbury,* and *Mahlon B. Doing* for the appellees in *Direction Der Disconto-Gesellschaft* v. *United States Steel Corporation,* 267 U. S. 22, should be noted as an addition to the report of that case.

Certificates of corporate stock duly endorsed in blank are treated by the modern law as constituting property in themselves, (a) capable of manual delivery like chattels, in pledge or otherwise; (b) the subject of jurisdiction *in rem;* and (c) the subject of taxation as such.

(a) *Christian* v. *Atlantic & N. C. R. R. Co.,* 133 U. S. 233; *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259; *In re Whiting,* 150 N. Y. 27; *Williams* v. *Colonial Bank,* 38 Ch. Div. 388; *Uniform Stock Transfer Act; Williston, Contracts,* Vol. I. pp. 835–837, Vol. II, pp. 1957, 1958; *Cook, Corporations,* 8th ed., Vol. II, pp. 1437 *et seq.; Sedgwick, Damages,* 9th ed., Vol. I, p. 521; (b) *Yazoo R. R.* v. *Clarksdale,* 257 U. S. 10; *South Dakota* v. *North Carolina,* 192 U. S. 286; *Mitchell* v. *Leland Co.,* 246 Fed. 103; *Vidal* v. *South American Securities Co.,* 276 Fed. 855; *Beal* v. *Carpenter,* 235 Fed. 273; *Blake* v. *Foreman Brothers Banking Co.,* 218 Fed. 265; *Merritt* v. *American Steel Barge Co.,* 79 Fed. 228; *Simpson* v. *Jersey City Contracting Co.,* 165 N. Y. 193; *Wynn* v. *Griffenhagen,* 167 App. Div. (N. Y.) 572; *General Motors Corp.* v. *Ver Linden,* 199 App. Div. (N. Y.) 375; *Griswold* v. *Kelly Springfield Tire Co.,* 120 Atl. (N. J.) 324; *Puget Sound Nat. Bank* v. *Mather,* 60 Minn. 362; *Stern* v. *The Queen,* (1896) 1 Q. B. 211; *Matter of K.,* 58 German Imperial Court Rep. (Civil Cases) 8; *Beale, Foreign Corporations,* pp. 483–485; (c) *De Ganay* v. *Lederer,* 239 Fed. 568, 250 U. S. 376; *Hatch* v. *Reardon,* 184 N. Y. 431.

Certainly, so long as there is no direct conflict between two jurisdictions in the exercise of power over particular shares of corporate stock, the foregoing principles are not adversely affected by the decisions in *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1; *Amparo Mining Co.* v. *Fidelity Trust Co.*, 75 N. J. Eq. 555; *Miller* v. *Kaliwerke &c. Gesellschaft*, 283 Fed. 746; *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289.

Consequently, the seizure by the Public Trustee in England of the endorsed stock certificates in controversy, in accordance with the provisions of the British Trading with the Enemy Acts 1914–1918, operated as a lawful seizure of the shares represented thereby as enemy property within the British jurisdiction, which will be considered effective everywhere. *United States* v. *Chemical Foundation*, 294 Fed. 300; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Luther* v. *Sagor*, (1921) 2 K. B. 532.

Furthermore, without regard to the property characteristics of these duly endorsed certificates of corporate stock, there has been in effect a voluntary transfer of the enemy interest in the shares represented thereby to the British Government by the provisions of the Treaties of Versailles and Berlin.

The British War Legislation and the Vesting Orders and measures of transfer executed thereunder with regard to these shares attempted and intended upon their face to transfer to the Public Trustee every right, title and interest of the enemy in such shares.

Every such attempt and intention of the British War Legislation and the Vesting Orders and measures of transfer executed thereunder was ratified, confirmed and rendered fully effective by the so-called "economic clauses" of the Treaty of Versailles without regard to the technical *situs* of the interests intended to be covered thereby. *Treaty of Versailles*, Art. 297, Annex Arts, 297–298, subd. 1 and 3; *B. & Sohne* v. *Baux*, 107 German Imperial Court Reports (Civil Cases) 43.

This intention of the Treaty is conclusively evidenced by the practical construction placed thereon by the parties. Great Britain has given and Germany has accepted under the Treaty, credit for the proceeds of the sale of certain endorsed certificates of stock in American corporations which were seized by the Public Trustee during the war, and Germany has paid compensation under the Treaty to her Nationals whose stock was so seized and sold. *American and English Encyc. of Law,* Vol. 28 pp. 488–490 and citations.

The Treaty has thus operated as a taking by Germany, in the exercise of her right of eminent domain, of the property of her nationals, wherever situate, in the payment of her war obligations, for which taking Germany agreed to provide, and did in fact provide, compensation to her nationals. *Treaty of Versailles,* Art. 297, par. 1; *Constitution of Germany;* (Reichsgesetzblatt 1919, pp. 1381 *et seq.*) Arts. 4, 7, 178–180; *German Laws,* No. 6958 of July 16, 1919, No. 7033 of August 31, 1919 and No. 7573 of May 26, 1920; *Directions of German Government,* issued thereunder November 15, 1919; *The Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace,* pp. 293, 294; *Luxardo* v. *Public Trustee,* (1924) 1 Chancery.

The German Government possesses the power, as an attribute of sovereignty admitted by international law, to devote the property of its nationals, wherever situate, to the termination and settlement of the war. This power in the nature of Eminent Domain finds numerous precedents in modern times as exemplified in treaties entered into by the United States, and has been sustained by this Court. It is recognized by authorities on international law generally and by the practice of civilized states. *Butler, Treaty Making Power of the United States,* Vol. II, p. 293 and citations; *Hijo* v. *United States,* 194 U. S. 315; *Herrera* v. *United States,* 222 U. S. 558; *James* v. *The Second Russian Insurance Co.,* 210 App. Div. (N. Y.)

82; *Cook* v. *Tait,* 265 U. S. 47; *The Blonde,* (1922) 1 App. Cas. 335.

The Treaty of Versailles contains a covenant binding German nationals not to question the title of the Public Trustee in and to the shares in controversy. *Treaty of Versailles, Annex* Art. 298, subd. 2.

The Treaty of Berlin, under the principles of international law, has adopted into American Law for the benefit of our Associates the ratifications and convenants of the Treaty of Versailles as against Germany and her nationals. *Treaty of Berlin,* Art. 2, Sec. 1; *Junkers* v. *Chemical Foundation,* 287 Fed. 597; *United States* v. *Chemical Foundation,* 294 Fed. 300; *Lange* v. *Wingrave,* 295 Fed. 565; *The Resolution,* 2 Dall. 1, 2 Dall. 19.

As the Government of the United States has taken no action at any time to seize under its war legislation, or to charge under the Treaty of Berlin, the shares of stock in American corporations represented by the certificates in question, that Government has no right or interest in this controversy. *Miller* v. *Rouse,* 276 Fed. 715; *Stoeck* v. *Public Trustee,* (1921) 2 Chancery 67; *Foster* v. *Neilson,* 2 Pet. 293; *Moore, Digest of International Law,* Vol. V, p. 222 and citations.

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