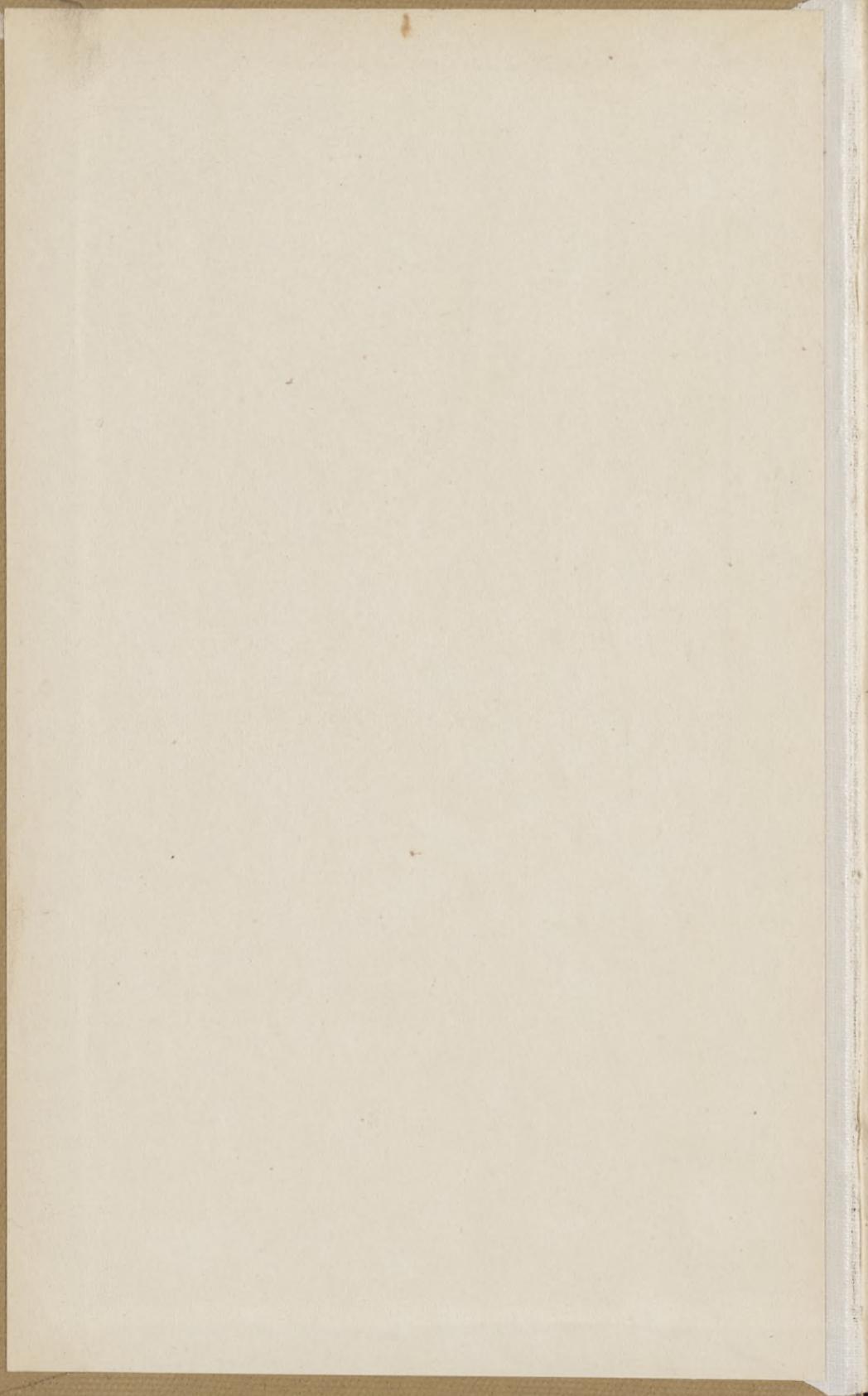


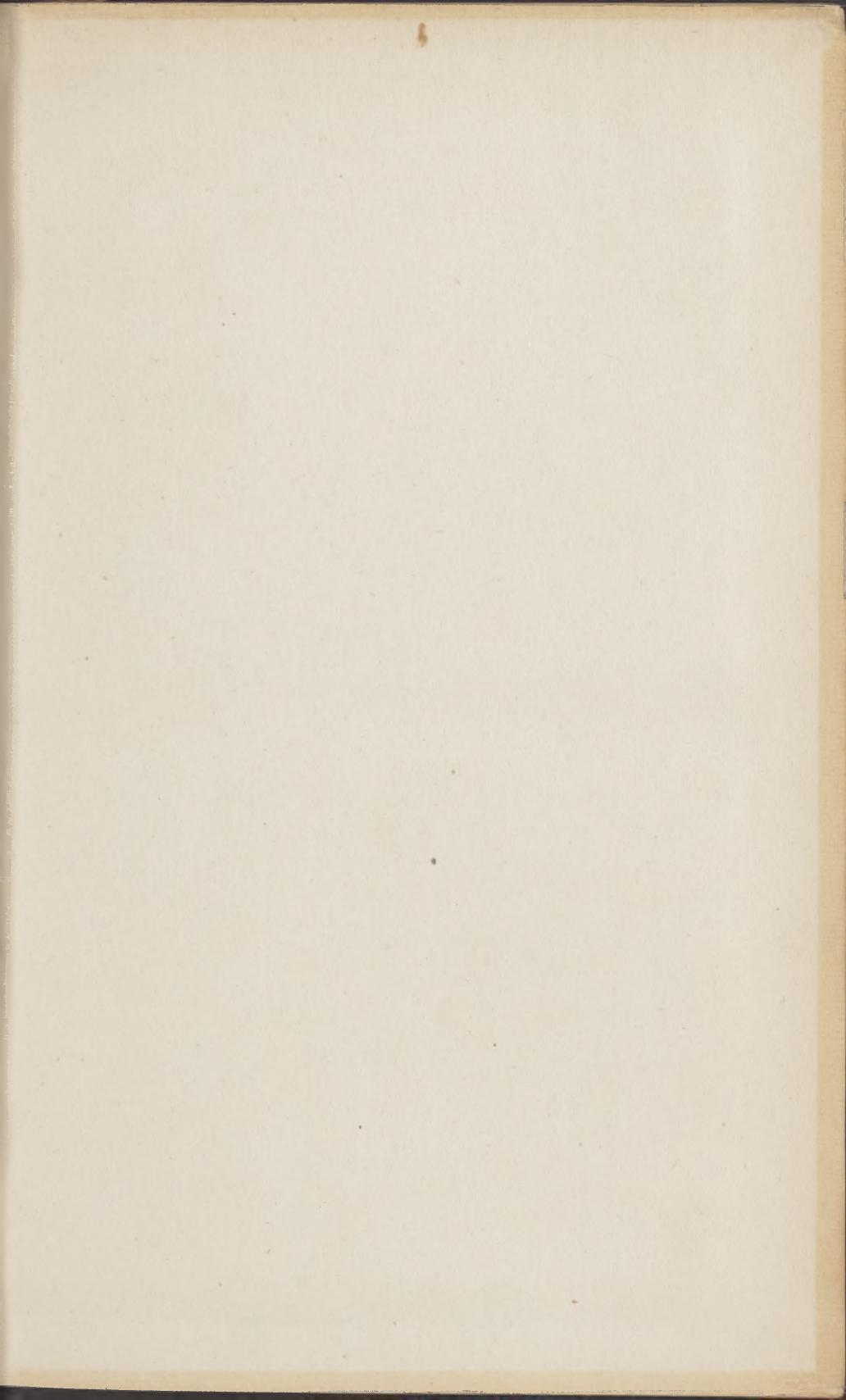
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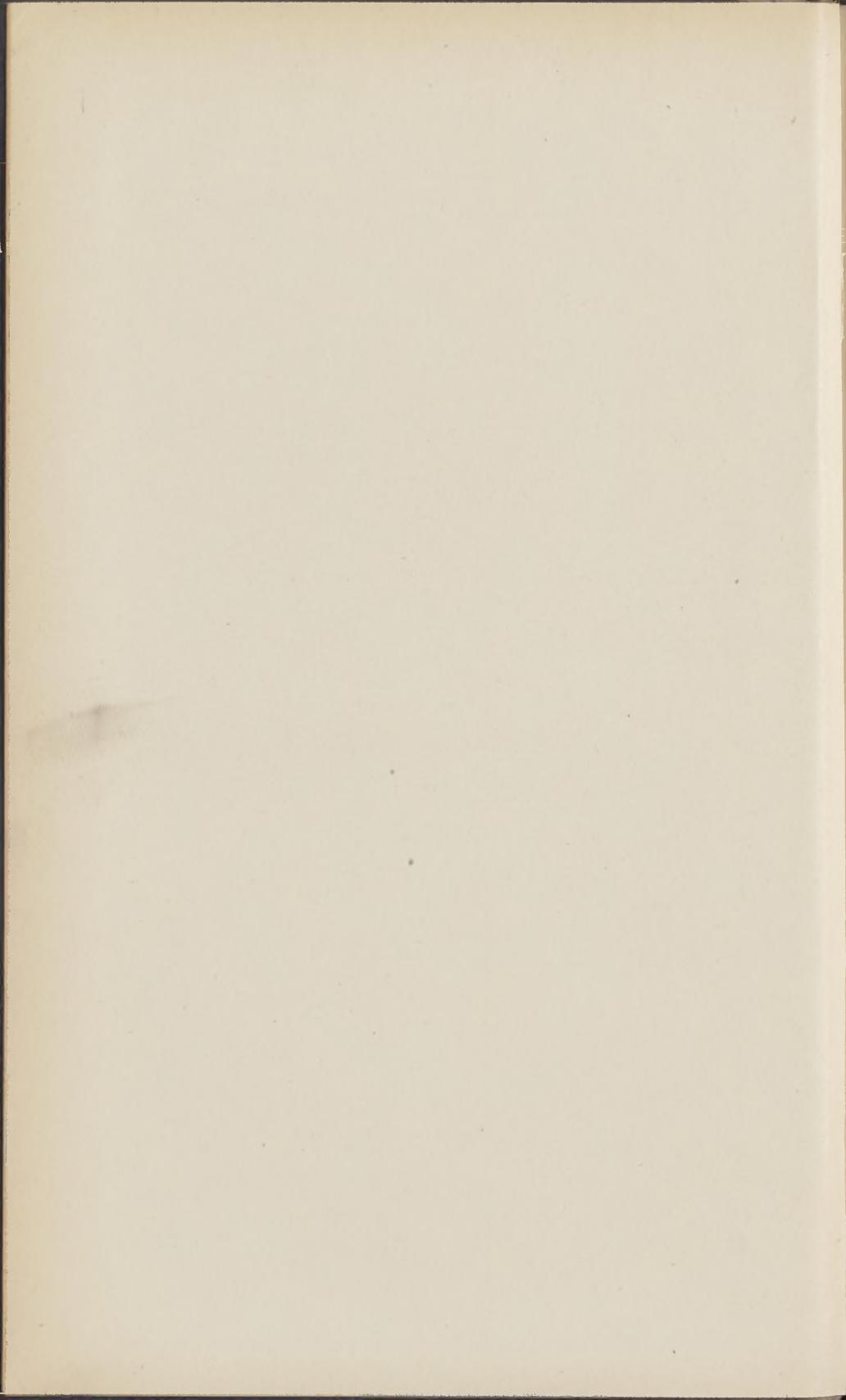


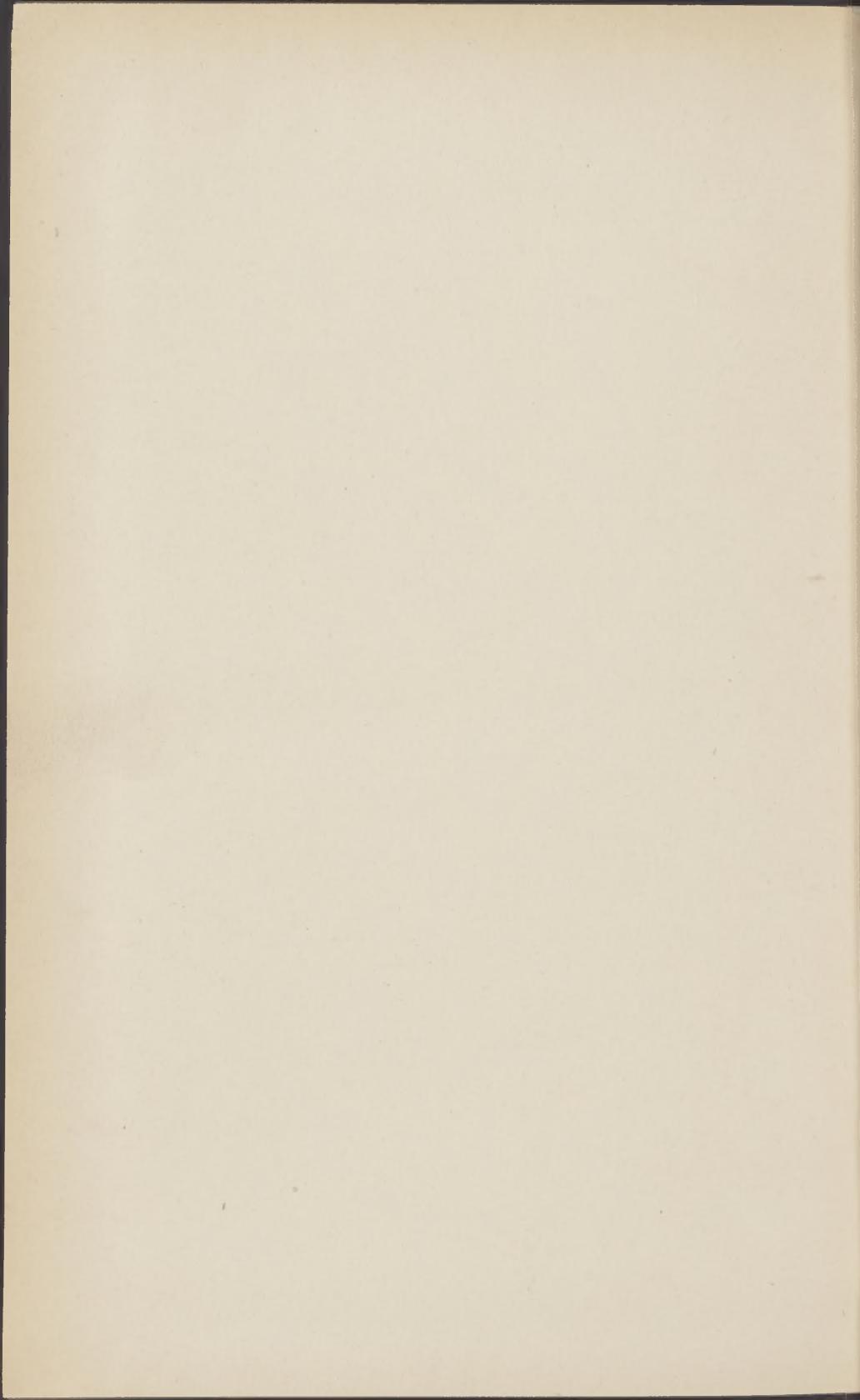
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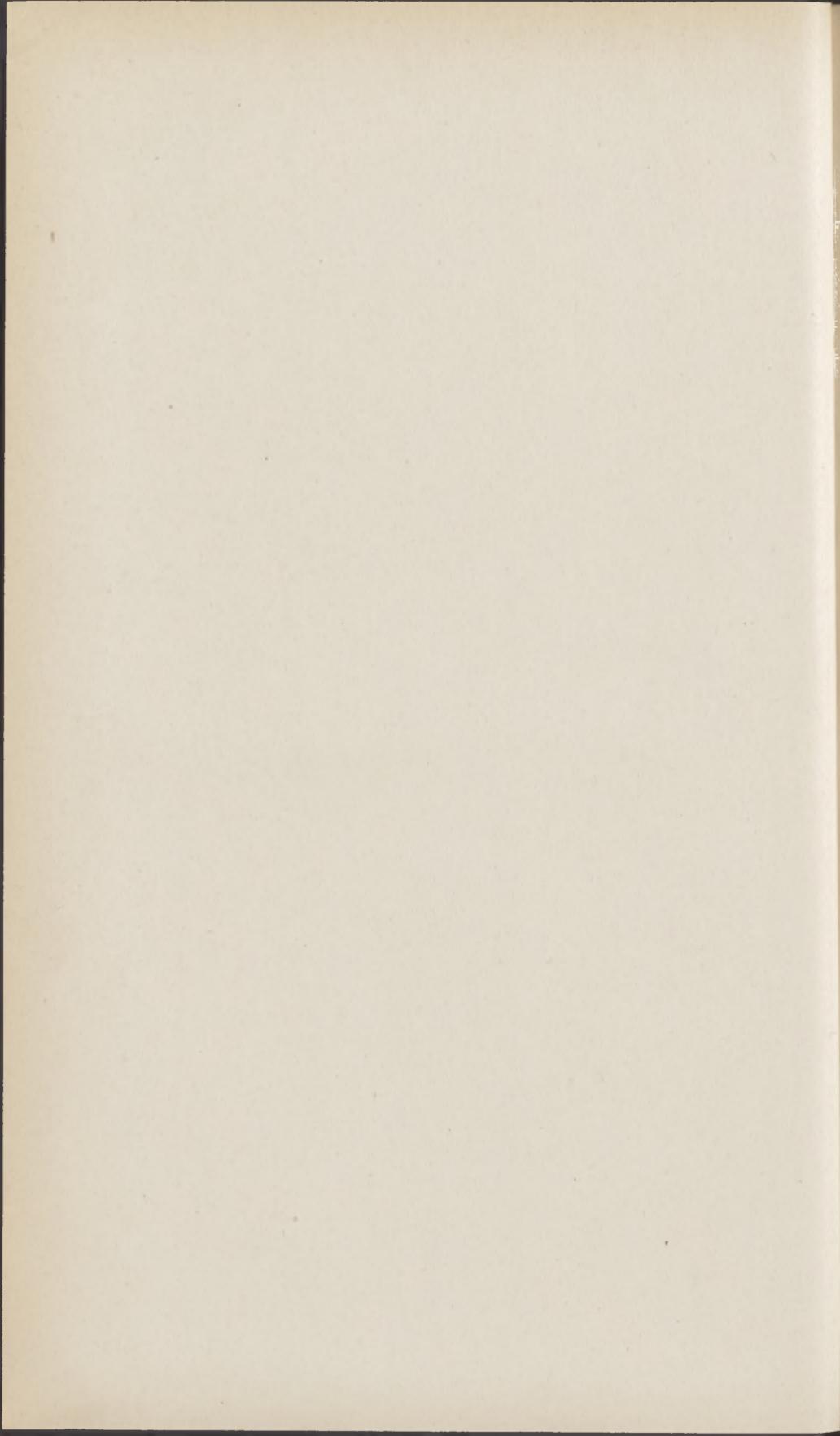
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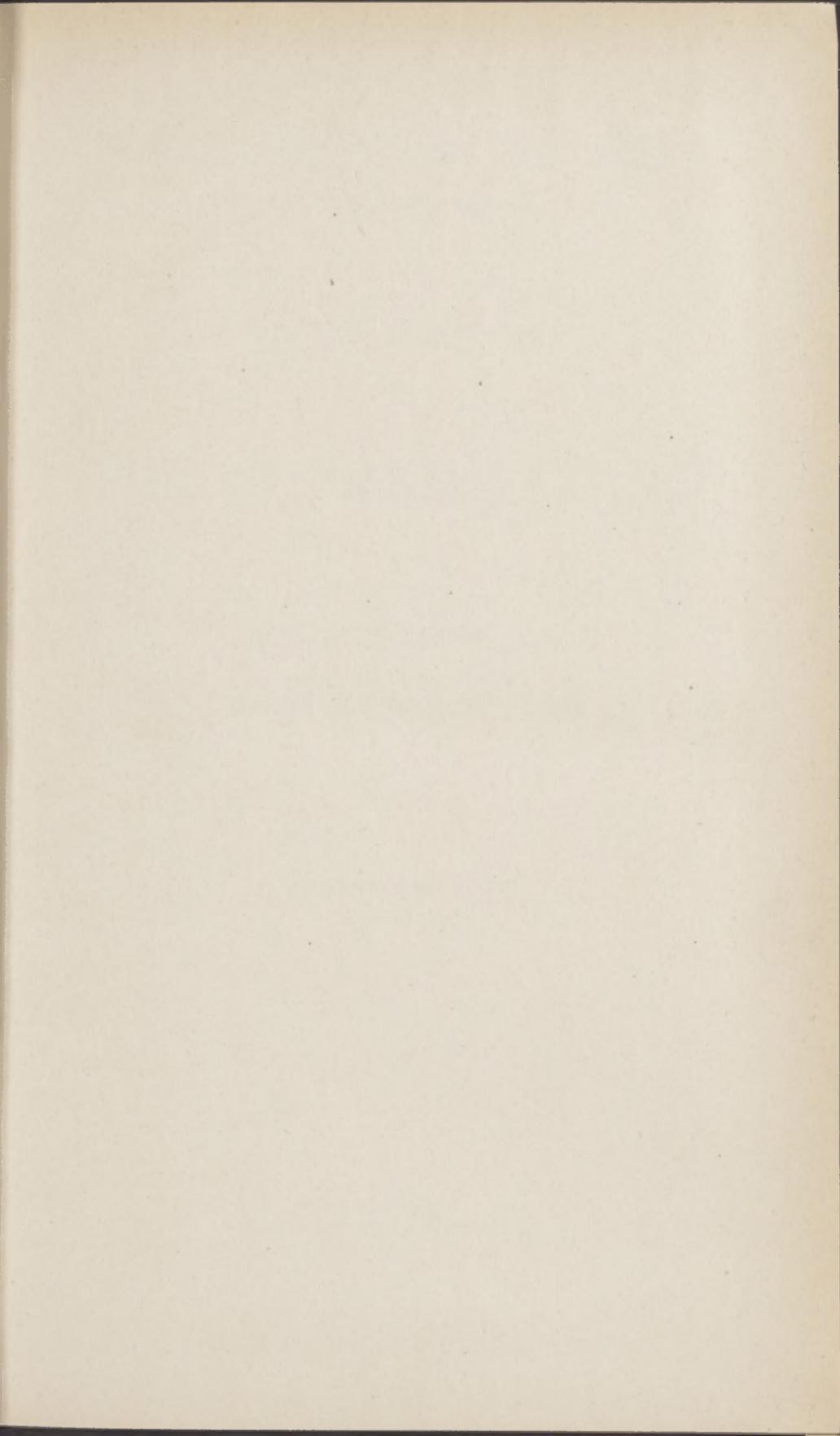


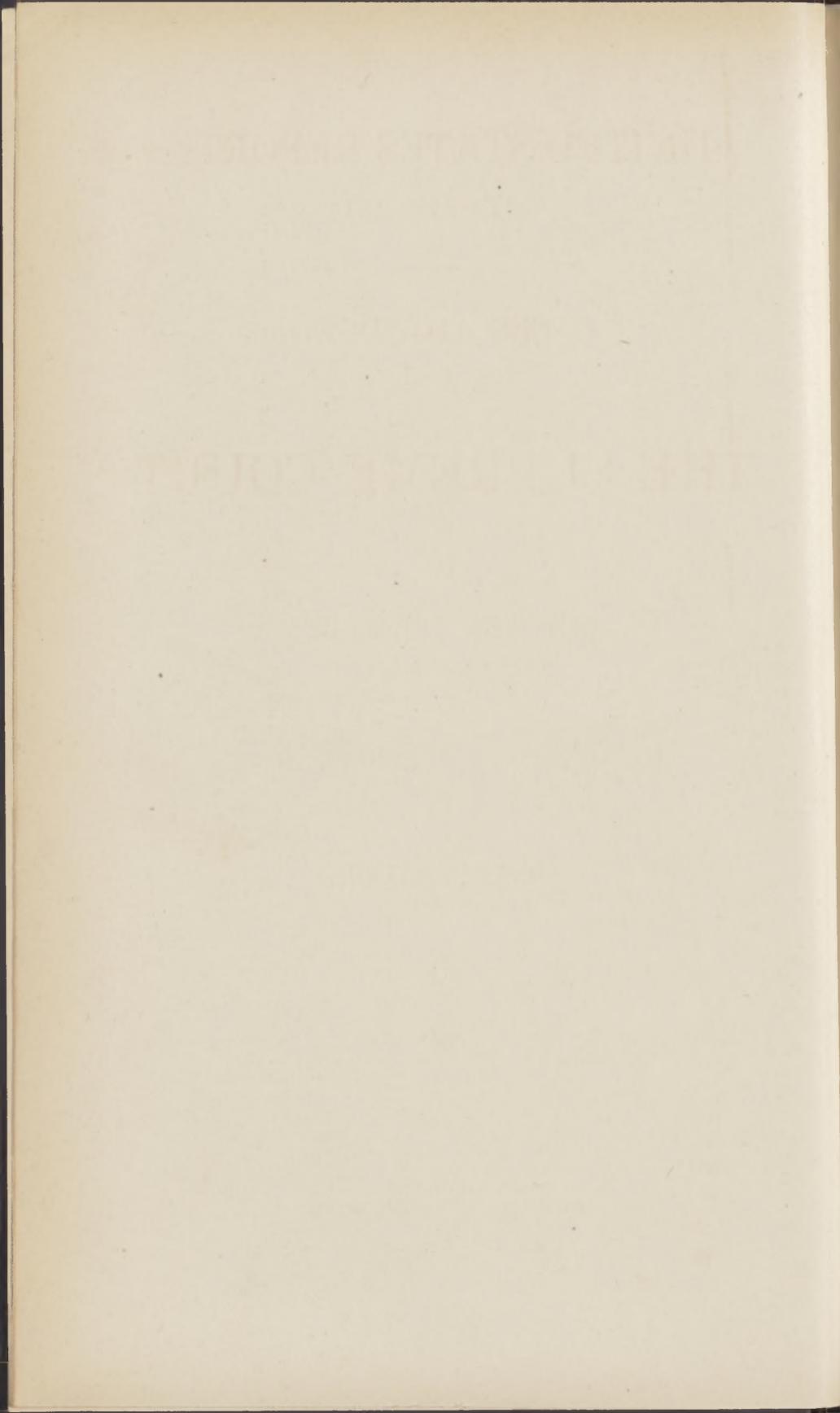












UNITED STATES REPORTS

VOLUME 271

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1925

APRIL 12, 1926 (IN PART)

TO AND INCLUDING JUNE 7, 1926

ERNEST KNAEBEL

REPORTER



WASHINGTON
GOVERNMENT PRINTING OFFICE
1927

UNITED STATES REPORTS
VOLUME 211
CASES ADJUDGED
IN
THE SUPREME COURT

CORRECTION. In 268 U. S. at page 65 in last line of paragraph (4), change "maximum" to "maxim."

Under the Act of May 29, 1926, c. 425, 44 Stat. 677, copies of this volume may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D. C.

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.

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.

¹ For the next previous allotment, see 268 U. S., p. IV.

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1925.

KEITH, FORMER COLLECTOR, *v.* JOHNSON,
ADMINISTRATRIX.

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

No. 295. Argued January 6, 1926.—Decided April 12, 1926.

1. The New York transfer tax (Cons. Ls. c. 60, Art. X) is primarily payable by the personal representative out of the estate, and not by the heirs, though they are required to pay if the property is transferred to them without prior deduction of the tax. P. 4.
2. An executrix who paid this tax, as required, out of funds of the estate, was entitled, under the Revenue Act of 1916, to deduct the amount from the income of the estate, during administration, for the purpose of computing the net income subject to the federal income tax. P. 9.
- 3 Fed. (2d) 361, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment in the District Court against the Collector in an action to recover money paid under protest as an income tax.

Messrs. Newton K. Fox and W. H. Trigg, with whom *Solicitor General Mitchell* and *Mr. A. W. Gregg*, *Solicitor of Internal Revenue*, were on the brief, for petitioner.

This Court has decided that taxes which are deductible from the income of an estate for the purpose of determining net income taxable under the federal Income Tax Act, are those taxes which are "charges against the estate" and are "to be paid out of it by the administrator or executor substantially as other taxes and charges are paid."

This Court has also held that the transfer tax imposed by the State of New York is not a charge against the estate, but is a charge against the beneficiaries. Furthermore, the New York tax is not paid by the personal representative of the decedent out of the mass of the property before distribution, as other taxes are paid, but is paid out of the particular shares after those shares have been determined.

Therefore a tax which is not imposed upon the estate is not deductible from gross income of the estate for the purpose of determining the net income taxable under the federal Income Tax Act. Citing: *New York Trust Co. v. Eisner*, 256 U. S. 345; *United States v. Woodward*, 256 U. S. 632; *New York Trust Co. v. Eisner*, 263 Fed. 620; *Winans v. Atty. General*, (1910) App. Cas. (H. L.) 27; *Knowlton v. Moore*, 178 U. S. 41; *Bugbee v. Roebing*, 94 N. J. Law 438; *New York Trust Co. v. Eisner*, 3 Fed. (2d) 361; *United States v. Perkins*, 163 U. S. 625; *United States v. Fox*, 94 U. S. 315; *Snyder v. Bettman*, 190 U. S. 249; *Prentiss v. Eisner*, 267 Fed. 16; *Farmers' Loan & Trust Co. v. Winthrop*, 238 N. Y. 488; *Home Trust Co. v. Law*, 236 N. Y. 607; *In re Meyer*, 209 N. Y. 386; *Smith v. Browning*, 225 N. Y. 358; *In re Gihon*, 169 N. Y. 443; *Carroll County v. Smith*, 111 U. S. 556; *Northern Trust Co. v. McCoach*, 215 Fed. 991; *National Bank of Commerce v. Allen*, 211 Fed. 743, aff. 223 Fed. 472; *First*

National Bank v. McNeel, 238 Fed. 559; *Eliot National Bank v. Gill*, 218 Fed. 600.

Messrs. Sidney V. Lowell and John M. Perry, with whom *Messrs. Harrison Tweed and Benjamin Mahler* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1917, John B. Johnson, a resident of New York, died intestate. Respondent was appointed administratrix, and in that year paid to the State \$233,044.20, the transfer tax imposed pursuant to Art. X, Tax Law, c. 60, Consolidated Laws. When respondent made the income tax return for the estate for 1917 (Revenue Act of 1916, c. 463, 39 Stat. 756, 757), she claimed that the state transfer tax paid in that year was deductible; but, yielding to the regulations of the Treasury Department, she did not make the deduction, and under protest paid to the United States an income tax calculated on \$164,958.00, amounting to \$30,985.53. If the deduction had been made there would have been no taxable income. This action was brought to recover the amount paid. The District Court gave respondent judgment which was affirmed by the Circuit Court of Appeals.

Under the Revenue Act of 1916, the income of the estate for 1917 during administration was subject to a tax to be assessed against the administratrix. She was required to pay the tax and was indemnified against claims of beneficiaries for the amount paid. § 2(b). It is provided that, in computing net income, in the case of a citizen or resident of the United States, for the purpose of the tax, there shall be allowed as deductions the taxes imposed by the authority of the United States or of any State and paid within the year. § 5(a) Third. Administrators and other fiduciaries are subject to all the provisions which apply to individuals. § 8(c).

In *United States v. Woodward*, 256 U. S. 632, it was held that the federal estate taxes imposed by the Revenue Act of 1916 are deductible in ascertaining net taxable income received by estates of deceased persons during the period of administration or settlement. Revenue Act of 1918, Title II. The court said (p. 635): "It [the estate tax] is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. . . . It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for purposes of administration, . . . but is made a general charge on the gross estate and is to be paid in money out of any available funds or, if there be none, by converting other property into money for the purpose."

The government contends that the state transfer tax is not imposed on the estate and is not deductible in calculating the federal tax on the income of the estate.

The transfer tax law imposes a tax "upon the transfer of property" from the deceased (§ 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. §§ 221, 221(a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. § 224.*

* "*Lien of tax and collection by executors, administrators and trustees.* Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as

They are not entitled to discharge until the tax is paid. § 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the State, the tax is in effect an appropriation by the State of a part of the property of the deceased at the time of death. And the State's portion is deductible from the legacy and does not pass to the legatee. If money is transferred the tax is withheld; property other than money passes subject to the transfer tax. Cf. *Matter of Estate of Swift*, 137 N. Y. 77, 83. In *Matter of Merriam*, 141 N. Y. 479, a bequest to the United States was

will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

held subject to the tax. The court said (p. 484), "This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession of property. This view eliminates from the case the point urged by the appellant that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet in contemplation of law the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid." That case was brought to this court on writ of error. *United States v. Perkins*, 163 U. S. 625. Following the decisions of the New York court it was held that the transfer tax is not imposed on property but on the transfer, and that the property does not pass to the heirs or legatees until, by the enforced contribution to the State, it has suffered diminution to the amount of the tax. And see *Prentiss v. Eisner*, 260 Fed. 589, affirmed, 267 Fed. 16; *People v. Fraser*, 145 N. Y. 593, affirming 74 Hun. 282.

The government cites *New York Trust Co. v. Eisner*, 256 U. S. 345. In that case there was involved the amount of the federal estate tax under § 201 of the Revenue Act of 1916, 39 Stat. 756, 777. Section 203 provided that there should be deducted from the value of the gross estate funeral expenses, administration expenses, claims against the estate, certain losses, "and such other charges against the estate as are allowed by the laws of the jurisdiction" where the estate was administered. When that case was before this court the latest decision of the New York Court of Appeals, having a direct bearing upon the matter, was *Matter of Gihon*, 169 N. Y.

443. It was there held that the state transfer tax was the same as the federal inheritance tax imposed by the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, which was considered by this court in *Knowlton v. Moore*, 178 U. S. 41; that the tax was not primarily payable out of the estate; that it was a tax not upon property but upon succession; "that is to say, a tax on the legatee for the privilege of succeeding to property," and that payment of the tax by the personal representative was for the legatee and not on account of the estate. In harmony with that case this court held that the state transfer tax paid by the executors was not deductible in calculating the amount of the federal estate tax. Since then the courts of New York, notwithstanding the *Gihon Case*, have construed the statute in harmony with the earlier decisions of the New York courts and *United States v. Perkins*, *supra*.

In *Home Trust Company v. Law*, 204 App. Div. 590, the court considered the state law which imposes an income tax on individuals (Tax Law, § 351,) and makes that tax applicable to income of estates of deceased persons received during administration. § 365. It is shown that the state income tax and deductions (§ 360) from gross earnings, authorized to be made to determine the amount of the taxable income of the estate, are patterned after the corresponding federal taxes and deductions; and, following the decision of this court in *United States v. Woodward*, *supra*, it was held that, since the federal estate tax paid is deductible to arrive at the income of the estate subject to the federal tax, the state transfer tax should be held to be deductible in ascertaining the income of the estate taxable under the state law. The court said (p. 594), "Aside from authority and theory we think it was the clear legislative intent, as indicated by the various provisions of the Tax Law, that in calculating the net income of the estate of a decedent

for income tax purposes, the amount paid by an executor during the year in satisfaction of a transfer tax should be deducted. The income tax payment is made by the executor of the estate from funds of the estate and not from funds belonging to legatees. (*Kings County Trust Company v. Law*, 201 App. Div. 181.) The transfer tax payment is made by the executor from the funds of the estate. 'The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time.' (*Matter of Hubbard*, 234 N. Y. 179.) Thus the tax is measurable not by the funds received by a legatee, but by the funds the executor receives. As the burden of paying the income tax, as well as the burden of paying the transfer tax, is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax Law measurable by gross income received less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself pays." This decision was affirmed by the Court of Appeals without opinion. 236 N. Y. 607. This court will follow the decisions of the state courts as to the meaning and proper application of the state transfer tax law, any expressions in its earlier decision to the contrary notwithstanding. *Green v. Lessee of Neal*, 6 Pet. 291, 298, 299; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Edward Hines Trustees v. Martin*, 268 U. S. 458, 464.

By indicating that the latest decisions of the state courts will be followed here as binding, it is not intended to intimate that a different view is entertained as to the construction properly to be given the state law. In fact we agree with that construction; and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a State where there has been no authoritative construction by

1

Syllabus.

the state courts. Compare *Harrigan v. Bergdoll*, 270 U. S. 560. And we are of opinion that the transfer tax is deductible. It was primarily payable by the respondent out of moneys and other property of the estate; and it was so paid by her. While this lessens the amount for distribution among the heirs, it cannot be said that they bore any part of that tax. As well might it be claimed that they paid the funeral expenses and debts, if any, of the intestate. No part of the transfer tax so paid could be taken by the heirs as a deduction in calculating their federal income taxes. It follows that the amount of the transfer tax paid in 1917 by the respondent was deductible in ascertaining the taxable income of the estate received by her in that year.

Judgment affirmed.

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

APPEAL FROM THE COURT OF CLAIMS.

No. 470. Argued March 18, 19, 1926.—Decided April 12, 1926.

1. In calculating the income tax on an estate during administration, under the Revenue Act of 1918, federal estate taxes are deductible from gross income. *United States v. Woodward*, 256 U. S. 632. P. 11.
2. But where the estate tax, though it accrued during the income tax year, was not paid until later, and the tax-payer's books were kept upon the basis of actual receipts and disbursements—not the "accrual" basis—, and the return showed such income only as was received during the tax year, the estate tax was not deductible in computing the taxable income of that year. *United States v. Anderson*, 269 U. S. 422. *Woodward Case, supra*, distinguished. *Id.*
3. Where claimants' right to recover money paid as income taxes depended on their books having been kept on the accrual basis, the burden was on them to prove that the books were so kept. P. 12.

4. A question not raised by counsel or discussed in the opinion is not to be regarded as decided merely because it might have been raised and decided on the record. P. 14.
 5. The inheritance tax imposed by Texas, and paid by executors, held deductible in computing the federal income tax of the estate under Revenue Law of 1918. *Keith v. Johnson, ante*, p. 1. P. 14.
- 60 Ct. Cls. 451, reversed.

APPEAL from a judgment of the Court of Claims for an amount paid as income tax.

Solicitor General Mitchell, with whom *Messrs. A. W. Gregg*, Solicitor of Internal Revenue, and *T. H. Lewis, Jr.*, were on brief, for the United States.

Mr. A. L. Humes, with whom *Mr. Stafford Smith* was on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

November 28, 1918, Dellora R. Gates, a resident of Texas, died testate; and, January 6, 1919, the County Court of Jefferson County granted letters testamentary to appellees. The federal estate tax accrued one year after her death; and, November 26, 1919, the executors made a return showing \$2,927,762.64 due the United States under the Revenue Act of 1916.¹ They did not pay any part of the tax in 1919, but paid \$1,000,000, February 25, 1920, and the balance May 27, of that year. Under the Revenue Act of 1918,² the executors, March 14, 1920, made an income tax return for the estate for 1919, showing a balance due of \$905,225.73. If the estate tax had been

¹Section 201, Act of September 8, 1916, c. 463, Title II, 39 Stat. 756, 777, as amended March 3, 1917, c. 159, Title III, 39 Stat. 1000, 1002, and October 3, 1917, c. 63, Title IX, 40 Stat. 300, 324.

²Act of February 4, 1919, c. 18, Title II, §§ 210, 214, 219, 40 Stat. 1057, 1062, 1067, 1071.

deducted there would have been no taxable income for that year. In 1919, the executors paid an inheritance tax of \$357,739.34, which was imposed and became due in that year under the laws of Texas.³ If that amount had been deducted, the income tax of the estate for that year would have been reduced by \$261,149.72. When the return was made, the rulings and regulations of the Commissioner of Internal Revenue and the Secretary of the Treasury did not permit the deduction of the federal estate tax or the state inheritance tax; and for that reason the executors did not claim that either should be deducted, and paid the amount shown by the return. After the decision of this court in *United States v. Woodward* (1921), 256 U. S. 632, the executors filed a claim for refund which was denied. The Bureau of Internal Revenue offered to allow them to deduct the estate tax paid in 1920 from gross income, in calculating the income tax on the estate, for that year. The executors refused to do so and brought this action in which they seek to recover the full amount of the 1919 income tax paid. And, in the event that the estate tax shall be held not deductible, they seek to recover \$261,149.72, the amount by which the income tax would have been lessened if the Texas inheritance tax paid in that year had been deducted. The Court of Claims held the estate tax deductible, and gave judgment for the full amount.

It is established that, in calculating the income tax on an estate during administration under the Revenue Act of 1918, § 214(a)(3), federal estate taxes are deductible. *United States v. Woodward, supra.* But the question presented by this case is whether, in calculating the income tax for 1919, the executors were entitled to deduct from the gross income actually received in that year the estate

³ Vernon's Sayles' Texas Civil Statutes, 1914 ed., as amended by c. 166, Laws of 1917, Art. 7487-7502.

tax which was not paid until 1920. The executors maintain that under § 214(a)(3) estate taxes are deductible if paid or if accrued within the taxable year; and that the estate tax, accruing in 1919 and paid in 1920, was deductible from gross income actually received in 1919. When regard is had to other provisions of the Act, it is clear that this contention is not admissible. Section 200 declares that "paid" means "paid or accrued," and that the phrase "paid or accrued" shall be construed according to the method of accounting upon the basis on which the net income is computed under § 212. And § 212 provides that net income shall be computed on the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of the taxpayer (*United States v. Anderson*, 269 U. S. 422); but if no such method has been employed, or if the method employed does not reflect the income, the computation shall be made upon a basis and in a manner that, in the opinion of the Commissioner, does clearly reflect the income. The return shows that it was made on the basis of income actually received in 1919. This indicates that the accounts were kept on the basis of actual receipts and disbursements, and there is nothing in the record to show that any other method was employed. The burden is on the executors to establish the invalidity of the tax. *United States v. Anderson, supra*. They have not shown that their books were kept on the accrual basis. Assuming, as we must, that the accounts of the estate were kept on the basis of actual receipts and disbursements, the executors were required to make return on that basis. Notwithstanding the option given taxpayers, it is the purpose of the Act to require returns that clearly reflect taxable income. That purpose will not be accomplished unless income received and deductible disbursements made are treated consistently. It was not the purpose of the Act to permit gross income actually

received to be diminished by taxes or other deductible items disbursed in a later year, even if accrued in the taxable year. It is a reasonable construction of the law that the same method be applied to both sides of the account.

Appellees contend that *United States v. Woodward*, *supra*, governs this case. The provisions of the Revenue Act of 1916 and of the Revenue Act of 1918 which are here involved were considered in that case. The cases are much alike. Woodward died December 15, 1917, and the estate tax became due one year later, but it was not paid until February 8, 1919. It may be assumed that the return for 1918 included only the income actually received in that year. The rules and regulations then in force did not permit the deduction of the estate tax. If that deduction had been made there would have been no taxable income. The executors paid the tax under duress, and brought suit for the amount paid. The Court of Claims held them entitled to recover, and this court affirmed the judgment. The question considered and decided was whether in ascertaining net taxable income the estate tax was deductible. The opinion referred to the provision which imposes the tax upon incomes of estates and that part of § 214 which authorizes the deduction of "taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes," and, in discussing the clause defining the deductions permitted to be made, the court said (p. 634), "The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes

were as well known at the time the provision was framed as the ones particularly excepted. . . . Thus their omission from the excepting clause means that Congress did not intend to except them. The Act of 1916 calls the estate tax a 'tax' and particularly denominates it an 'estate tax.' This court recently has recognized that it is a duty or excise and is imposed in the exertion of the taxing power of the United States. *New York Trust Co. v. Eisner, ante*, 345." The question decided concerned the character of the exaction; that is, whether the so-called federal "estate taxes" were "taxes" within the meaning of that word as used in the clause of § 214 quoted. The government did not contend that, if deductible at all, the estate taxes could not be deducted in that case because the return was made on the basis of income actually received in 1918, whereas the estate tax, accruing in that year, was not paid until 1919. That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster v. Fall*, 266 U. S. 507, 511. The *Woodward Case* does not support the contention that, where the estate income tax return is made on the basis of income actually received in the taxable year, there may be deducted the estate tax accruing in that year but paid in the following year.

It remains to be considered whether, in calculating the tax on the income of the estate, the inheritance tax imposed by the law of Texas and paid by appellees in 1919 is deductible from the gross income received in that year. That law provides that all property, which shall pass by will or by the laws of descent, shall upon passing to or for the use of any person (with certain exceptions) be subject to a tax for the benefit of the State. We are of

opinion that, in respect of the matter under consideration, the Texas inheritance tax law cannot be distinguished from the New York transfer tax law; and that under *Keith v. Johnson*, decided this day, *ante*, p. 1, the executors are entitled to have the inheritance tax paid in 1919 deducted from the income of the estate received in that year.

Judgment reversed

MOTTRAM v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 142. Argued January 15, 1926.—Decided April 12, 1926.

Where a lot of goods, among surplus military supplies auctioned by the United States, was grossly overstated as to quantity in the list of things advertised for sale, and the auctioneer, in ignorance of the mistake, accepted a bid for the listed quantity, but informed the bidder that he could not guarantee it, and the sales, according to the catalogue, were subject to errors of description and without warranty, and the bidder had previously inspected the goods and could have ascertained their true amount, *held* that he had no cause of action against the United States for failure to deliver the quantity bid for.

59 Ct. Cls. 302, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition.

Mr. Jennings C. Wise, with whom *Messrs. John S. Wise, Jr.*, and *A. Warner Parker* were on the brief, for appellant.

Solicitor General Mitchell and *Assistant Attorney General Galloway* were on the brief for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff filed his petition claiming £44,773, 16s., 3d. damages because of failure of the United States to de-

liver him certain steam packing for which he bid at an auction sale of surplus war materials held at Slough, England. The Court of Claims made findings of fact and gave judgment for the United States dismissing the petition.

By an Act of Congress approved May 10, 1918, c. 70, 40 Stat. 548, the President was authorized to sell property acquired in connection with the prosecution of the War. Pursuant to that Act, an agreement was made by an army contracting officer, acting for the United States, with J. G. White & Company, Limited, of London, by which the latter agreed to sell at auction engineers' stores and equipment enumerated and described in an inventory compiled by such officer. The selling agents agreed to employ the auctioneer and other persons required to prepare and distribute catalogues and to conduct the sale. They employed an auctioneer to sell the stores and equipment at the United States Engineers' Depot at Slough, and advertised an auction sale to be held at that place on June 24, 1919, and days following. They issued a catalogue purporting to contain a list giving descriptions and quantities of the things to be sold. It showed that the United States was vendor, and specified that, "The whole shall be sold, with all faults, imperfections, errors of description, in the lots of the catalogue . . . and without any warranty whatever, the buyers being held to have satisfied themselves as to the condition, quality, and description of the lots before bidding . . ." There were listed twenty-two lots of steam packing, and eleven of these were described as Garlock packing. Due to an error in transcribing a list furnished by the officer in command at the depot, the quantity of each lot of Garlock packing was expressed in hundred-weights instead of pounds; and so indicated one hundred times the quantities intended. Plaintiff received notice of the sale through the press and from the catalogue which was fur-

nished to him at his request by the auctioneer. He made many visits to the depot before the sale, and had full opportunity to ascertain the character and quantities of the property to be sold. At his request the Garlock packing was shown to him by one of the employees at the depot on the day before the sale. It was all housed together, and he had full opportunity to determine its quantity. He then had the catalogue which listed 278,432 pounds for sale. It would have required 560 cases to hold that amount and 15,000 cubic feet of space to house it. Such a quantity would have supplied the needs of Great Britain for that article for twenty years. June 25, 1919, the plaintiff attended the sale as a bidder. And when the Garlock packing was offered, and after the question of the quantity of such packing had been raised and the auctioneer had stated that he would not guarantee any quantity, the plaintiff bid three and one-fourth pence per pound for the lots of Garlock packing shown by the catalogue to amount in all to 278,432 pounds; and these lots were knocked down to him at that price.

The auctioneer did not know that a mistake had been made in the catalogue, and sent plaintiff a bill which included the amount bid for the packing. June 30, 1919, plaintiff sent a check for the amount of the bill to the sales agents. The same day he gave to one Davies an option to buy from 50 to 90 tons of the packing. The option contained the following clause: "Subject to the quantity being in stock as sold by the U. S. A." When the sales agents received the check, they knew that there was no such quantity of steam packing at the depot. July 4, 1919, plaintiff was notified that a mistake had been made and that no such quantity had ever been at the depot. He then wrote the sales agents that he expected delivery of the quantity for which he had paid.

They answered explaining the mistake, and stated that they considered the explanation sufficient to close the incident with the return of the money. Plaintiff replied that he would hold them to the contract; and afterwards he made demands for delivery of the quantity erroneously stated in the catalogue. Delivery was refused on the ground that the quantity demanded had never been in existence. Under an arrangement that it was done without prejudice to either party, there was returned to the plaintiff the amount paid by him according to his bid for the packing.

It was not the purpose of the United States to sell any property other than that belonging to it and then at its depot at Slough; and the facts found show that plaintiff so understood when he made his bid. The authority to sell conferred by Congress was limited to property acquired for the prosecution of the War. More than seven months had elapsed after the Armistice; a large part of the American Expeditionary Forces had been withdrawn from Europe, and the United States was disposing of its surplus war supplies there. Plaintiff was warned by the statement in the catalogue that the sales were to be held subject to errors of description and were to be made without any warranty. He went to see the packing and had opportunity to determine quantities. It was obvious that the amount stated in the catalogue was erroneous and enormously in excess of that on hand. Plaintiff made his bid after the auctioneer had stated that he would not guarantee any quantity of Garlock packing. And the clause in the option to Davies shows that he was not relying on the statement of quantity in the catalogue.

It is clear that the facts are sufficient to show that when plaintiff made his bid he was charged with knowledge that the United States was not offering for sale any such quantity of Garlock packing as stated in the catalogue. He was not entitled to a greater amount than the United

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Opinion of the Court.

States had in the depot at Slough. There was no finding that delivery of that quantity was refused or that he was willing to accept it. He cannot recover. *Lipshitz and Cohen v. United States*, 269 U. S. 90; *Brawley v. United States*, 96 U. S. 168, 171. Cf. *Hummel, Trustee, v. United States*, 58 Ct. Cls. 489, 494.

Judgment affirmed.

EVANSVILLE AND BOWLING GREEN PACKET
COMPANY v. CHERO COLA BOTTLING COM-
PANY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF INDIANA.

No. 127. Argued January 13, 1926.—Decided April 12, 1926.

A wharfboat, in a river, used as an office, warehouse, and wharf, but not used or capable of use as a means of transportation, held not a "vessel" within the law allowing limitation of liability. Rev. Stats. § 4283; Act of June 19, 1886, 24 Stat. 79. P. 22.

Affirmed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a petition in admiralty for limitation of liability.

Mr. Chauncey I. Clark, with whom *Mr. Phelps F. Darby* was on the brief, for appellant.

Messrs. James T. Cutler and *Paul H. Schmidt*, with whom *Messrs. Joseph H. Iglehart* and *Isidor Kahn* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant owned a wharfboat in the Ohio River at Evansville, Indiana. May 14, 1922, it sank, causing dam-

age to appellees' merchandise thereon. Appellant filed a petition in admiralty for limitation of liability. Appellees answered; and, after a trial at which much evidence as to the character of the structure was given, the District Court found that it was not a vessel within the meaning of the statutes sought to be invoked; held that the court was without jurisdiction, and dismissed the cause. The appeal is under § 238, Judicial Code, and the question of jurisdiction alone is certified.

Section 4283, Revised Statutes, provides: "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost [loss], damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Section 3, Revised Statutes, provides: "The word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Act of June 19, 1886, § 4, c. 421, 24 Stat. 79, 80, makes the provisions relating to limitation of liability apply to "all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters."

Appellant was engaged in operating steamboats between Evansville and places on the Green River in Kentucky. The wharfboat in question was built in 1884 and was used at Hopefield, Arkansas, on the Mississippi River. In 1901 it was towed to Madison, Indiana, where it was overhauled, and then to Louisville, Kentucky, where it was used. In 1910, after more repairs at Madison, it was taken to Evansville. Appellant acquired it in 1915. Each winter it was towed to Green River harbor to protect it

from ice. While in use at Evansville it was secured to the shore by four or five cables and remained at the same point except when moved to conform to the stage of the river. The lower part of the structure was rectangular, 243 feet long, 48 feet wide and six feet deep. It was built of wood and, to strengthen it and keep the water out, was lined around the sides and ends, extending 18 or 20 inches from the bottom, with concrete eight inches thick. It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters. There was plumbing in the structure, and it was connected with the city water system; it obtained current for electric light from the city plant, and had telephone connections. Appellant's office and quarters for the men in charge were located in one end of the structure. There were floats and an apron making a driveway between the land and a door near each end. The wharfboat was used to transfer freight between steamboats and land and from one steamboat to another. Some shippers paid fixed monthly charges for storage of their goods on the structure and for services in transferring them to and from steamboats. Charges made for services performed by its use were for storage and handling and not for transportation.

The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. See *Providence & New York S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 593; *The Main v. Williams*, 152 U. S. 122, 127. Our statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries. See *Moore v. American Transportation Co.*, 24 How. 1, 39; *Norwich Company v. Wright*, 13 Wall. 104, 121. The rule should be

applied having regard to the purposes it is intended to subserve and the reasons on which it rests.

The only question presented is whether appellant's wharfboat was a "vessel" at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another. It was not practically capable of being used as a means of transportation. It served at Evansville as an office, warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed. There appears to be no reason for the application of the rule of limited liability. Many cases, involving a determination of what constitutes a vessel within the purview of the statute have been before the courts; but no decision has been cited, and we have found none, that supports the contention that this wharfboat was a vessel. Cf. *Cope v. Valette Dry Dock Co.*, 119 U. S. 625, 629; *The Robert W. Parsons*, 191 U. S. 17, 30; *Ruddiman v. A Scow Platform*, 38 Fed. 158; *Patton-Tully Transportation Co. v. Turner*, 269 Fed. 334, 337.

Decree affirmed.

Argument for Appellants.

BOARD OF PUBLIC UTILITY COMMISSIONERS
ET AL. v. NEW YORK TELEPHONE COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY.

No. 567. Argued January 18, 19, 1926.—Decided April 12, 1926.

1. The just compensation safeguarded to a public utility by the Fourteenth Amendment is a reasonable return on the value of the property used, at the time that it is being used, for the public service. And rates not sufficient to yield that return are confiscatory. P. 31.
2. Constitutional protection against confiscation does not depend on the source of the money used to purchase property; it is enough that the property is used to render the service. *Id.*
3. The relation between a public utility and its customers is not that of partners, or agent and principal, or trustee and beneficiary. The amount of money remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property. *Id.*
4. The law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. P. 32.
5. Assets of a public utility represented by a credit balance in the reserve for depreciation can not be used to make up the deficiency in current rates which are not sufficient to yield a just return after paying taxes and operating expenses including a proper allowance for current depreciation. *Id.*

Affirmed.

APPEAL from a decree of the District Court granting a temporary injunction, in a suit by the Telephone Company to restrain the Board of Public Utility Commissioners, of New Jersey, from enforcing confiscatory rates.

Mr. Thomas Brown for appellants.

Depreciation expense is a charge made against earnings periodically to care for depreciation of the utility's property not covered by current repairs. Depreciation reserve is the fund accumulated from such depreciation charges. *Knoxville v. Water Co.*, 212 U. S. 1, makes it clear that

the allowance in expense for depreciation is required in the interest of the bond and stockholders, on the one hand, and the public, concerned with continuously adequate and proper service, on the other hand. It likewise makes it clear that the measure of allowance is the sum required to assure that "the original investment remains as it was at the beginning," and that its purpose is "the making good the depreciation" and replacing the units of property "when they come to the end of their life." It also makes it clear that the allowance cannot be considered profit, for it is taken by the utility before and in addition to profit for the specific purpose above indicated. It follows that the depreciation reserve is built up, not merely in protection of the integrity of the investment of the bond and stockholders, but in the protection of the interest of the public in continuously adequate service as well. This reserve is the property of the company only in the sense that the legal title thereto rests in it, but its right of property therein is qualified by the public interest in protection of which the reserve is built up.

If it were profit it could be added to capital or disbursed to the stockholders in dividends, but it cannot be so used, nor is it to be considered as part of the property of the company which the latter absolutely owns. *Louisiana R. R. Comm. v. Cumberland Tel. & Tel. Co.*, 212 U. S. 410.

It must be remembered that in this case the court assumed that the company was getting a fair return on its property during the years when the excess in the depreciation reserve fund was being accumulated. This excess was accumulated unnecessarily, if not improperly, and at the expense of the rate payers. *Newton v. Consolidated Gas Co.*, 258 U. S. 165, distinguished. The action of the Board is in accordance with the general practice regarding the treatment of excessive reserves for depreciation. *Georgia Ry. & Pr. Co. v. Railroad Comm.*,

P. U. R. 1925, A, 594; *In re Thompson*, P. U. R. 1922, A, 558; *Re Eaton Rapids*, P. U. R. 1922, D, 94; *Re Consumers Company*, P. U. R. 1923, A, 430; *Re Southern California Edison Co.*, P. U. R. 1924, C, 1; *Re Utica Gas Co.*, P. U. R. 1922, A, 558.

The court erred in holding that the appellants were estopped from inquiring whether there was an excess in the depreciation reserve; and, finding such excess, from requiring that such excess be absorbed.

Messrs. Charles M. Bracelen and Thomas G. Haight, with whom Messrs. Charles T. Russell and Frankland Briggs were on the brief, for appellee.

The requirement that the Company overcome an admitted deficit in its annual earnings by revising retroactively the depreciation expense actually charged in the past is illegal, and would confiscate the property of the Company.

In order to get rid of the shortage below a fair annual return, the Board allows the Company, as an annual depreciation expense, a sum substantially less than the Board itself finds to be the actual, normal, currently accruing depreciation, until an alleged excess of \$4,750,000 in its "depreciation reserve" shall have been "absorbed." The Company denies the existence of any excess. Moreover, the present balance in this account was built up prior to the Board's order under service rates lawful at the time when charged and during a period when no depreciation expense rates had been prescribed by the appellants or their predecessors in office.

There is no justification in law or equity for any such treatment of the Company's past expenses. *Newton v. Consolidated Gas Co.*, 258 U. S. 165; *Galveston Elec. Co. v. Galveston*, 258 U. S. 388; *Knoxville v. Water Co.*, 212 U. S. 1; *Monroe Gaslight Co. v. Public Utility Comm.*, 292 Fed. 139; *Garden City v. Garden City Tel. & Mfg. Co.*, 236 Fed. 693.

The Company's charges for depreciation expense are regulated by the Interstate Commerce Commission, and its jurisdiction is exclusive; the order of the Board is, therefore, invalid and its enforcement was properly enjoined.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an appeal from a decree of the district court—three judges sitting, § 266, Judicial Code—which granted a temporary injunction restraining the enforcement of certain telephone rates.

The company owns and operates a telephone system in New Jersey, New York and Connecticut. In the territory served in New Jersey there is a number of local areas. Service between telephones in the same area is exchange service, and that between telephones in different areas is toll service. The latter includes both intrastate and interstate business. The system is used to give exchange and toll service to all subscribers. For about 10 years prior to the commencement of this suit the rates in New Jersey remained at substantially the same level. March 6, 1924, the company filed with the Board of Public Utility Commissioners, to take effect April 1, 1924, a schedule providing for an increase of rates for exchange service in New Jersey. The Board suspended the proposed rates pending an investigation as to their reasonableness. December 31, 1924, the increase was disallowed, and the company was required to continue to serve at the existing rates. The Board found that the value of the company's property in New Jersey, as of June 30, 1924, was \$76,370,000; that a rate of return of 7.53 per cent. producing from \$5,750,000 to \$6,000,000 would be a fair return for that year; that the amount charged by the company in 1924 for depreciation, \$3,452,000, was excessive, and that \$2,678,000 was sufficient. And the Board found that net earnings in 1924 would be \$4,449,000,—less than the fair return by at least \$1,300,000.

The company's accounts are kept according to the uniform system of accounts for telephone companies prescribed by the Interstate Commerce Commission. Charges are made to cover the depreciation in the elements of the plant which for one cause or another will go out of use. These charges are made month by month against depreciation in the operating expense accounts, and corresponding credits are entered in the depreciation reserve account. When a unit or element of the property is retired, there is no charge to operating expense, but its original cost less salvage is charged to the reserve account. December 31, 1923, the company's books showed a credit balance in depreciation reserve accounts of \$16,902,530. This was not set aside or kept in a separate fund, but was invested in the company's telephone plant. The Board prescribed a rule for the determination of depreciation expenses to be charged by the company in 1925 and subsequent years. It declared that the credit balance was more than required for the maintenance of the property, and directed that \$4,750,000 of that amount be used by the company to make up deficits in any year when earnings are less than a reasonable return as found by the Board. And it said, "But having made such charges in the past, future charges beginning January 1st, 1925 may be deducted from the normal charge until such time as at least \$4,750,000 of the excess is absorbed as hereinafter provided." The effect of the order is to require that if total operating expenses deducted from revenues leaves less than a reasonable return in 1925 or a subsequent year, there shall be deducted from the expense of depreciation in that year and added to the net earnings a sum sufficient to make up the deficiency; then, by appropriate book entries, the resulting shortage in depreciation expense is to be made good out of the balance in the reserve account built up in prior years.

On the application for a temporary injunction, the company attacked the findings of the Board as to rate

of return, property value, and expense of depreciation. And it contended that the charges on account of depreciation in earlier years were not excessive, and that in any event the company could not be compelled to make up deficits in future net earnings out of the depreciation reserves accumulated in the past.

The record shows that the rates in effect prior to the temporary injunction were not sufficient to produce revenue enough to pay necessary operating expenses and a just rate of return on the value of the property. There is printed in the margin ¹ a statement made by the Board and included in its decision, giving a comparison of re-

¹ Results under Present Rates—Estimated for the Year 1924.

	By Company (Exhibit P-14)	By Board, based on Ex- hibit C-34 modified
Revenues:		
Exchange Revenues	\$11,936,000	\$11,936,000
Toll Revenues.....	10,465,000	10,465,000
Miscellaneous Operating.....	257,000	257,000
	<hr/>	<hr/>
Total Telephone Revenue.....	\$22,658,000	² \$22,658,000
	<hr/> <hr/>	<hr/> <hr/>
Expenses:		
Traffic Expenses.....	\$5,846,000	\$5,846,000
Commercial Expenses	2,309,000	2,309,000
General and Miscellaneous Expenses....	548,000	548,000
Uncollectible Operating Revenues.....	150,000	150,000
Rent and Other Deductions.....	¹ 283,000	283,000
Current Maintenance.....	¹ 3,230,000	3,230,000
Depreciation.....	3,452,000	2,678,000
Taxes.....	2,170,000	2,200,000
Licensee Revenue, Dr.....	965,000	965,000
	<hr/>	<hr/>
Total Telephone Expenses.....	\$18,953,000	\$18,209,000
	<hr/> <hr/>	<hr/> <hr/>
Total Telephone Earnings.....	\$3,705,000	\$4,449,000

¹ Include a certain portion of depreciation for right of way from clearing accounts.

² Omits concessions (\$102,000) and interest during construction (\$160,727) aggregating \$262,727 in Exhibit C-34.

sults of operation in 1924 under these rates as found by the Board and as estimated by the company. And, in opposition to the motion for the temporary injunction, the Board submitted an affidavit containing a statement ²

² Estimated Rate of Return During Year 1925 under Present Rate Schedule.

	Plaintiff's depreciation rate	Board's depreciation rate	Compliance with order of Board
Telephone Revenues:			
Exchange Service.....	\$13,281,000	\$13,281,000	\$13,281,000
Toll Service.....	11,113,000	11,113,000	11,113,000
Miscellaneous.....	316,269	316,269	316,269
	<hr/>	<hr/>	<hr/>
Total Telephone Revenues.....	\$24,710,269	\$24,710,269	\$24,710,269
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>
Telephone Expense:			
Current Maintenance....	\$3,453,400	\$3,453,400	\$3,453,400
Depreciation and Amortization.....	4,128,000	3,314,716	*683,430
Traffic.....	6,404,465	6,404,465	6,404,465
Commercial.....	2,657,000	2,657,000	2,657,000
General and Miscellaneous	589,166	589,166	589,166
Uncollectibles.....	140,000	140,000	140,000
Taxes.....	2,269,691	2,371,812	2,700,723
Rent Expense and Deductions.....	325,744	325,744	325,744
Miscellaneous Deductions.	56,813	56,813	56,813
License Contract Expense.	1,041,695	1,041,695	1,041,695
	<hr/>	<hr/>	<hr/>
Total Telephone Expense	\$21,065,974	\$20,354,811	\$18,052,436
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>
Net Telephone Earnings	\$3,644,295	\$4,355,438	\$6,657,833
Average Cost, \$86,401,736			
% Return on Average Cost.	4.22	5.04	7.71
Defendant's Average Fair and Reasonable Value, \$88,417,448			
% Return on Value.....	4.12	4.93	7.53

* Allowing a return of 6% on value of property depreciation and amortization expense will be \$2,163,471.

which set forth in detail the estimated results for 1925 based on the same rates. The affidavit shows net additions to the company's property in New Jersey in 1924, amounting to more than \$13,000,000; and the Board calculates the return on \$88,417,448 as the reasonable value of the property. The calculation is made on three bases: (1) depreciation taken at the company's figure, \$4,128,000, (2) depreciation as found by the Board, \$3,314,716, and (3) depreciation allowed by the Board's order, \$683,430. The effect of the order is to deduct \$2,631,286 from operating expenses found by the Board properly chargeable for depreciation in 1925. This deduction is made at the expense of the property of the company paid for out of depreciation reserves built up in prior years. And it has the same effect on net earnings as would the addition of the same amount of revenue received for service. On the basis of the company's estimate of depreciation expense, the return is 4.12 per cent.; on the Board's estimate it is 4.93 per cent.; and by increasing net earnings \$2,631,286, as directed by the order, it is made 7.53 per cent. It is conceded that unless, as directed by the Board, depreciation expense is reduced below what the Board itself found necessary, and net earnings are correspondingly increased, the rates cannot be sustained against attack on the ground that they are unreasonably low and confiscatory. Appellants do not contend that the rate of return from the intrastate business is or will be higher than that resulting from the company's business as a whole in New Jersey. And the record supports the claim of the company that the intrastate business, or that covered by the exchange rates complained of, is not relatively more profitable than the other business of the company.

It may be assumed, as found by the Board, that in prior years the company charged excessive amounts to depreciation expense and so created in the reserve account

balances greater than required adequately to maintain the property. It remains to be considered whether the company may be compelled to apply any part of the property or money represented by such balances to overcome deficits in present or future earnings and to sustain rates which otherwise could not be sustained.

The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *Bluefield Co. v. Public Service Commission*, 262 U. S. 679, 692. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454, 459; *Gas Light Co. v. Cedar Rapids*, 144 Ia. 426, 434, affirmed, 223 U. S. 655; *Consolidated Gas Co. v. New York*, 157 Fed. 849, 858, affirmed 212 U. S. 19; *Ames v. Union Pacific Railway Co.*, 64 Fed. 165, 176. The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. Cf. *Fall River Gas Works v. Gas & Electric Light Com'rs*, 214 Mass. 529, 538. The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston*,

258 U. S. 388, 395; *Georgia Ry. v. R. R. Comm.*, 262 U. S. 625, 632. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 175; *Galveston Electric Co. v. Galveston*, *supra*, 396; *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission*, 292 Fed. 139, 147; *City of Minneapolis v. Rand*, 285 Fed. 818, 823; *Georgia Ry. & Power Co. v. Railroad Commission*, 278 Fed. 242, 247, affirmed 262 U. S. 625; *Chicago Rys. Co. v. Illinois Commerce Commission*, 277 Fed. 970, 980; *Garden City v. Telephone Company*, 236 Fed. 693, 696.

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock. It is conceded that the exchange rates complained of are not sufficient to yield a just return after paying taxes and operating expenses, including a proper allowance for current depreciation. The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency.

Decree affirmed.

MR. JUSTICE STONE took no part in the consideration of this case.

Counsel for Parties.

ENGEL v. DAVENPORT ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 189. Submitted January 26, 1926.—Decided April 12, 1926.

1. A complaint by a seaman against a ship owner for damages for injuries alleged to have resulted from the owner's negligence in furnishing a defective appliance, *held* an action under the Merchant Marine Act as supplemented by the Employers' Liability Act, in which the plaintiff must prove negligence and subject himself to reduction of damages in proportion to any contributory negligence on his part. P. 36.
2. The state courts have jurisdiction, concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law. P. 37.
3. The provision of the Employers' Liability Act that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued," is one of substantive right, both setting a limit and necessarily implying that the action may be maintained, as a substantive right, within that period. P. 38.
4. This provision was incorporated by adoption in the Merchant Marine Act, and controls in actions brought under that Act in state courts, regardless of the statutes of limitations of the States. P. 38.

194 Cal. 344, reversed.

CERTIORARI to a judgment of the Supreme Court of California which affirmed a judgment dismissing, on demurrer, a complaint in an action for damages, brought by Engel against Davenport.

Mr. H. W. Hutton for petitioner.

Messrs. Edward J. McCutchen and Farnham P. Griffiths for respondents.

MR JUSTICE SANFORD delivered the opinion of the Court.

The questions involved in this case relate to the effect of § 33 of the Merchant Marine Act of 1920, 41 Stat. 988, c. 250, which amended § 20 of the Seamen's Act of 1915, 38 Stat. 1164, c. 153, to read as follows: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Engel, the petitioner, brought this action at law, in January, 1923, in a Superior Court of California, against the respondent Davenport, one of the owners of a vessel on which he had been employed as a seaman,¹ to recover damages for personal injuries suffered, in April, 1921, while he was engaged in placing a chain lashing around part of a cargo of lumber that had been taken on board the vessel at a port of landing. The complaint alleged, in substance, that the vessel had been negligently sent upon her voyage when unseaworthy and equipped with

¹Although other owners of the vessel were also named as defendants in the complaint, the record does not indicate that any of them were served with process or entered their appearance, the suit apparently having been prosecuted against Davenport alone.

defective appliances, in that a pelican hook, which was a necessary part of the chain lashing used in carrying the cargo, had in it a flaw observable upon ordinary inspection; that this hook was not inspected; and that it broke by reason of this flaw, causing the injuries in question. Davenport demurred to the complaint, on the ground, *inter alia*, that the cause of action was barred by § 340, subd. 3, of the California Code of Civil Procedure, which required an action for personal injury caused by wrongful act or negligence to be commenced within one year. This demurrer was sustained, without leave to amend; and judgment was entered in favor of Davenport, which was affirmed, on appeal, by the Supreme Court of the State. 194 Cal. 344. This writ of certiorari was then granted. 266 U. S. 600.

The petitioner contends that the suit is one founded on § 33 of the Merchant Marine Act, of which the state courts have jurisdiction concurrently with the federal courts; and that, by virtue of § 6 of the Employer's Liability Act, 35 Stat. 65, c. 149, incorporated in the provisions of the Merchant Marine Act, it might be commenced within two years after the cause of action accrued, irrespective of the state statute.

The respondent contends, on the other hand, that the suit is not founded on the Merchant Marine Act and its provisions therefore have no application; and that, in any event, § 6 of the Employer's Liability Act is not incorporated in the Merchant Marine Act and does not determine the period of time within which an action may be commenced in a state court.

It is settled by the decision in *Panama Railroad v. Johnson*, 264 U. S. 375, that § 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employer's

Liability Act and its amendments—adopted by the generic reference to “all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees”—and “extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules”; that is, that it grants them, as an alternative, the common law remedy of an action “to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules,” which, as a modification of the maritime law, may be enforced through appropriate proceedings *in personam* on the common-law side of the courts.

1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence, but also, under § 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the *Panama Railroad Case*, pp. 382, 383, in which the complaint charged that the

injuries resulted from negligence in providing a defective appliance and in other respects; and it is not in conflict with the *Carlisle Packing Co. Case*, in which, as shown by the original record, the suit was commenced in 1918, prior to the Merchant Marine Act. And see *Lorang v. Steamship Co.* (D. C.), 298 Fed. 547, and *Lynott v. Transit Corporation*, 202 App. Div. 613.

2. It is clear that the state courts have jurisdiction concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law. This was assumed in *Re East River Co.*, 266 U. S. 355, 368; and expressly held in *Lynott v. Transit Corporation*, *supra*, affirmed, without opinion, in 234 N. Y. 626. And it has been implied in various decisions in the District Courts involving the question of the right to remove to a federal court a suit that had been commenced in a state court.

By a provision of the Judiciary Act of 1789, now embodied in § 24, subd. 3, and § 256, subd. 3 of the Judicial Code, giving District Courts original jurisdiction of civil causes of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of a common law remedy where the common law is competent to give it. In *Chelentis v. Steamship Co.*, 247 U. S. 372, 384, where the suit had been commenced in a state court and removed to the federal court, it was said that, under this saving clause, "a right sanctioned by the maritime law may be enforced through any appropriate proceeding recognized at common law." And the jurisdiction of the state courts to enforce the new common law right made a part of the maritime law, is necessarily affirmed by the provision contained in § 6 of the Employer's Liability Act²—plainly, we think, incorporated in the Merchant Marine Act by the generic reference—that jurisdiction of the federal courts under the Act shall be concurrent with that of the courts

² Inserted by the amendment of 1910, 36 Stat. 291, c. 143.

of the several States, and no case arising thereunder when brought in any state court of competent jurisdiction shall be removed to any federal court. Nor is the jurisdiction in suits under § 33 of the Merchant Marine Act limited to the federal courts—as has been sometimes held in the District Courts—by its provision that jurisdiction “shall be under the court of the district” in which the employer resides or his principal office is located. This, as was held in the *Panama Railroad Case*, p. 385, was not intended to affect the general jurisdiction of the federal courts, but only to prescribe the venue of actions brought in them under the Act.

3. This brings us to the question whether a suit brought in a state court to enforce the right of action granted by the Merchant Marine Act may be commenced within two years after the cause of action accrues, or whether a state statute fixing a shorter period of limitation will apply. Section 6 of the Employer's Liability Act provides that “no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.” This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates. *Atlantic Coast Line v. Burnette*, 239 U. S. 199, 201. And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years.

The adoption of an earlier statute by reference, makes it as much a part of the later act as though it had been incorporated at full length. *Kendall v. United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 94; *Interstate Railway v. Massachusetts*, 207 U. S. 79, 85. It brings into the later act “all that is fairly covered by the reference,” *Panama Railroad Case*, p. 392; that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act. It is clear that the provision of the Employer's Liability

Act as to the time within which a suit may be instituted, is directly applicable to the subject-matter of the Merchant Marine Act and covered by the reference. In the *Panama Railroad Case*, p. 392, it was held that the contention that the Merchant Marine Act did not possess the uniformity in operation essential to its validity as a modification of the maritime law, was unfounded, since the Employer's Liability Act which it adopted, had a uniform operation, which could not be deflected from "by local statutes or local views of common law rules." The period of time within which an action may be commenced is a material element in such uniformity of operation. And, plainly, Congress in incorporating the provisions of the Employer's Liability Act into the Merchant Marine Act did not intend to exclude a provision so material, and to permit the uniform operation of the Merchant Marine Act to be destroyed by the varying provisions of the state statutes of limitation.

We conclude that the provision of § 6 of the Employer's Liability Act relating to the time of commencing the action, is a material provision of the statutes "modifying or extending the common law right or remedy in cases of personal injuries to railway employees" which was adopted by and incorporated in the Merchant Marine Act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control in an action brought in a state court under the Merchant Marine Act, regardless of any statute of limitations of the State. See *Arnson v. Murphy*, 109 U. S. 238, 243.

The judgment of the Supreme Court of California is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MISSOURI EX REL. HURWITZ v. NORTH ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 209. Submitted March 12, 1926.—Decided April 12, 1926.

1. A state statute which authorizes a board of health to revoke the license of a physician upon the ground that he has unlawfully produced an abortion, giving him reasonable notice, specification of charges and opportunity to be heard with his witnesses before the board, with a right of review in the state courts, *held* valid under the due process and equal protection clauses of the Fourteenth Amendment. Mo. Rev. Stat. § 7336. Pp. 41, 43.
 2. Failure of the statute to authorize the board to subpoena witnesses is not an objection, the right to compel their testimony by deposition being granted. P. 42.
- 304 Mo. 607, affirmed.

ERROR to a judgment of the Supreme Court of Missouri, which affirmed the state circuit court in sustaining, on certiorari, an order of the Board of Health revoking the license of the plaintiff in error to practice in the State as a physician.

Mr. I. V. McPherson for plaintiff in error.

Messrs. North T. Gentry and *J. Henry Caruthers* for defendants in error.

MR. JUSTICE STONE delivered the opinion of the Court.

Plaintiff in error was a physician licensed to practice by the State Board of Health of Missouri. On complaint made to the Board, and after notice and hearing, his license to practice was revoked on the ground that he had unlawfully produced an abortion. The proceedings before the Board were reviewed on certiorari by the state Circuit Court and the determination of the Board sustained. On appeal to the Supreme Court of Missouri,

the judgment was affirmed. 304 Mo. 607. The case comes here on writ of error. Jud. Code, § 237. .

By § 7336 of the Missouri Revised Statutes, the State Board of Health is authorized to grant licenses for the practice of medicine within the State, and, after hearing, to revoke licenses "for producing criminal abortions," and for other specified causes. Hearings are required to be upon twenty days' written notice personally served upon the physician against whom charges are made, containing "an exact statement of the charges and the date and place set for hearing." The statute provides:

"Testimony may be taken by deposition to be used in evidence at the trial of such charges before the Board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

It is also provided that proceedings before the Board may be reviewed by the state Circuit Court on certiorari and, as was done here, an appeal may be taken from the judgment of the Circuit Court to the Supreme Court of the State.

Plaintiff's assignments of error assail the correctness of various rulings of the state court as to the meaning and effect of the statute drawn in question. These assignments must be disregarded here, as upon writ of error to a state court we are bound by its construction of the state law. See *West v. Louisiana*, 194 U. S. 258; *Gatewood v. North Carolina*, 203 U. S. 531, 541; *Watson v. Maryland*, 218 U. S. 173; *Schneider Granite Co. v. Gast Realty Co.*, 245 U. S. 288, 290. The Supreme Court of Missouri held that in the proceedings for the revocation of the plaintiff's license, he was entitled to take testimony on deposition, as provided by the statute, but not to subpoena witnesses to appear before the Board, and that his application for such subpoenas was properly denied. It is assigned as error that these rulings and the revocation

of plaintiff's license by the State Board of Health were a denial of due process of law and of the equal protection of the laws under the Fourteenth Amendment.

It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure, as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. *Hurtado v. California*, 110 U. S. 516; *Maxwell v. Dow*, 176 U. S. 581; *Louisville & Nashville R. R. v. Schmidt*, 177 U. S. 230; *West v. Louisiana*, *supra*; *Twining v. New Jersey*, 211 U. S. 78; *Oregon R. R. & N. Co., v. Fairchild*, 224 U. S. 510.

The procedure authorized by the Missouri statute as it was applied by the Board satisfied these requirements. The notice prescribed was reasonable. The testimony of all witnesses who appeared before the Board was taken and recorded, including that of the plaintiff in error. Although the statute did not authorize the Board to issue subpoenas, the plaintiff in error was authorized, as the state court held, to take the depositions of witnesses who did not voluntarily appear. See *State ex rel. Farber v. Shot*, 304 Mo. 523. Officers who take depositions are authorized to compel witnesses to attend and give testimony. Mo. Rev. Stat. (1919) § 5460. The depositions, when taken, may be read at the hearing before the Board. *State ex rel. Farber v. Shot*, *supra*. The procedure prescribed and followed here gave ample opportunity to plaintiff to make a defense to the charges preferred and there was no denial of due process.

Nor did the statute deny to the plaintiff in error the equal protection of the laws. A statute which places all physicians in a single class, and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws within the meaning of the Fourteenth Amendment. *Dent v. West Virginia*, 129 U. S. 114; *Reetz v. Michigan*, 188 U. S. 505; *Watson v. Maryland*, *supra*.

The judgment of the Supreme Court of Missouri is
Affirmed.

HARTSVILLE OIL MILL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 609. Argued March 3, 4, 1926.—Decided April 12, 1926.

1. Jurisdiction of the Court of Claims to hear and decide a claim, existing under Jud. Code, § 145, was not affected by a resolution of the Senate referring to that court for consideration and report (Jud. Code, § 151) a bill for payment of the claim. P. 44.
 2. The fact that a government contractor signed a settlement after negotiations in which government officers threatened to break the existing contract if the settlement were not accepted, does not of itself support a legal inference that the settlement was procured by duress. *Freund v. United States*, 260 U. S. 60, distinguished. P. 48.
 3. A threat to break a contract does not constitute duress in the absence of evidence of some probable consequences of it to person or property for which the remedy afforded by the courts would be inadequate. P. 49.
 4. Mutual promises of the parties are adequate consideration sustaining a compromise of a disputed contract. P. 50.
- 60 Ct. Cls. 712, affirmed.

APPEAL from a judgment of the Court of Claims.

Messrs. Christie Benet and Wade H. Ellis, with whom *Mr. Don F. Reed* was on the brief, for appellant.

Mr. Paul Shipmen Andrews, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Messrs. Arthur M. Loeb* and *Harold Horvitz*, Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

On February 5, 1923, a bill (S. 4479) was introduced in the Senate authorizing and directing the Secretary of the Treasury to pay to two hundred and eighty-five named persons, firms and corporations, including the appellant, "which entered into contracts with the United States of America through the agency of the United States Ordnance Department, which contracts were cancelled by said Ordnance Department, the several sums set opposite their names." By Senate Resolution of March 3, 1923, the bill, with accompanying documents, was referred to the Court of Claims for consideration and report. Jud. Code, § 151. Appellant filed its petition in the Court of Claims, referring to the Senate bill and resolution and setting up a claim upon a contract of September 26, 1918, for the sale of cotton linters to the Government. The Court of Claims held, upon the facts found, that it had jurisdiction to render a judgment under the provisions of chapter 7 of the Judicial Code; that the plaintiff was not entitled to recover upon its claim, and entered judgment dismissing the petition.

The case comes here on appeal. Jud. Code, § 242, before its repeal by the Act of February 13, 1925.

The petition sets out a cause of action for failure of the Government to perform its contract of September 26, 1918, and, by way of anticipation of a defense, alleges that a later contract of December 31, 1918, between appellant and the Government, purporting to cancel the earlier contract, was procured by duress and was without consideration. The jurisdiction to hear and determine the

claim is conferred by Jud. Code § 145, and was not enlarged or otherwise affected by the Senate resolution.

The petitioner, a South Carolina corporation, was engaged in the business of crushing cotton seed for the production of cotton seed oil, cotton seed meal and other cotton seed products, including cotton linters, which are the short fibres adhering to cotton seed after the removal of the staple cotton by ginning. During the late war, cotton linters were used extensively in the manufacture of explosives. After the entry of the United States into the war, appellant, with all others engaged in the production of cotton seed products, became subject to the direction and control of the War Industries Board (Act of May 20, 1918, c. 78, 40 Stat. 556), and of the United States Food Administration (Act of August 10, 1917, c. 53, 40 Stat. 276), with respect to the production and distribution of their product and the prices of both the raw material purchased and the product sold by them. This control was an essential feature of a plan to stabilize price and stimulate production.

Appellant, by its contract, which was similar in form and content to those of the other manufacturers named in the Senate resolution, agreed to sell to the Government its estimated product of cotton linters for the year ending July 31, 1918, approximately 2,250,000 pounds, at 4.67 cents per pound. The contract contained a clause authorizing the Government to cancel it "in the event of the termination of the present war" with the proviso that the seller should continue to make deliveries for thirty days after the effective date of cancellation and that the Government should save the seller harmless from actual loss resulting from the cancellation.

In November, 1918, after the armistice, negotiations were begun between the Cotton Products Section of the War Industries Board and a Committee representing appellant and other manufacturers, for the adjustment

and settlement of all obligations upon appellant's contract of September 26th and all similar contracts. In the course of these negotiations, it was contended by the representatives of the Government and denied by the Committee that the termination of the war had occurred, within the meaning of the cancellation clause. The War Industries Board ceased to function on December 21, 1918, and these negotiations were continued on behalf of the Government by representatives of the Ordnance Department. On December 30, 1918, officers of this department notified the Committee that the Government would settle its obligations upon these contracts only by accepting the linters then on hand and inspected, about 270,000 bales, and would take only a part of the linters produced between January 1 and July 31, 1919, not to exceed 150,000 bales, the amount taken to be pro-rated among the manufacturers. At the same time they notified the Committee that, unless this proposal was accepted within one hour from the time it was made, the Government would refuse to perform its contracts and would refuse to accept or pay for any linters either on hand with the manufacturers or afterwards produced by them, and that appellant and other manufacturers could seek their remedy in the courts.

Within the hour, the Committee, although protesting against the Government's interpretation of the contract and the position taken by its representatives, notified them that the manufacturers would accede to the proposed modification of their contracts. On the same day, the Ordnance Department gave to appellant and other manufacturers telegraphic notice of the cancellation of their contracts, and on January 2, 1919, a form of contract, embodying the verbal agreement reached between the officers of the Ordnance Department and the Committee, was submitted to the appellant and the other manufacturers, accompanied by a copy of a letter of the

Ordnance Department stating that linters would not be accepted by the Government from any producer who refused to execute the contract. Appellant's counsel assisted in the preparation of this letter. The form contract, dated December 31, 1919, was signed by appellant; it contained recitals of the cancellation of the earlier contract of September 1918; that a dispute had arisen as to whether the war had terminated and as to the measure of damages provided by the cancellation clause in the earlier contract, and stipulated that the new contract was in lieu of cancellation of the earlier contract and a modification of it.

The findings of the Court of Claims establish appellant's right to recover under the earlier contract if it was not modified by the later one. Appellant urges that the later contract does not bar such recovery because the coercive measures resorted to by officers of the Ordnance Department, to induce its execution, amount in law to duress, rendering the second contract invalid and without force to modify the first. To support this position appellant relies on the serious consequences which the industry would have suffered if the Government had wholly refused to perform its contracts. It asserts that 270,000 bales of linters already inspected by the Government were in the hands of manufacturers; that a million tons of cotton seed, purchased at the uniform price of \$70 fixed by the Government, were on hand; that the manufacturers had made commitments for the purchase of 480,000 tons in the hands of farmers. It is contended that the Government's refusal to carry out the contracts would have resulted in the failure of the scheme for the stabilization of the price of cotton seed and its products, and in the collapse of the business structure which had been reared upon the basis of the stabilized price, and that great loss would have resulted to appellant and other manufacturers.

A difficulty encountered by the appellant at the outset is that this view is not supported by the findings made. On its own theory of the case, appellant must prove the probable injury which it would have suffered from the threatened refusal of the Government to carry out its contract, and that fear of that loss was the effective cause of its executing the settlement contract. Any inference that the business of manufacturing and distributing cotton seed products would have been disastrously affected, would avail appellant nothing because it does not appear what the consequences to its own business and finances would have been.

The findings establish that on December 30, 1918, there were in the hands of manufacturers 270,000 bales of linters; but it does not appear what proportion of them, if any, were in the hands of appellant. There is no finding with respect to the amount of cotton seed or cotton seed products in the hands of the manufacturers. There is no finding with respect to the nature or extent of the commitments of the manufacturers for the purchase of seed, or as to the nature or extent of the loss which appellant would have suffered if on December 30, 1918, the Government had refused to go forward with its contract; or that the legal damages for such breach of contract would not have been adequate to compensate for its loss. There is no finding that appellant was induced to sign the settlement contract by fear of the consequences of a refusal to sign.

In applying to the facts of this case the principles which control duress as a legal ground for avoidance of a contract, we are limited to such conclusions of law as may be drawn from the fact found by the court below, that the appellant signed the settlement contract after negotiations in the course of which the threat was made that the Government would disregard the admitted obligations of its contracts unless those entitled to the performance of

them would yield to its demands. This threat was discreditable to the officers who made it and injurious to the Government, whose high obligation to deal justly and according to law, with those with whom it contracts, might well have been their first concern. But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate. *Silliman v. United States*, 101 U. S. 465; *Rosenfeld v. Boston Mut. Life Ins. Co.*, 222 Mass. 284; *Hackley v. Headley*, 45 Mich. 569; *Goebel v. Linn*, 47 Mich. 489; *Cable v. Foley*, 45 Minn. 421; *Wood v. Telephone Co.*, 223 Mo. 537; *Secor v. Clark*, 117 N. Y. 350; *Doyle v. Rector, etc., Trinity Church*, 133 N. Y. 372; *Smithwick v. Whitley*, 152 N. C. 369; *Earle v. Berry*, 27 R. I. 221; and see *Mason v. United States*, 17 Wall. 67; *United States v. Child*, 12 Wall. 232.

Freund v. United States, 260 U. S. 60; *Hunt v. United States*, 257 U. S. 125; *United States v. Smith*, 256 U. S. 11, relied upon by appellant, present different considerations from those involved here. All were cases in which Government contractors were called on to perform extra services, the representatives of the Government taking the position that the services demanded were stipulated for by the contracts. In each it was held that the services were not contemplated by the contract, and that the contractor did not assent to the Government's construction. There was consequently no legal bar to the contractor's recovering the fair value of the service rendered to the Government, the Postmaster General having authority to request the services and to pay for them. See also *United States v. Stage Co.*, 199 U. S. 414; *St. Louis, S. W. Ry. v. United States*, 262 U. S. 70, 76. Here the appellant is confronted with the finding that it has executed a formal

contract which bars its recovery unless it sustains the burden of proving duress.

The objection that the contract by which the parties settled the controversy between them was without consideration is without weight. *Savage Arms Corp. v. United States*, 266 U. S. 217.

Affirmed.

MR. JUSTICE SUTHERLAND took no part in the case.

ROBERTS & SCHAEFER COMPANY *v.* EMMERSON,
SECRETARY OF STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 210. Argued March 12, 1926.—Decided April 12, 1926.

1. *Quaere*: Whether, as between its domestic corporations, a State may not constitutionally measure their franchise taxes by the amounts of their authorized capital stock without regard to the amounts issued? *Air-Way Corp. v. Day*, 266 U. S. 71, distinguished. P. 53.
2. A corporation is not in a position to raise this question under the equal protection clause of the Fourteenth Amendment, if all of its authorized capital stock has been issued. P. 54.
3. As applied to domestic corporations doing only intrastate business, a state franchise tax measured by a flat rate on authorized capital stock, adopting the par value for par-value stock and \$100 per share for no-par stock, is not such a discrimination as infringes the equal protection clause of the Fourteenth Amendment, either (1) as between corporations whose authorized no-par shares may be of like number but represent very different capital values, or (2) as between corporations with par-value stock and corporations with no-par value stock. Pp. 55, 57.
So *held* where the law permitted par value shares to be issued only for money or property equivalent to the par value, but no-par value stock for money or property of any value not less than \$5 nor more than \$100 per share. Ills. Rev. Stats. 1925, c. 32, as amended by Ls. 1921, p. 365; 1923, p. 280.
4. The fact that a corporation issued no-par stock when the law valued it at a lower figure for the purpose of measuring the cor-

poration's franchise tax, did not give rise to a contractual obligation preventing the State from adopting a higher valuation, increasing the tax. P. 58.

5. If the Illinois corporate franchise tax law may be deemed part of a corporation's charter, it may nevertheless be amended under the power reserved by § 146 of the Illinois General Corporation Act. *Id.*

313 Ill. 137, affirmed.

ERROR to a judgment of the Supreme Court of Illinois which affirmed a judgment dismissing the bill in a suit by a corporation for a mandatory injunction to compel the Illinois Secretary of State to accept a sum specified, as the plaintiff's annual franchise tax.

Mr. Paul O'Donnell, with whom *Mr. Charles W. Paltzer* was on the brief, for plaintiff in error.

Mr. Bayard Lacey Catron, with whom *Messrs. Oscar E. Carlstrom* and *Albert D. Rodenburg* were on the brief, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

The plaintiff in error, a corporation organized under the laws of Illinois, and doing business in that State, filed its bill in the Circuit Court of Sangamon county, Illinois, for a mandatory injunction to compel the defendant in error, as Secretary of State for Illinois, to accept the sum of \$75.00 in full discharge of its liability for an annual franchise tax for the year 1923, imposed by § 105 of the Illinois Corporation Act, and to enjoin the defendant in error from collecting more than that amount.

The plaintiff corporation was originally organized with an authorized capital stock of \$100,000, divided into one thousand shares of the par value of \$100. In 1921, the Illinois Corporation Act was amended so as to allow corporations to issue shares of no par value. Ill. Rev. Stats., (Cahill, 1925) c. 32, § 32, as amended by Act of June 11, 1921, Laws of 1921, p. 365. Shortly after the passage

of this Act, the corporation, by amendment of its charter, converted its outstanding stock into preferred stock, and authorized and issued forthwith, 10,000 shares of common stock of no par value.

Section 105 of the Corporation Act then provided:

"Each corporation for profit . . . organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State.

The Secretary of State demanded of the plaintiff corporation, under this statute, the payment of five cents on each share of no-par stock, on the assumption that for the purpose of the tax, no-par shares were to be valued at \$100. The plaintiff took the position that there was no statutory authority for the assessment of the tax on that basis, and that, since its no-par value shares had been issued as "fully paid up and non-assessable upon the payment of five dollars for each share in cash or property," it was liable to a tax only on the basis of that valuation; and tendered the tax so computed to the Secretary of State. In a mandamus proceeding brought by the plaintiff corporation, the Supreme Court of Illinois upheld this contention and ordered the Secretary of State to accept the lesser sum in satisfaction of the tax. *People ex rel. Roberts & Schaefer Co. v. Emmerson*, 305 Ill. 348.

After this decision, the legislature of Illinois amended § 105 (Laws 1923, p. 280) by adding the sentence:

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of \$100 per share."

The plaintiff's bill in the case before us attacks the validity of the franchise tax imposed on it pursuant to this amendment, on the ground that the amendment is unconstitutional. The circuit court dismissed the bill for want of equity. On appeal, the Supreme Court of Illinois affirmed the judgment (313 Ill. 137), holding that the tax was lawfully assessed. The plaintiff comes here on writ of error. Jud. Code § 237.

It is urged that the selection of authorized capital stock as the basis for the franchise tax or license fee is arbitrary and has no tendency to produce equality, and results in imposing different rates of taxation on corporations having the same issued capital stock, holding the same amount of property and doing the same amount of business, whenever they have different amounts of authorized capital stock; that the mere number of authorized no-par value shares, regardless of their value or the amount of money or property for which they are or may be issued, is not a reasonable basis for a franchise tax, but is wholly arbitrary; that the provision of § 105 assigning an arbitrary valuation of \$100 per share to no-par stock for the purpose of computing the tax in question, results in a discrimination against corporations which issue shares of no par value, and in favor of those which issue them at a par value. Reliance is also placed on the invalidity of the amendment as impairing the obligation of contract (Constitution, Art. 1, § 10) in that the shares of the plaintiff were issued before the amendment of § 105, and at a time when, it is alleged, the law of Illinois provided that, for the purpose of this tax, no-par stock was to be valued at the amount for which it was actually issued.

In support of the argument that authorized capital stock is not a permissible basis for a franchise tax, the plaintiff relies on *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71. That case dealt with a privilege tax,

laid by Ohio on a foreign corporation engaged in interstate and intrastate commerce in that and other States. It was held that a tax on such a corporation for the privilege of doing business in Ohio, where the tax was measured by that proportion of its total authorized capital stock which its business done and property owned in Ohio bore to its total business done and property owned everywhere, was invalid as an unconstitutional burden on interstate commerce, and a denial of the equal protection of the laws. While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the State, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the *Air-Way Case*, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation.

In the present case, the plaintiff corporation is organized and does all its business in Illinois. We cannot say that a State may not impose a franchise tax on a domestic corporation, measured by its authorized capital stock. See *Kansas City Ry. v. Kansas*, 240 U. S. 227, 232-3; *Kansas City v. Stiles*, 242 U. S. 111.

But the plaintiff is not in a position to raise this question. As this Court has often held, one who challenges the validity of state taxation on the ground that it vio-

lates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains. See *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552-3; *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55, 60; *Withnell v. Ruecking Constr. Co.*, 249 U. S. 63; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 121. The plaintiff cannot complain that the tax is measured by authorized, instead of issued, capital stock, because all of its authorized capital stock has been issued. Any discrimination that exists operates, therefore, in plaintiff's favor.

It is argued that the tax imposed is a tax at a flat rate per share on no-par value stock, regardless of its value, so that different corporations are taxed at different amounts although their no-par stock was issued for the same total amount of capital; and that the tax is based upon an unreasonable and discriminatory classification in which no-par value stock is placed in one class and taxed at an arbitrary valuation of \$100 per share, while par value stock is placed in another class and taxed at the value at which it is authorized to be issued. Both arguments leave out of account the nature of the tax and the essential differences between the two classes of stock.

The tax is imposed as a franchise tax upon a domestic corporation doing business only within the State. Its power to issue shares of both classes is derived from the laws of Illinois. The amount which may be issued; the manner of issue; the liability of holders of these shares and all other incidents of them, are regulated by the law of that State. The tax is not a property tax imposed on shares of stock or on the assets of the corporation. It is a tax on the corporate franchise, which includes the privilege, whether exercised or not, of issuing

and using when issued, a particular kind of stock known as "no-par value stock." As the stock may, under the statute, be issued for as much as \$100 a share, if the company so chooses, the statute fixes the maximum extent to which the privilege may be exercised as the basis for computing the tax.

Neither this privilege nor the corresponding privilege of issuing par value stock bears any necessary relation to the value of the stock or the assets of the corporation; and the tax is imposed whether or not the stock is issued and without regard to the value of the stock or of the corporate property. We cannot say that the value of the corporation's franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued. The only question with which we need be concerned is whether there are such differences between the two privileges to issue the two classes of stock, as to constitute a proper basis for classification for purposes of taxation, so that the amount of the tax in the one case may be based on the issue price of the stock, and in the other upon the maximum price at which it may be issued, regardless of the price at which it actually is issued.

That there are differences of practical importance between the two classes of stock and the privileges of issuing and using them is sufficiently evidenced by the very general adoption of legislation authorizing the issue of no-par value stock, and by the widespread practice of issuing that type of corporate shares.

The nature of the more important of these differences sufficiently appears from the provisions of the Illinois statute as interpreted and applied in the opinion below in the Supreme Court of Illinois. Par value stock may be issued only for money or property equivalent to the par value. No-par value stock may be issued for money or property of any amount or value provided it is not less

than \$5.00 nor more than \$100 per share. From this it follows that all the par value stock of an authorized class must be issued, if issued at all, at a uniform value or price, while no-par value stock may be issued from time to time at different prices or values, although the holders of all these shares are entitled to share equally in the distribution of profits of the corporation. The liability of stockholders of the two classes of stock for the debts of the corporation may be different, and greater facility is permitted in the issuance and marketing of no-par value shares than in the case of stock having a par value.

These differences, both in the legal incidents and in the practical uses of the two classes of stock, not only are a basis for classification of them for purposes of taxation, but make unavoidable certain differences in the method of assessing this tax. Authorized capital stock cannot well be used as the measure of a tax unless some arbitrary value is assigned to the no-par shares; for they may be issued from time to time at varying prices, and until issued, they cannot have any value. To require the stock to be issued at a value fixed in advance of its issue, and to make that value the basis of the tax, would in effect abolish no-par stock. Because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no-par value stock and not result in similar inequalities.

The inequalities complained of result from a classification which, being founded upon real differences, is not unreasonable, and the discrimination which results from it is not arbitrary or prohibited by the Fourteenth Amendment. It is enough that the classification is reasonably founded upon or related to some permissible policy of taxation. *Watson v. State Comptroller*, 254 U. S. 122; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; *Clement National Bank v. Vermont*, 231 U. S. 120, 135-7.

Only brief consideration need be given to the contention that the amendment of § 105 of the Illinois Corporation Act impairs the obligation of contract. That plaintiff's stock when issued was not subject to the tax computed at the rate of \$100 per share, which was later authorized by § 105 as amended, was decided in *Roberts & Schaefer Co. v. Emmerson*, 305 Ill. 348. The fact that the corporation issued its stock under statutes which were later so interpreted can give rise to no inference that the State contracted not to increase or otherwise modify the tax. See *Home Ins. Co. v. City Council*, 93 U. S. 116; *Memphis Gas Co. v. Shelby County*, 109 U. S. 398; *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379; *Seaton Hall College v. South Orange*, 242 U. S. 100.

Even if the taxing statute be deemed to be a part of its corporate charter, it was nevertheless subject to the provisions of § 146 of the Illinois General Corporation Act reserving to the legislature the power "to amend, repeal or modify this act at pleasure."

Judgment of the Supreme Court of Illinois is

Affirmed.

READING COMPANY *v.* KOONS, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 213. Argued March 12, 15, 1926.—Decided April 12, 1926.

Section 6 of the Employers' Liability Act, providing "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued," is to be construed as allowing, in death cases, two years from the time of death—not two years from the appointment of the administrator. P. 60.

281 Pa. 270, reversed.

CERTIORARI to a judgment of the Supreme Court of Pennsylvania, which affirmed a judgment (26 Dauphin Co. Pa. Reps. 234) in an action under the Federal Employers' Liability Act.

Mr. John T. Brady, with whom *Mr. Charles Heebner* was on the brief, for petitioner.

Mr. John R. Geyer, with whom *Messrs. Geo. Ross Hull* and *Paul G. Smith* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent's intestate, while employed by the Philadelphia & Reading Railway Company, an interstate carrier of which petitioner is the successor, received injuries from which he died on the following day, April 23, 1915. Letters of administration were granted to respondent September 23, 1921. Five months later, on February 6, 1922, nearly seven years after the death, respondent brought the action, now under review, in the Pennsylvania Court of Common Pleas, to establish a liability under the Federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65, 66, as amended by the Act of April 5, 1910, c. 143, 36 Stat. 291.

A petition of the defendant below, petitioner here, for judgment of *nol. pros.* on the ground that the action, having been brought more than two years after the death, was barred by the statute of limitations, was denied (26 Dauphin County Pa. Reports 234) and judgment was entered for plaintiff, respondent here. On an appeal to the Supreme Court of Pennsylvania, the judgment was affirmed. 281 Pa. 270. This court granted certiorari. 266 U. S. 600.

As respondent brought his action more than two years after the death and less than two years after his appointment as administrator, the sole question presented for

review is whether, in an action for wrongful death brought under the Federal Employers' Liability Act, the two-year statute of limitations begins to run at the date of the death or at the date of the appointment of the administrator of the decedent.

The Federal Employers' Liability Act imposes upon common carriers by railroad, engaged in interstate commerce, liability for the death of an employee employed in such commerce, when the death results from the negligence of the carrier or its agents, and gives a right of action to the personal representative of the decedent for the benefit of the surviving spouse and children of such employee, or if there are no such survivors, then for the benefit of his dependent next of kin. By § 6 of the Act, it is provided "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

The application of this statute turns on the question whether the cause of action created by the Act may be deemed to have "accrued," within the meaning of the Act, at the time of death or on the appointment of the administrator, who is the only person authorized by the statute to maintain the action. *American R. R. of Porto Rico v. Birch*, 224 U. S. 547; *St. Louis, S. F. & T. Ry. v. Seale*, 229 U. S. 156. The question has never been directly answered by this Court, although in *Missouri, K. & T. Ry. v. Wulf*, 226 U. S. 570, it was assumed that the cause of action was barred in two years after the death.

It has received conflicting answers in the decisions of other courts. The decision of the First Circuit Court of Appeals in *American R. R. of Porto Rico v. Coronas*, 230 Fed. 545, holding that the statute does not begin to run until the appointment of the administrator, has been followed in *Guinther v. Philadelphia & R. Ry.*, 1 Fed. (2d) 85; in *Kierejewski v. Great Lakes Dredge & Dock Co.*, 280 Fed. 125, and in *Bird v. Ft. Worth & Rio Grande*

Railway, 109 Tex. 323. Other cases have laid down a similar rule with respect to state laws giving a right of recovery for wrongful death. *Andrews v. Hartford & New Haven R. R.*, 34 Conn. 57; *Capro v. City of Syracuse*, 183 N. Y. 395.

On the other hand, the Supreme Court of Georgia (*Seaboard Air Line v. Brooks*, 151 Ga. 625) and the Supreme Court of Kansas (*Giersch v. Atchison, Topeka & Santa Fe Ry.*, 171 Pac. 591) have expressly declined to follow the rule laid down in the first circuit in *American R. R. of Porto Rico v. Coronas*, *supra*. The same result was reached in *Bixler v. Pennsylvania R. R.*, 201 Fed. 553, and a like rule has been applied in state courts to similar state statutes. See *Radezky v. Sargent & Co.*, 77 Conn. 110; *Rodman v. Ry.*, 65 Kan. 645; *Swisher v. Ry.*, 76 Kan. 97; *Carden, Adm'r. v. L. & N. R. R.*, 101 Ky. 113; *Gulledge v. R. R.*, 147 N. C. 234; *Hall v. R. R.*, 149 N. C. 108.

This diversity of view arises principally from the attempt made to find in the word "accrued" used in the statute, some definite technical meaning which will in itself enable courts to say at what point of time the cause of action has come into existence and consequently at what point of time the statute of limitations begins to run.

It is argued in support of one view, as the court below held, that, as the cause of action for death is the creature of statute and is given exclusively to the administrator of the decedent, no cause of action can arise or accrue until there is an administrator. On the other hand, it is asserted with, we think, equal plausibility, that, when all of the events have occurred which determine the liability of the common carrier, the cause of action has come into existence or has "accrued."

We do not think it is possible to assign to the word "accrued" any definite technical meaning which by

itself would enable us to say whether the statutory period begins to run at one time or the other; but the uncertainty is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

Whatever effect may be given to the assertion often made in judicial opinion that, in the ordinary case where a cause of action arises in favor of the estate of a decedent, there is no person who can enforce it if there is no executor or administrator,¹ that statement cannot be applied strictly to causes of action for death arising under the Federal Employers' Liability Act. For while it is true that the executor or administrator is the person authorized to bring the suit, he nevertheless acts only for the benefit of persons specifically designated in the statute. At the time of death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator. This Court has held that a suit brought by such persons in their individual capacity is not a nullity within the provisions of the Act, and that if by amendment the plaintiff is properly described as executor or administrator of the decedent, even though the amendment is had after the expiration of the statutory period, the suit may be maintained and a recovery had under the statute. See *Missouri, K. & T. Ry. v. Wulf*, *supra*. See also *Seaboard Air Line v. Renn*, 241 U. S. 290, and *New York C. & H. R. R. Co. v. Kinney*, 260 U. S. 340. Thus, at the death of dece-

¹ See *Johnson, Adm'r v. Wren*, 3 Stew. 172; *Bucklin v. Ford*, 5 Barb. 393; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; *Seymour v. Mechanics & Metals Nat. Bank*, 199 App. Div. 707; *Murray v. East India Co.*, 5 B. & Ald. 204; but see *Tynan v. Walker*, 35 Cal. 634, 637-8.

dent, there are real parties in interest who may procure the action to be brought; and there are no such practical inconveniences or necessary delays as would lead to the conclusion that the word "accrued," as used in the statute, cannot be taken to refer to the time of death.

The language of the statute evidences an intention to set a definite limit to the period within which an action may be brought under it, without reference to the exigencies which arise from the administration of a decedent's estate. The statute relates not only to causes of action for wrongful death but to causes of action for other injuries. Where the cause of action for personal injury survives to personal representatives of an injured employee who dies after the injury from other causes, the language of the statute seems peremptorily to require the action to be brought within two years from the time of injury, without regard to any intervening period after death when there is no executor or administrator. Compare *Whipple v. Johnson*, 66 Ark. 204; *Gibson v. Ruff*, 8 App. D. C. 262; *Sammis v. Wightman*, 31 Fla. 10; *Sanford v. Sanford*, 62 N. Y. 553, 555.

It cannot be supposed that Congress, in enacting the statute, intended to impose a fixed limitation of two years within which all actions for personal injury must be begun, regardless of death and of the time of appointment of an administrator of the injured employee, and at the same time intended to allow an indefinite period within which application may be made for the appointment of an administrator as the prerequisite to an action to recover for wrongful death. Indeed, the limitation would seem to be more necessary in the case of personal injuries than in the case of a wrongful death; for in the former case some part of the period of limitations will have run at the time of death. This inconsistency is avoided if the word "accrued," whether applied to causes of action for personal injury or for wrongful death, be taken to apply

uniformly to the time when the events have occurred which determine that the carrier is liable, even though the particular person through whose agency the liability is to be enforced, has not been designated.

It is argued that, as it was provided by Lord Campbell's Act that the period of limitation should run from the time of death, the omission of that phraseology from the Employers' Liability Act indicates that it was the intention of Congress that the statutory period should run from a different time, namely, from the time of the appointment of an administrator. This argument, however, leaves out of account the fact that the present statute deals with causes of action arising from personal injury as well as causes of action arising from a wrongful death. The limitation that no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued, applies to both. This accounts for the omission of any specific reference to death in fixing the period of limitation; and the fact that the limitation is made applicable equally to the two causes of action, one of which admittedly "accrues" on the happening of the events which fix the defendant's liability, leads persuasively to the conclusion that a like test was intended for determining when the cause of action accrued for wrongful death.

Every practical consideration which would lead to the imposition of any period of limitation, would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator. Here the appointment was not made until six years after the death. No reason appears, if the opinion of the court below is followed, why the time might not have been extended indefinitely by the failure to apply for administration. The only persons who can procure the appointment of an administrator are ordinarily spouse, next of kin, or

creditors of the decedent. Certainly the common carrier would have no standing to make the application. The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation. If the persons who are designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the two-year period of limitation so far as it applies to actions for wrongful death might as well have been omitted from the statute. An interpretation of a statute purporting to set a definite limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose. There is nothing in the language of the statute to require, or indeed to support, such an interpretation.

Judgment of the Supreme Court of Pennsylvania is

Reversed.

MASSACHUSETTS *v.* NEW YORK ET AL.

IN EQUITY.

No. 14, Original. Argued March 4, 1926.—Decided April 12, 1926.

1. Property and dominion over lands in America discovered under royal authority vested in the Crown to be held as part of the public domain for the benefit of the nation. P. 85.
2. As a result of the Revolution, the people of each State became sovereign, and in that capacity acquired the rights of the Crown in the public domain. *Id.*
3. A treaty between two of the States granting land and reserving jurisdictional rights is to be construed with regard not only to technical meanings of words used, but also to public convenience, avoidance of controversy, and the object to be achieved. P. 87.

4. In construing such an instrument as the Treaty of Hartford, the applicable principles of English law, well understood at its time, the object of the grants made, contemporaneous construction of it and long usage under it, are all to be given consideration and weight. P. 87.
5. By this treaty, made December 16, 1786, with the avowed purpose of settling all controversies over the territory involved, Massachusetts granted to New York "all the claim, right and title" which Massachusetts had "to government, sovereignty and jurisdiction" over a large area now in Western New York, then claimed by both States under conflicting royal charters, and New York ceded to Massachusetts "the right of preëmption of the soil from the native Indians, and all other right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York" had in or to the lands and territories within an area described, extending from Pennsylvania on the south to the international boundary on the north, thus embracing not only the southern shores of Lake Ontario but also in part its navigable waters, which were the principal means of access to the region covered by the grant. The treaty contained a clause securing the right of Massachusetts and her grantees to use the waters of the lake for navigation and fishery. There were numerous islands within the part of the lake embraced by the description. *Held* that the treaty conveyed to Massachusetts no title to the bed of the lake, but vested this in New York as incident to the sovereignty both granted and reserved to that State over the area described. Pp. 85-90.
6. Wherever there is a grant by a State having power to make it of the rights and title of government and sovereignty over a specified territory, or where, in a grant of land to be held in private ownership by one State within the limits of another, there is a reservation to the grantor State of these sovereign rights, the grant or reservation carries with it, as an incident, title to any lands under navigable waters. P. 89.
7. The rule that a grant whose boundaries extend to the "shore," or "along the shore," of the sea carries only to high water, is inapplicable to conveyances of land on non-tidal waters. P. 92.
8. A conveyance by Massachusetts of land, (part of that ceded to her by the Treaty of Hartford,) bounded by a line extending "to the shore" and thence "along the shores" of Lake Ontario, carried to the water; therefore she was not entitled to subsequent additions to the strip of shore, made by accretions or filling. P. 91.

9. Practical construction by the two States of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and long continued acquiescence by Massachusetts in that construction, support the conclusion that Massachusetts neither acquired, under the treaty, proprietary title to land in the bed of Lake Ontario next the shore, nor reserved the shore when alienating the upland. P. 94.
10. In a suit between States not involving any public boundary or public ownership, costs are awarded against the defeated plaintiff. P. 96.

Bill dismissed.

SUIT brought in this Court by the Commonwealth of Massachusetts against the State of New York, the City of Rochester, private corporations and individuals,* wherein the plaintiff asserted title to a narrow strip of land on the water front in the City, and sought to enjoin the City from taking it by eminent domain, or, in the alternative, to obtain money compensation for such taking. See *post*, p. 636.

Mr. Edwin H. Abbott, Jr., with whom *Mr. Jay R. Benton*, Attorney General of Massachusetts, was on the brief, for complainant.

The Hartford Treaty released and ceded to Massachusetts title to that part of the bed of Lake Ontario described in Article II. As the consideration for the grant and release of sovereignty made to New York by

* The docket title of the case, with the names of parties, is as follows: Commonwealth of Massachusetts, Plaintiff, v. State of New York; City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe, State of New York; Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal; New York Central Railroad Company; Ontario Beach Hotel & Amusement Company; Central Union Trust Company of New York; Upton Company; Anna T. Granger; Emil Boshart; Rebecca Boshart; Bartholomay Brewing Company; Milton J. McIntyre; Belle McIntyre; Twentieth Ward Co-operative Savings and Loan Association; and The Farmers Loan & Trust Company, Defendants.

Article I was the lands and territories released to Massachusetts by Article II, together with the further privileges and safeguards accorded by subsequent articles of the treaty to protect the territory so released, it is inadmissible to construe this portion of Article II as if the lands thereby conveyed had been bounded upon the edge of Lake Ontario, and not upon the international line which ran through the centre of the lake. The express words of the treaty must receive due effect. *Asakura v. Seattle*, 265 U. S. 332; *Green v. Biddle*, 8 Wheat. 1.

Neither Massachusetts nor New York had made good its asserted title either to the sovereignty or to the soil of the tract in dispute. The conflicting claims stood squarely opposed. Each State stood equal in this respect, unless the fact that Massachusetts claimed under the earlier royal grant in 1620, while New York claimed under a grant made in 1666, gave Massachusetts an advantage. Unlimited as yet by Art. I, sec. 10, of the Constitution, they could make such compact as they chose in order to settle their difference. *Wharton v. Wise*, 153 U. S. 155; *Rhode Island v. Massachusetts*, 12 Pet. 657. Both before and since the Constitution conflicting rights as to sovereignty, boundary and navigable waters have been settled by compacts between States. *Howard v. Ingersoll*, 13 How. 381; *Alabama v. Georgia*, 23 How. 505; *Devoe Mfg. Co., Petr.*, 108 U. S. 401; *Central R. R. of N. J. v. Jersey City*, 209 U. S. 473; *Georgia v. South Carolina*, 257 U. S. 516. Such compacts (especially those made prior to the adoption of the Constitution) stand upon a broader foundation than grants to individuals or corporations by statute or otherwise. The exception of sovereignty from "the right of preëmption from the native Indians and all other the estate, right, title and property" granted and released to Massachusetts by Article II, merely preserved intact the grant and release of sovereignty already made by Massachusetts in Article I. It

did not enlarge that release. It simply made clear that Massachusetts was to take title and every property interest in the whole tract described, while New York was to have sovereignty over it.

The property rights which New York was to receive under the Treaty are defined by Article III which grants and releases to her, in language similar to that used in Article II, "the right of preëmption of the soil from the native Indians, and all other the estate, right, title and property which the Commonwealth of Massachusetts hath of, in or to the residue of the lands and territories so claimed by the State of New York as hereinbefore stated and particularly specified" (in the preamble of the treaty).

In seeking so to extend the word "sovereignty" by implication, the defendants overlook the fact that that very sovereignty is qualified by other articles of the Treaty in order to protect the tract released to Massachusetts by Article II. Neither Article I nor Article II purport to cede or release any lands to New York. The lands ceded and released to New York, which include not only the upland but also a part of the bed of the lake, are defined by Article III, which includes only the "residue of the lands and territories" which remains after the description in Article II is fully satisfied. The express grant to New York in Article III excludes any implied grant to New York of any part of the lands described and released to Massachusetts by Article II. *Green v. Biddle*, 8 Wheat. 1.

Within five years of the Treaty, Massachusetts, to the knowledge of New York but without any protest from that State, unequivocally asserted her title to the bed of the lake within the boundaries defined by Article II of the Treaty.

The defendants have not established any title to the *locus* by accretion. The burden is on the defendants to prove title by accretion. Accretions belong only to that land which bounds upon and is in contact with the water.

The physical nature of the boundary called for by Mass. St. 1788, c. 23, (the effective conveyance to Phelps and Gorham,) is to be determined by construing that act in the light of the Massachusetts decisions, while the legal incidents flowing from the nature of the physical boundary so ascertained depend upon and are determined by the law of New York, in which the land lies.

In New York the question whether a given boundary is in law in contact with the water depends upon the given boundary and the nature of the water. A deed calling for the sea as a boundary conveys to the ordinary high water mark. *Shively v. Bowlby*, 152 U. S. 1; *Sage v. Mayor of New York*, 154 N. Y. 61; *Matter of Mayor of New York*, 182 N. Y. 361; *Nevins v. Friedauer*, 198 App. Div. 250. On the other hand, a boundary upon the cliff or beach is not a call for the sea and does not define a line in contact with the water. *Trustees of Easthampton v. Kirk*, 84 N. Y. 215. A grant which bounds the premises conveyed upon a navigable lake conveys to low water mark. *Stewart v. Turney*, 237 N. Y. 117; *Champlain & St. L. R. R. v. Valentine*, 19 Barb. 484; *People v. Canal Commrs.*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377. A boundary upon the beach, upon the shore or upon high water mark of a navigable lake does not convey to the edge of the water or confer riparian rights. *People ex rel. Burnham v. Jones*, 112 N. Y. 597; *Geneva v. Henson*, 195 N. Y. 447; *New York Central & H. R. R. Co. v. Moore*, 137 App. Div. 461, aff'd. 203 N. Y. 615; *Cook v. McClure*, 58 N. Y. 437; *Sloan v. Biemiller*, 34 Oh. St. 492; *Axline v. Shaw*, 35 Fla. 305. Intimations in *People ex rel. Burnham v. Jones*, *supra*, and *Matter of the City of Buffalo*, 206 N. Y. 319, that the line of contact with the waters of a navigable lake is high water mark, were overruled in *Stewart v. Turney*, 237 N. Y. 117.

A boundary upon a navigable river, above the point where the tide ebbs and flows, conveys only to the water's

edge and includes no part of the bed. *Danes v. New York*, 219 N. Y. 67; *Fulton L. H. & P. Co. v. New York*, 200 N. Y. 400; *People v Canal Appraisers*, 33 N. Y. 461; *Tibbetts Case*, 5 Wend. 423, 13 Wend. 355, 17 Wend. 571, 19 N. Y. 523. A grant bounded upon a non-navigable stream, or upon a small lake or pond which is susceptible of private ownership, passes title to the thread of the stream, or to the center of the pond or little lake as the case may be. *Fulton L. H. & P. Co. v. New York*, 200 N. Y. 400; *Calkins v. Hart*, 219 N. Y. 145; *Gouverneur v. Natl. Ice Co.*, 134 N. Y. 355; *Smith v. Rochester*, 92 N. Y. 463. On the other hand, a boundary upon the bank or margin of a non-navigable stream restricts the conveyance to low water mark even though the grantor might have conveyed to the thread of the stream. *Child v. Starr*, 4 Hill 369, 5 Denio 599; *Babcock v. Utter*, 1 Abb. Ct. of App. 27; *Halsey v. McCormick*, 13 N. Y. 296; *Matter of the City of New York*, 212 N. Y. 328.

The statute is a grant by Massachusetts to two of its citizens. Such grants are always construed in favor of the State and against the grantees; nothing can be inferred against the State. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

While the legislature accepted and adopted the description of the metes and bounds furnished and requested by Gorham and Phelps, the changes in the instrument show that that description was carefully considered and clearly understood by the legislature according to its tenor.

Where a tract bounds upon, and so excludes, the shore, the word "appurtenances" passes no part of the shore nor any land beneath the water. *Geneva v. Henson*, 195 N. Y. 447; *Commonwealth v. Alger*, 7 Cush. 53; *Whitmore v. Brown*, 110 Me. 410; *Dunlap v. Stetson*, 4 Mason 349.

Thus, by striking out the enumeration employed in the Indian deed and substituting therefor the word "appur-

tenances," the legislature eliminated from the description the only language which by any stretch of construction could have included anything outside the boundaries described. This is a clear indication of the intention that the description furnished by the grantees is not to include anything not expressly within the terms thereof when strictly construed according to the rules of law. The precise question, therefore, is whether a statutory grant by the Commonwealth to two of its citizens, which, at the request of the grantees, runs the western line along or in reference to the Genesee River "to the shore of the Ontario Lake" and runs the north line "thence eastwardly along the shores of said Lake" conveys to the low water mark or only to the line where shore and upland meet. See *Storer v. Freeman*, 6 Mass. 435; *Saltonstall v. Proprietors of Long Wharf*, 7 Cush. 195; note to *Commonwealth v. Roxbury*, 9 Gray 451; *Niles v. Patch*, 13 Gray 254; *Chapman v. Edmands*, 3 Allen 512; *Boston v. Richardson*, 13 Allen 146; *Tappan v. Burnham*, 8 Allen 65; *Litchfield v. Scituate*, 136 Mass. 39; *Litchfield v. Ferguson*, 141 Mass. 97; *Castor v. Smith*, 211 Mass. 473. The cases show that at the time when St. 1788, c. 23, was enacted the words "to the shore and along the shore" had already acquired a settled meaning which excluded the shore or beach. The rule is not peculiar to Massachusetts. It is generally in force in other States, including New York. Gould on Waters, § 199.

It may be that the defendants will contend that fresh non-tidal waters possess no high water mark and therefore have no shore. Such is not the law. In Iowa and Arkansas a call for a navigable river fixes the boundary at high water mark. *Barney v. Keokuk*, 94 U. S. 324; *Park Commissioners v. Taylor*, 133 Ia. 453; *Bennett v. Natl. Starch Co.*, 103 Ia. 207; *Wallace v. Driver*, 61 Ark. 429; *St. Louis, etc., Ry. Co. v. Ramsey*, 53 Ark. 314; *Winford v. Griffin*, 1 Fed. (2d) 224. Cf. *Howard v.*

Ingersoll, 13 How. 381; *Alabama v. Georgia*, 23 How. 505; *Oklahoma v. Texas*, 260 U. S. 606. In New York and Illinois it was intimated that a call for one of the Great Lakes as a boundary conveyed to high water mark. *People ex rel. Burnham v. Jones*, 112 N. Y. 597; *Matter of the City of Buffalo*, 206 N. Y. 319; *People v. Kirk*, 162 Ill. 138; *Cobb v. Commissioners*, 202 Ill. 427; *Illinois Central R. R. v. Chicago*, 176 U. S. 648. These intimations did not finally crystallize into law; in both States a call for a navigable lake bounds the tract conveyed upon low water mark. *Stewart v. Turney*, 237 N. Y. 117; *Brun- dage v. Knox*, 277 Ill. 470. But the final selection of the low water mark as the line of contact with the water necessarily recognizes that a high water mark exists in fact. Thus, a grant bounded upon the high water mark of a pond conveys to a fixed and unchanging line which is not in contact with the water. *Cook v. McClure*, 58 N. Y. 437; *Nixon v. Walter*, 41 N. J. Eq. 103.

The boundary running "to the shore of the Ontario Lake, thence eastwardly along the shores of said Lake" when read in the light of attendant conditions and the state of the law existent at the time of its enactment, restricts the grant to the upland, and includes no part of the shore or beach. It does not convey to low water mark or define a line in contact with the water. *Axline v. Shaw*, 35 Fla. 305; *People ex rel. Burnham v. Jones*, 112 N. Y. 597; *Geneva v. Henson*, 195 N. Y. 447; *New York Central, etc., R. R. v. Moore*, 137 App. Div. 461, 203 N. Y. 615; *Cook v. McClure*, 58 N. Y. 437; *Sloan v. Biemiller*, 34 Oh. St. 492; See also *Sweringen v. St. Louis*, 151 Mo. 348; *Nixon v. Walker*, 41 N. J. Eq. 103. Cf. *Castle v. Elder*, 57 Minn. 289. Distg. *Stewart v. Turney*, 237 N. Y. 117; *Burke v. Niles*, 13 N. Bruns. 166; *Haskell v. Friend*, 196 Mass. 198; *Doane v. Willcutt* 5 Gray 328.

The Shepard survey marks the actual boundary upon the soil at the line where upland and beach meet, pre-

cisely in accordance with the natural meaning of the statute when construed in the light of the Massachusetts cases and applied according to the New York authorities. That survey was made in 1803 and became the basis of the partition deed of October 16, 1804, through which all the individual defendants claim under Sir William Pulteney.

A practical construction of an instrument, concurred in by both parties, is of weight in determining its meaning because they act out the intent which they intended to express. In the absence of such concurrence by both States, there is no practical construction of the instrument, and the court will determine its meaning by construing the language of it. *Handley's Lessee v. Anthony*, 5 Wheat. 374; *Alabama v. Georgia*, 23 How. 505.

The conveyance to Morris was not a practical construction of the Treaty by Massachusetts which in any way limited her rights thereunder; it was an assertion by Massachusetts of her title to that part of the bed of the lake ceded and released to her by the second article of the Treaty, brought to the knowledge of New York and acquiesced in by that State for nearly a century at least.

The Bartholomay Company and the New York Central Railroad seized and filled the *locus* without right and with notice of the title of the Commonwealth.

The defendants have not established their claim of estoppel.

The Massachusetts statute of limitations is inapplicable, and the defendants do not bring themselves within its terms.

Messrs. Anson Getman and Arthur E. Sutherland, with whom *Messrs. Albert Ottinger*, Attorney General of New York, *Daniel M. Beach, Clarence P. Moser, Harry Otis Poole*, and *Harry C. Miller* were on the briefs, for defendants.

There have been, and still are, those who assert that the law of England regarded the water-covered lands below high water mark as being alienable by the King for private purposes, without regard to the rights of the upland owner or of the general public; and that such English law became the law of the Colony and State of New York. This doctrine seems to have yielded to a new and more logical view in which the English law is seen as entirely consonant with the civil law doctrine that such lands are held in an entirely different manner from the uplands. A study of the history of the English law bearing on these questions will establish that, even in England, the royal power could not grant lands under navigable waters into unrestricted private ownership and that no such right came down into Colonial and State law.

Careful examination of the proceedings of the Colonial Assemblies fails to reveal any statute or resolution of any kind in any way adopting or even referring to the alleged British "*prima facie* rule" of royal alienability of lands under navigable waters. Colonial Laws, vols. I and II. Those who declare that the common law of England with respect to these subjects became automatically the law of this country will have to find recourse to some other authority than the acts of the People's Assembly itself. As bearing upon the attitude of the Colonists toward underwater lands, attention is directed to a statute passed by the Assembly in 1699 entitled "An Act for Ye Vacateing, Breaking and Annulling of Several Extravagant Grants." Among other grants so characterized as "extravagant" and vacated was one made to John Evans in 1694 purporting to grant land under water and swamp land adjoining the Duke's Farm on Manhattan Island. Col. Laws, vol. I, p. 412.

There seems to have been no judicial affirmation of the *jus privatum* and *jus publicum* rule even in the English courts since *Attorney General v. Philpot*, 1633, until after

the American Revolution. As an illustration of the feeling which the English judiciary themselves held toward the law of the *Philpot Case*, see remarks made by Baron Wood in *Attorney General v. St. Aubyn*, Wightwick, 167.

In 1777, the first Constitution was adopted by the Colony of New York. This Constitution contained the following language, "Such parts of the common law of England . . . as . . . did form the law of the said Colony on the 19th day of April, 1775 . . . shall be and continue the law of this State." This language has been used as authority for the proposition that the 1777 Constitution adopted all of the English law. It seems absurd to suppose that a people who after years of bloody revolution had overthrown the yoke of English rule and had made a treaty whereby they became a free government, actually inherited all the laws of their conquered enemy. In *People v. Canal Appraisers*, 33 N. Y. 468, it is clearly pointed out how utterly inapplicable certain portions of the law of England were to the physical conditions which obtained in the new country.

Outside of a few fishing cases there are practically no English cases, decided prior to the American Revolution, relating to foreshore rights, with the possible exception of such decisions as contained in the celebrated *Philpot Case*.

The people in their constitution and statutes since the formation of the State of New York, have always provided that they "Are deemed to possess in their right of sovereignty the original and ultimate title to all land within the jurisdiction of the State." Vol. I, Revised Laws, p. 380; § 2; 1829 Revised Statutes, Title I, Art. I, § 1; Const. 1845, Art. I, § 11, and subsequent State Constitutions.

The colony and State of New York asserted original title to all lands held by reason of sovereignty. *People v. Trinity Church*, 22 N. Y. 44. The people's right has

often been regarded as a trust title. *Coxe Case*, 144 N. Y. 396; *People v. Baldwin*, 197 App. Div. 285; *Hinkley v. State*, 202 App. Div. 570; *Re Long Sault Development Co.*, 212 N. Y. 1; *Speedway Case*, 168 N. Y. 134; *Appleby v. City of New York*, 235 N. Y. 351.

It is to be noted that the grant to Massachusetts was for a private—not a sovereign purpose. *Speedway Case*, 168 N. Y. 134, “If the State may use the water ways for any purpose whatsoever, then it is no longer a trustee but an irresponsible autocrat. If it may erect upon our tideways or tide waters any kind of structure that may be suggested by the whim or caprice of those who happen to be in power, it will be possible to destroy navigation and commerce by the very means designed for their preservation and improvement.” Probably the clearest statement of the underlying rule governing transfers of sovereign-owned lands is that in the *Coxe Case*, 144 N. Y. 396, where it is said: “The title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit.” See also the *Long Sault Case*, 212 N. Y. 1; *People v. Steeplechase Park Co.*, 218 N. Y. 459; *Appleby v. City of New York*, 235 N. Y. 351. Such a grant must be: (a) Limited in extent so as not to amount to a surrender of control over an entire water front, unless to a municipality by delegation. (b) To promote commerce or manufacture. (c) For “beneficial enjoyment.”

It has quite frequently been asserted heretofore that the soil under navigable waters including the larger lakes and bodies of tide water, was the subject of private ownership, even in its natural state, save only in those cases where the area involved was large and such area was under a large lake or tide water, *People v. Steeplechase*

Park Co., 218 N. Y. 459, and save also lands under the St. Lawrence River, *Matter of Long Sault Development Co.*, 212 N. Y. 1. There are numerous decisions to the effect that the soil under upstate rivers, including the Mohawk, *Williams v. Utica*, 217 N. Y. 162, and lakes, excepting possibly Lake Champlain, *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. 484, and a few other large lakes, *Stewart v. Turney*, 237 N. Y. 117, might be privately owned even while covered with water and in a natural state.

The mere grant of a stated area of land under water without conditions is not a withdrawal of that area from navigation and may give no right of withdrawal or right to improve any part thereof. In any event it would give no right to exclude the public immediately. Under such circumstances one may fill at his peril, at least in part. In granting lands under large lakes or navigable tide waters, without any specification as to filling, there is no presumption that all of the area may be filled and the contractual right to do so may not be implied. This very point was involved in *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, and *People v. Steeplechase Park Co.*, 218 N. Y. 459, both decided, however, by a divided court. It was also involved in *Coxe v. State*, 144 N. Y. 396.

So long as the land is left in a state of nature the grantee should be held to have only a right to a title which right would be appurtenant to the upland. This is in accordance with the doctrine laid down in *Archibald v. Railroad Co.*, 157 N. Y. 574, cited in *Smith v. Bartlett*, 180 N. Y. 360, and follows *Peoples Trust Co. v. Schenck*, 195 N. Y. 398. If the grantee owned the soil under water, subject, of course, to certain public rights, as he owned the soil to upland, he might convey the upland or the land under water separately. If this is so, the Court of Appeals was wrong in deciding the *Archibald Case* as it did, especially in view of what was said in the *Peoples*

Trust Company Case. No grant of land under large navigable lakes and navigable tide waters immediately transfers title to the soil.

Title results only from improvements in the public interest. There is no distinction between a grant which purports to grant the soil and one which grants only the right to fill and thus acquire a so-called title, as considered in *First Const. Co. v. State*, 221 N. Y. 295. The soil under navigable tide waters and large lakes in a natural state is not the subject of private ownership in the sense of "title" or "fee title." The people do not have a proprietary title to this soil, *Re Long Sault Development Co.*, 212 N. Y. 1, so cannot convey such a title. From a close scrutiny of many of the federal decisions it is maintainable that what the States got, and what the adjacent owners got, in respect to the banks and beds of navigable water courses, was a collection of relative rights and not a title. *Water Power Co. v. Water Commrs.*, 168 U. S. 349.

There would appear to be two tenable theses: (a) There is a title and it is held by the people of the State in trust; or (b) There can be no title and all that can, and do, exist are correlated rights, powers and privileges.

The original source of all title, under American state government, and to all rights in, or powers with respect to, the public domain, is the people of each sovereign State. Massachusetts did not acquire a title to the lands under the waters of Lake Ontario either as a result of the two grants from the King of England in 1620 and 1691, respectively, or the Hartford Treaty. Whatever rights Massachusetts had were of a sovereign nature and passed to New York when New York was recognized to be sovereign. These rights are trust rights and still vest in the people of the State of New York except as surrendered by them in reference to small granted areas.

Neither State had title as the word "title" is generally understood. Whatever rights existed were the rights of

the State at the time sovereign and in control. The sovereign people in control really controlled these rights so far as they were subject to control. When Massachusetts conceded the sovereignty of New York, Massachusetts conceded all of these sovereign rights as existing in New York. This is the legal effect of the Hartford Treaty.

The sixth article reserved equal rights of navigation and fishing on and in Lake Ontario, to the citizens of Massachusetts. If Massachusetts owned the soil under Lake Ontario as it claimed to own the upland, and if it continued to own the soil under Lake Ontario, after the Hartford Treaty, these reservations were unnecessary. They appear to have been unnecessary in any event.

This whole case turns on whether Massachusetts or New York could ever sell the southern part of Lake Ontario as it might the adjacent uplands or some small interior lake or stream, even subject to navigation on the waters comprising Lake Ontario. It is the contention of New York that it could not and that the land under Lake Ontario was not the subject of ownership and conveyance as contended by the plaintiff.

If it should be found that Massachusetts did not in fact part with all of the upland owned by it, and that Massachusetts continues to be an owner of upland, with the incidental riparian rights, then the fill in this case might be regarded as unlawful, both as against Massachusetts and against the defendant. In that event, defendant can still claim sovereign rights, as above, to the lands formerly under water, as against plaintiff.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an original suit in equity brought by the Commonwealth of Massachusetts against the State of New York, the City of Rochester in New York, and certain corporations and individuals, to quiet title to land located

in the City of Rochester, and to enjoin the City from taking it by eminent domain, or in the alternative, to have the amount of compensation for the taking determined by this Court. The case was heard upon bill and answer and the report of a Special Master appointed to take proofs and to make an advisory report upon the questions of fact raised by the pleadings, except as to the amount of damages to be paid for the property if taken by eminent domain.

The land in dispute is a narrow strip of about twenty-five acres fronting upon Lake Ontario within the city limits of Rochester. By the Treaty of Hartford, entered into between New York and Massachusetts, December 16, 1786, land within the territorial limits of New York was granted to Massachusetts in private ownership. The title to the land in controversy depends upon the meaning and effect of this treaty, and upon the construction of a subsequent conveyance by Massachusetts of a part of the land thus acquired, through which conveyance the several defendants other than the State of New York derive their title.

Before 1786, Massachusetts and New York claimed, under conflicting royal grants, both sovereignty and title of a large area of what is now western New York. The controversy was settled by the Treaty of Hartford by which Massachusetts gave up all its claim to sovereignty over the territory, and its claim to private ownership in part of it, and New York ceded to Massachusetts, "the Right of pre-emption of the Soil from the native Indians and all other the Estate, Right, Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted) which the State of New York hath . . . in or to all the Lands and Territories within the following Limits and Bounds that is to say, BEGINNING in the north boundary Line of the State

of Pennsylvania in the parallel of forty-two degrees of north Latitude at a point distant eighty-two miles west from the northeast Corner of the State of Pennsylvania on Delaware River as the said boundary Line hath been run and marked by the Commissioners appointed by the States of Pennsylvania and New York respectively and from the said Point or Place of beginning running on a due meridian north to the boundary Line between the United States of America and the king of Great Britain thence westerly and southerly along the said boundary Line to a meridian which will pass one mile due East from the northern Termination of the Streight or waters between Lake Ontario and Lake Erie thence South along the said Meridian to the South Shore of Lake Ontario thence on the eastern side of the said Streight by a Line always one mile distant from and parallel to the said Streight to Lake Erie thence due west to the boundary Line between the United States and the king of Great Britain thence along the said boundary Line until it meets with the Line of Cession from the State of New York to the United States thence along the said Line of Cession to the northwest corner of the State of Pennsylvania and thence East along the northern boundary Line of the State of Pennsylvania to the said place of beginning."

Article 10 of the Treaty provided that Massachusetts might grant the right of pre-emption in the lands thus acquired, "to any person or persons who by virtue of such Grant shall have good right to extinguish by purchase the claims of the native Indians," by compliance with certain conditions not now important.

By act of the Massachusetts legislature, approved April 1, 1788 (Laws & Res. 1786-7, c. 135, p. 900), it was provided that "this Commonwealth doth hereby agree, to grant, sell & convey" to Oliver Phelps and Nathaniel Gorham for a purchase price stated in the Act "all the Right, Title & Demand, which the said Commonwealth

has in & to the said Western Territory" ceded to it by the Treaty of Hartford. On July 8, 1788, the Five Indian Nations (Mohawks, Oneidas, Onandagas, Cayugas and Senecas) executed a deed or treaty extinguishing the Indian claim to the territory described in it and conveying that territory to Phelps and Gorham. The description embraces approximately the east one-third of the territory ceded to Massachusetts by the Treaty of Hartford, and begins at a point "in the north boundary line of the State of Pennsylvania in the parallel of forty-two degrees north latitude at a point distant eighty-two miles west from the northeast corner of Pennsylvania on Delaware river." The description proceeds by various metes and bounds to a point on the Genesee River from which, so far as now material, it reads as follows:

" . . . thence running in a direction due west twelve miles, thence running in a direction northwardly, so as to be twelve miles distant from the most westward bends of said Genesee River to the shore of the Ontario Lake thence eastwardly along the shores of said Lake to a meridian which will pass through the first point or place of beginning. . . ."

By legislative act (Laws & Res. 1788-9, c. 23, p. 35), approved November 21, 1788, the Commonwealth of Massachusetts granted to Phelps and Gorham the land which had been conveyed by the deed or treaty with the Five Tribes, the description of the land conveyed being, so far as it is now material, identical with that in the conveyance from the Five Tribes, which we have quoted. By treaty between the Six Nations and the United States, executed November 11, 1794, known as the Pickering Treaty, 7 Stat. 44, the Indians formally disclaimed any rights in the land lying east of the west line of the Phelps and Gorham tract.

The several corporate and individual defendants who are in possession of or claim an interest in land now in

controversy, derive their title, through mesne conveyances, from Phelps and Gorham, who took under the grants last described, from the Five Tribes and from the Commonwealth of Massachusetts; and Massachusetts is not entitled to relief in this suit unless title in the *locus quo* was acquired by it by the Treaty of Hartford and remained in it after its grant to Phelps and Gorham.

After the Act approved November 21, 1788, Phelps and Gorham having failed to pay the purchase price stipulated in the Resolve of April 1, 1788, a settlement of the contract or agreement between them and the Commonwealth of Massachusetts was effected. By this they retained the easterly one-third of the lands which had been released and confirmed to them by the Five Tribes and later conveyed to them by the Commonwealth of Massachusetts, and they released and quit-claimed to the Commonwealth all their right and title in the remainder of the land.

It is established that, since the grant to Phelps and Gorham, there has been a shifting of the shore line of Lake Ontario, and that the land now in dispute, which, certainly in 1803 and probably at the time of the Phelps and Gorham grant, was under water north of the shore line of Lake Ontario, is now above water and south of the high water mark of the lake. Whether the change in the shore line and in the physical condition of the land in question was due wholly to accretion or partly to accretion and partly to filling, does not clearly appear, and in the view we take of the case, is not material.

The argument of the Commonwealth of Massachusetts is that the legal effect of the Hartford treaty was to release and convey to Massachusetts, within the limits of the description in the grant, the bed of Lake Ontario as it then existed; and that by the treaty it acquired title to the land now in dispute; that its grant to Phelps and Gorham, bounding the land conveyed by a line running "to the Shore of the Ontario Lake; thence eastwardly

along the Shores of the said Lake," carried only to high water mark, and that title to all the land below high water mark as it then existed remained in Massachusetts. Even though this contention that the bed of the lake vested in Massachusetts be decided against it, Massachusetts nevertheless takes the position that the land in dispute was due to accretion, and that all the benefits of the accretion accrued to Massachusetts, because it did acquire title to the shore of the lake by the Treaty of Hartford, and did not part with the title to the shore by its grant to Phelps and Gorham.

The first question which must receive our consideration is whether Massachusetts acquired any title to the bed of Lake Ontario by the Treaty of Hartford. That treaty contained three principal clauses of cession. One granted to New York "all the claim right and Title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction" in all the lands in controversy between the two States. The second granted to Massachusetts "the Right of pre-emption of the Soil from the native Indians and all other the Estate, Right, Title and Property (the Right and Title of Government, Sovereignty and Jurisdiction excepted)" of the State of New York in that part of the land, the description of which has already been set forth in detail, and which included that part of the bed of the lake lying within the east and west boundaries of the tract ceded, and south of the international boundary. By the third, with which we are not now concerned, Massachusetts gave up and ceded to New York its claim to private ownership in the remainder of the land in controversy.

The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the Crown, which under the principles of the British Constitution was deemed to hold

them as a part of the public domain for the benefit of the nation. Upon these principles rest the various English royal charters and grants of territory on the Continent of North America. *Johnson v. McIntosh*, 8 Wheat. 543, 577 *et seq.*, 595. As a result of the Revolution, the people of each State became sovereign and in that capacity acquired the rights of the Crown in the public domain (*Martin v. Waddell*, 16 Peters 367, 410), and it was by the exercise of their sovereign power as States that New York and Massachusetts undertook to make disposition of a portion of their public domain by the grants contained in the Treaty of Hartford.

The effect of the grant made to Massachusetts in the treaty, so far as concerns the question now presented, depends upon the interpretation of the restrictive language excepting from the operation of the grant the "Right and Title of Government Sovereignty and Jurisdiction" of New York, and of the co-temporaneous grant by Massachusetts to New York of "all the claim right and Title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction" over all the lands in controversy. We have to decide whether the grant and reservation to New York of sovereign rights vested or reserved in New York the title to the bed of the navigable waters lying within the exterior limits of the grant made by it to Massachusetts in the same instrument.

The question is not the vexed one argued at the bar, whether there was power in New York to grant the soil beneath its navigable waters in private ownership. Compare *Martin v. Waddell*, *supra*, p. 410. We need not consider here whether, in such circumstances, there is a limitation on the power of a sovereign state to grant its public domain, nor the nature and extent of the limitation if it exists, for in our view the meaning of the grant itself determines the principal question which we have to decide.

In ascertaining that meaning, not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted "with a view to public convenience, and the avoidance of controversy"; and "the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." Marshall, C. J., in *Handly's Lessee v. Anthony*, 5 Wheat. 374, 383-4. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Waddell, supra.*

The grant made by New York to Massachusetts embraced a vast domain extending more than one hundred and forty miles from east to west, and from the northern boundary of Pennsylvania to the Canadian line, comprising about six million acres of land, largely an unsettled wilderness inhabited by Indians, to which the navigable waters of Lake Ontario were the principal means of access. The purpose of it was, while reserving and securing to New York its right as a sovereign State in the granted territory, to confer upon Massachusetts the right of pre-emption of the soil from the Indians, and to enable it to make sale of the lands to settlers by conferring on it the power to grant this right of pre-emption.

It does not appear that the Indians ever had or claimed any rights to the soil under the lake or that any attempt was made by Massachusetts or those claiming under it to exercise the granted right of pre-emption with respect to the bed of the lake. Nor is there anything to indicate that either party to the treaty contemplated grants of the soil under the water, or intended any such limitation upon the sovereign rights of New York over navigable waters within its territory, as necessarily would have resulted from the grant in private ownership of lands under water.

It would be difficult to suggest any purpose which the high contracting parties could have had in mind which would have been furthered by a grant to Massachusetts of a fee in the bed of the lake. The right of Massachusetts and her grantees to use the waters of the lake was amply secured and protected by a clause of the treaty, which provided that "Citizens of the Commonwealth of Massachusetts shall . . . at all times hereafter have and enjoy the same and equal Rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie and the Waters communicating from, one to the other . . . as shall from time to time be had and enjoyed by the Citizens of the State of New York. . . ."

On the other hand, a grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over the navigable waters of the State and on the free use of the principal waterway of the newly settled territory. All these considerations lead to the conclusion that the grants in the Treaty of Hartford did not convey to Massachusetts, which took in private ownership, any title in the bed of the lake, unless the technical language employed in the grants compels us to take an opposite view.

The fact that the northern limit of the grant to Massachusetts was described as the international boundary, and not the edge of the lake, is not inconsistent with our view of the general purpose of the grant with respect to the lands under water. A map in evidence antedating the treaty shows numerous islands in Lake Ontario within the described area. It was unquestionably the purpose to grant the right of pre-emption of all the islands, and, in order to include them, it was necessary to extend the description to the international boundary line. Moreover, it was the avowed purpose of the treaty to settle all controversies with respect to the area described, and these included conflicting claims of sovereignty as well as

disputes with respect to proprietary rights. It was necessary, therefore, to make the international boundary a descriptive term in the grants and reservations whereby sovereignty and jurisdiction over the entire tract were being adjusted.

It is a principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. *Shively v. Bowlby*, 152 U. S. 1. The rule is applied both to the territory of the United States (*Shively v. Bowlby, supra*) and to land within the confines of the States whether they are original States (*Johnson v. McIntosh, supra; Martin v. Waddell, supra*) or States admitted into the Union since the adoption of the Constitution. *United States v. Holt State Bank*, 270 U. S. 49. The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership. *Martin v. Waddell; Shively v. Bowlby, supra*. Such grants are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction. *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, 544-548; *Shively v. Bowlby, supra*. It follows that, wherever there is a grant by a State having plenary power to make it, of the rights and title of government and sovereignty over a specified territory, or where, in a grant of land to be held in private ownership by one State within the limits of another, there is a reservation to the grantor State of these sovereign rights, the grant or reservation carries with it, as an incident, title to lands under navigable waters.

The precise question now under consideration was before this court in *Martin v. Waddell*, *supra*. This case involved the title to lands under tidal waters within the territorial limits of New Jersey, which were embraced within the territory granted by royal charters to the Duke of York. By successive conveyances, these lands had been transferred to twenty-four individuals, the Proprietors of East New Jersey, who were invested with the plenary rights and powers of government and ownership which had been conferred on the Duke of York by the original grants. In 1702, by formal instrument, the Proprietors surrendered to the Crown all their rights and powers of government, retaining their rights of private property in the granted territory.

It was held, in an opinion by Chief Justice Taney, that the relinquishment by the Proprietors to the Crown, of the rights and powers of government vested in them, carried with it as an incident the title to land under tidal waters; that that title and ownership had passed to the State of New Jersey as an incident to its sovereignty over the territory embraced in the royal grants, and excluded all claims of title to lands under navigable waters by those claiming under grants by the Proprietors. The reasoning of the opinion was addressed wholly to the proper interpretation to be placed upon grants or reservations of rights of sovereignty with respect to their operation to transfer title of lands under navigable waters; and it is decisive of this case. It compels the conclusion, which is supported by every consideration that could throw light upon the purpose and intent of the Treaty of Hartford, that the proper construction of the technical language of the treaty (which both granted and reserved to New York the right and title of sovereignty and jurisdiction over the area described) gave to New York, as incident to its sovereignty, title to all lands under navigable waters. See *Pollard's Lessees v. Hagan*, 3 How. 212; *Coxe v. State*, 144 N. Y. 396, 406.

We pass now to the contention of Massachusetts that, even if it did not acquire title to the bed of the lake, it did acquire title to the shore of the lake by the Treaty of Hartford, and that it is entitled to the benefit of all accretion to the shore because it has never parted with its title. This contention depends upon the interpretation of the language of its grant to Phelps and Gorham, of lands bounded by a line described as extending "to the Shore of the Ontario Lake; thence eastwardly along the Shores of the said lake"; and it can be sustained only if we conclude that, notwithstanding the nature of the grant and the circumstances under which it was made, Massachusetts, after its execution, retained a narrow and undefined ribbon of land extending some forty miles along the lake front, north of the Phelps and Gorham grant, and separating the latter from the lake.

That grant embraced more than two million acres of unsettled land, for the development of which access to the lake was essential. It was made pursuant to the agreement of 1787 between Massachusetts and Phelps and Gorham to convey to them *all* of the property which Massachusetts had acquired under the Treaty of Hartford and pursuant to the Treaty of the Five Nations with Phelps and Gorham of July 8, 1788, purporting to extinguish the Indian claims to "All that territory or Country of land lying within the State of New York contained within & being parcel of the lands and territory, the right of pre-emption of the soil whereof from the native Indians was ceded by the State of New York" to Massachusetts by the Treaty of Hartford. There is no conceivable purpose for which it could be supposed that Massachusetts intended to retain such a proprietary interest in the shore as is now claimed, or to deny to its grantees and to settlers in the granted territory access to the great natural waterway upon its northern boundary. We are not dealing here with the disposition of the *jus publicum*, but with

land held by Massachusetts in private ownership and granted by it to private persons. See *Georgia v. Chattanooga*, 264 U. S. 472. It would require clear and unequivocal language so to limit the obvious general purpose and effect of the grant.

In order thus to restrict its operation, Massachusetts relies on the use of the words "to the Shore" and "along the Shores," instead of "to the lake" and "along the lake," which concededly would have carried to the water's edge; and it is argued that the same effect must be given to these words as when they are used in conveyances granting land bounded by the shore of tidal waters. In this connection, it should be observed that in the Treaty of Hartford the words "shore" and "lake" were used synonymously, their choice being determined by convenience of expression. For example, the western boundary in the treaty was described as running from the international boundary line in the middle of Lake Ontario "to the South Shore of Lake Ontario" and thence continuing south "to Lake Erie." In each instance it is clear that the margin of the Lake was intended, and it was not meant by the particular use of these phrases to exclude "the shore" from the grant.

The "seashore" is that well defined area lying between high water mark and the low water mark, of waters in which the tide daily ebbs and flows. The fact that by the English common law, and by the law of those States bounded by tidal waters, the public has rights in the seashore, and that grants extending only to the high water mark of such waters nevertheless give access to the sea, accounts for the rule, generally recognized and followed, that a grant whose boundaries extend to the "shore" or "along the shore" of the sea, carries only to high water mark. *Howard v. Ingersoll*, 13 How. 381; *Storer v. Freeman*, 6 Mass. 435; *Shively v. Bowlby*, *supra*; *Kean v. Stetson*, 5 Pick. 492; *Cortelyou v. VanBrundt*, 2 Johns. 357. But the word "shore," even in its application to tidal

waters, is subject to construction by the terms of the deed and surrounding circumstances, and may mean the water's edge at low water mark; *Storer v. Freeman, supra*; *Hathaway v. Wilson*, 123 Mass. 359; *Haskell v. Friend*, 196 Mass. 198.

The application of that rule to conveyances of land bordering upon non-tidal waters is supported neither by reason nor by authority. The lack of clear definition, by natural land marks, of the shore of non-tidal waters, would make its application impracticable. It would deny to grantees all access to such waters except on the irregular and infrequent occasions of flood, since there are no public rights in the shores of non-tidal waters, and the abutting owner could not cross the shore to the water without trespass. Such a result would contravene public policy and defeat the intention with which such conveyances are normally made. New York has consistently refused to apply the rule to non-tidal waters, holding that a conveyance "to the shore" or "along the shore" of such waters carries to the water's edge at low water, *Child v. Starr*, 4 Hill. 369, 375-6; *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van De Bogert*, 56 N. Y. 526; *Stewart v. Turney*, 237 N. Y. 117, 131; and the local rules for interpreting conveyances should be applied by this Court in the absence of an expression of a different purpose. *Hardin v. Jordan*, 140 U. S. 371, 384; *Oklahoma v. Texas*, 258 U. S. 574, 594; *Brewer Oil Co. v. United States*, 260 U. S. 77, 88. The same rule is, however, generally followed elsewhere. See *Castle v. Elder*, 57 Minn. 289; *Lamb v. Rickets*, 11 Ohio 311; *Daniels v. Cheshire R. R.*, 20 N. H. 85; *Kanouse v. Stockbower*, 48 N. J. Eq. 42, 50; *Seaman v. Smith*, 24 Ill. 521; *Slauson v. Goodrich Transp. Co.*, 94 Wis. 642; *Burke v. Niles*, 13 New Bruns. 166; *Stover v. Lavoia*, 8 Ont. W. R. 398.

Upon neither of the theories advanced, therefore, does the Commonwealth of Massachusetts sustain its claim to the land in question.

If any further support were required for the conclusion which we reach, it is to be found in the practical construction by the two States of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and in long continued acquiescence by Massachusetts in that construction. After the relinquishment by Phelps and Gorham to Massachusetts, of all claim to the westerly two-thirds of the land acquired by Massachusetts under the Treaty of Hartford, Massachusetts, by resolution of its legislature of March 8, 1791 (Laws & Res. 1790-1, c. 121, p. 221) bargained to sell to Samuel Ogden all the title and interest which the Commonwealth then had in the land granted to it by the State of New York, except such parts of the land as then belonged to Phelps and Gorham. Robert Morris succeeded to such rights as Ogden had under this contract. Five several conveyances to Morris, embracing the westerly two-thirds of the tract, were made by a Committee appointed for that purpose, and the report of the Committee, describing these conveyances in detail, was approved by resolution of the Massachusetts legislature of June 17, 1791 (Laws & Res. 1790-1, c. 65, p. 416). This resolution recited that the Committee had been appointed with authority "to sell & convey . . . the right of pre-emption, & other the title & interest of the Commonwealth to that part of the lands lying in the State of *New-York*, the right of pre-emption whereof the said State of *New-York* had ceded to this Commonwealth, & which had not been by them before otherwise ceded or granted." Although the descriptions in the deeds were so drawn as to exclude from their operation any lands lying east of the western bounds of the Phelps and Gorham grant, this resolution was a clear recognition by the Massachusetts legislature, (as were also the recitals in the several deeds by this Committee to Morris,) that Massachusetts retained no interest in the shore or in the

bed of Lake Ontario east of the westerly boundary of the Phelps and Gorham grant. The deed of the most easterly land conveyed to Robert Morris describes it as bounded on the north by the international boundary line and on the east by lands "confirmed to Nathaniel Gorham and Oliver Phelps," but makes no mention of any land on the east belonging to Massachusetts, as would have been appropriate if it had retained any interest in the shore line, east of the land granted to Morris.

In 1797, Morris obtained from the Indians a grant of their right to all such part of the lands ceded by New York to Massachusetts "as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham," and in a Resolve of the Massachusetts legislature passed March 8, 1804 (Laws & Res. 1803-4, c. 155, p. 939), this Treaty of Morris with the Indians is referred to as having been made with the authority of Massachusetts and as having extinguished all the Indian rights in the land referred to.

There is no evidence of any official act, or any expression, of the general court or the legislature of Massachusetts, or of any official of the Commonwealth, from the time of the Phelps and Gorham grant until the commencement of the present suit, which suggests that Massachusetts had reserved or retained any interest whatever in land under Lake Ontario or upon its shores within the boundaries of that grant. So far as appears, the public authorities of New York have continuously treated the property as other property in the State and as not encumbered by any claim or title of the Commonwealth of Massachusetts.

Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary. *Indiana v. Kentucky*, 136 U. S. 479; *Michigan v. Wisconsin*, 270 U. S. 295. Even though the Treaty of

Hartford provided "that no adverse possession of the said lands for any length of time shall be adjudged a disseisin of the Commonwealth of Massachusetts," it does not affect the interpretation by Massachusetts of her own deeds and acts, or her long continued acquiescence in that interpretation, as persuasive, if not conclusive, evidence of the correctness of the construction which we place upon the deeds themselves.

The complainant has failed to sustain its claim of title to the land in question. The decree will therefore be for the defendants, and, since no public boundary or public ownership was involved, costs are awarded against the complainant. The parties, or either of them if so advised, may, within thirty days, submit the form of a decree to carry this opinion into effect; failing which a decree dismissing the bill, with costs to the defendants, will be entered.

It is so ordered.

SUN SHIP BUILDING COMPANY *v.* UNITED STATES.

KENILWORTH COMPANY *v.* UNITED STATES.

DORRIS MOTOR CAR COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 237, 240, 241. Argued April 15, 16, 1926.—Decided April 19, 1926.

Judgments of the Court of Claims rejecting claims because settled by agreement or manifestly not justified under the contracts involved, *held* clearly correct.

59 Ct. Cls. 156, 757; 60 Ct. Cls. 68, affirmed.

Mr. Frank E. Scott for appellant in No. 237.

Mr. Benjamin Carter, with whom *Mr. Junius G. Adams* was on the brief, for appellant in No. 240.

Mr. John E. Hughes for appellant, in No. 241.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* and *Mr. Jerome Michael*, Special Assistant to the Attorney General, were on the briefs, for the United States.

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

These are three appeals from the Court of Claims which it is convenient to dispose of together.

No. 237.

The Sun Shipbuilding Company sought compensation on account of several items, chiefly one for loss sustained by it in obeying the request of certain naval officers and the Secretary of the Navy to hold free from other use a ship-way which they thought would probably be needed for the construction of one of a number of mine sweepers which the claimant was under a cost-plus contract to build. The claimant had private contracts to execute in which it could use this way, and which were thus delayed. The negotiations as to this way took place before the contract was drafted and executed. The contract provided for a Compensation Board to fix the cost, and specified elements of cost to be considered, including a proper proportion for loss resulting from displacement of, or delay in, work contracted for prior to the date of the contract, caused by or attributed to work, under emergency conditions, by the contractor for the Government, and items similar thereto in principle. The Court of Claims held that all the items of the claim were covered by the decision and award of the Board except one for \$1,500 for which it gave judgment. On the findings and the contract we hold the conclusion correct, deny the motion to remand and affirm the judgment.

No. 240.

The Kenilworth Company leased its hotel at Asheville to the Government for five months for use as a hospital, with a restriction that it should not be used for the purpose of receiving for treatment any person having tuberculosis in any form or any other like contagious or obnoxious disease, provided, however, that this should not apply to a patient housed temporarily in the premises for the purpose of an operation or the like. The suit was for breach of this restriction. The finding of the Court of Claims showed that no tuberculosis cases as such were received, and that the only ones actually housed were brought in for the purpose of an operation or the like. It was also alleged by the claimant that syphilitic cases were treated in the hospital. The finding of the Court was that such cases were not contagious within the meaning of the contract and denied the claim for damages. There is nothing in the record or in the other findings on which we can reach a different conclusion. We deny the motion to remand for further findings and affirm the judgment.

No. 241.

The Dorris Motor Car Company had a contract with the Government for the manufacture of Liberty Motor governors and petrol air pumps. The contract provided for its cancellation by the Government in the event of the termination of the war or in anticipation thereof, upon thirty days' notice and payment for all articles delivered during the contract and the thirty days' period. The Ordnance Department notified the contractor to suspend operations under the contract December 14, 1918. The general manager of the claimant discussed the question of termination with the local Claims Board at St. Louis, which declined to recommend payment for anything un-

less the suspension was accepted. Thereupon a complete settlement was made, and the amount agreed upon paid. There was a reservation in the settlement which by no reasonable construction could include the claim here made. The claim was for profit for what might have been made in the 30 days. The Court of Claims held that the claim must fail by reason of the executed settlement and we affirm that judgment.

Valuable time was taken in hearing these cases. After arguments on behalf of the claimants, we declined to hear the other side because the correctness of the judgments of the Court of Claims was clear. It is fortunate for all that under the Act of February 13, 1925, judgments of the Court of Claims entered after May 13, 1925, can only be reviewed here after a showing of merits.

GREAT NORTHERN RAILWAY COMPANY *v.*
GALBREATH CATTLE COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
MONTANA

No. 138. Argued January 15, 1926.—Decided April 19, 1926.

1. Where a petition for removal is based on diverse citizenship and also on the ground that the suit arises under federal law, the case is removable if either ground be well taken. P. 101.
2. Where the removal papers are well grounded, it is error for the state court to deny the petition and proceed further with the case. *Id.*
3. An action against a railroad by one who was owner, consignor and consignee of cattle shipped in, partly by another railroad, from another State on a through bill of lading governed by the Carmack Amendment, for damage resulting from defendant's failure to unload them, while in transit, for rest, water, and feeding, as required by the Act of Congress (34 Stat. 607), is a suit arising under the laws of the United States. P. 102.
4. A suit by a citizen of the State where it is brought and a citizen of another State, against a citizen of a third State, is a suit between

citizens of different States in the sense of Jud. Code, § 24, defining the general jurisdiction of the District Courts, and, the other requisites being present, is removable by the defendant to that court from a state court. Jud. Code, § 28. P. 102.
66 Mont. 198; 71 *id.* 56, reversed.

CERTIORARI to a judgment of the Supreme Court of Montana affirming a judgment against the Railway Company in an action for damages to a shipment of cattle.

Mr. I. Parker Veazey, Jr., with whom *Mr. F. G. Dorety* was on the brief, for petitioner.

Mr. Samuel Herrick, with whom *Mr. E. E. Enterline* was on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action begun in a state court in Montana to recover for injuries to cattle shipped by railroad in interstate commerce.

In due time the defendant presented a verified petition, accompanied by a proper bond with good and sufficient surety, for the removal of the case into the federal district court for Montana; but the state court denied the petition, accorded the defendant an exception, and proceeded to the disposal of the case on the merits. After a trial it gave judgment for the plaintiffs, which the Supreme Court of the State affirmed after a part of the damages awarded was remitted. 66 Mont. 198; 71 Mont. 56; Montana Rev. Code, 1921, § 9748. The case is here on writ of certiorari.

One of the rulings assigned for error in the Supreme Court of the State was the denial of the petition for removal; but that court held that the case was not removable and sustained the ruling. It was to review the decision on this point that certiorari was granted.

The material allegations of the plaintiffs' complaint were to the following effect: One of the plaintiffs is a corporate citizen of Montana and the other is an individual citizen of Wyoming; while the defendant is a corporate citizen of Minnesota. The cattle were shipped from Cody, Wyoming, to Seville, Montana, on a through bill of lading over two connecting lines of railroad, the second being owned and operated by the defendant. The plaintiffs owned the cattle, were both consignors and consignees of the shipment and were the lawful holders of the bill of lading. The cattle were injured while in transit over the defendant's road by the defendant's action in unreasonably delaying and carelessly handling them and wrongfully omitting to unload them, when necessary, in a humane manner into properly equipped pens for rest, water and feeding—the resulting damages to the plaintiffs being upwards of \$30,000.

The petition for removal, besides showing the presence of the requisite jurisdictional amount and the defendant's non-residence in the State where sued, asserted a right of removal on two grounds; first, that the case was one arising under the laws of the United States, particularly those applying to the shipment of cattle by railroad in interstate commerce; and, secondly, that the case was between citizens of different States.

If either ground was well taken the case was removable, Judicial Code, § 28; *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 271, *et seq.*; *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, and the state court erred in denying the petition and proceeding further with the case, Judicial Code, § 29; *New Orleans, Mobile and Texas R. R. Co. v. Mississippi*, 102 U. S. 135, 141; *National Steamship Company v. Tugman*, 106 U. S. 118, 122.

Whether the first ground was well taken is to be determined from the plaintiffs' statement in the complaint

of their cause of action. According to that statement the cause of action was for injuries to cattle resulting from the defendant's negligent and wrongful non-performance of duties devolving on it as a second and connecting carrier while the cattle were being transported over its road on a through bill of lading—including the duty to unload them for needed rest, water and feeding. The bill of lading was issued under a law of Congress, Carmack Amendment, c. 3591, § 7, 34 Stat. 593, 595, and governed the entire transportation—that over the defendant's line as well as that over the line of the initial carrier, *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, 387. And the carriers' duties in respect of unloading the cattle "in a humane manner into properly equipped pens for rest, water and feeding" were prescribed by a law of Congress, c. 3594, 34 Stat. 607. So it is apparent that the case stated in the complaint was one arising under the laws of the United States. *Cincinnati, etc., Ry. Co. v. Rankin*, 241 U. S. 319, 326; *St. Louis, etc., Ry. Co. v. Starbird*, 243 U. S. 592, 595; *Southern Pacific Co. v. Stewart*, 245 U. S. 359; *ibid.* 562; same case, 248 U. S. 446. And see *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 507.

It also is apparent from the complaint and the petition for removal that the case was one between citizens of different States in the sense of the statute defining the general jurisdiction of the federal district courts, Judicial Code, § 24. The words of that statute are, "shall have original jurisdiction . . . of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and . . . is between citizens of different States." This was such a case. The amount in controversy exceeded the requirement, and the plaintiffs were citizens of States other than the one of which the defendant was a citizen. *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 256.

And as the case was begun in a court of a State of which the defendant was a nonresident, it came plainly within the provision for the removal of cases on the ground of diverse citizenship, Judicial Code, § 28. In concluding otherwise the state courts conceived that they were following *Smith v. Lyon*, 133 U. S. 315, and *Camp v. Gress*, 250 U. S. 308. But they misapprehended the question involved in those cases. Both were begun in a federal court, and both were recognized as falling within the general jurisdiction of those courts. The question in each was one of venue—whether the case could be maintained in the court of a particular district against the defendant's objection. That question was answered in the negative. In *Camp v. Gress* the Court was careful to point out the difference in purpose and operation between the statutory provision defining the general jurisdiction of the federal district courts and the provision dealing with venue. And in *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, *supra*, and *Lee v. Chesapeake & Ohio Ry. Co.*, *supra*, this Court again pointed out that difference, and also that the venue provision respecting suits begun in those courts has no application to suits removed into them from state courts. The difference between the original removal statute of 1789, c. 29, § 12, 1 Stat. 79, to which the state courts gave some attention, and the present statute was shown in the last paragraph of the opinion in *Lee v. Chesapeake & Ohio Ry. Co.*, *supra*, and does not call for further comment here.

We are of opinion that the state court of first instance should have given effect to the petition for removal and have declined to proceed further in the case and that the appellate court should have reversed the judgment with a direction that that be done.

Judgment reversed.

BOYD *v.* UNITED STATES.

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

No. 365. Argued December 1, 1925.—Decided April 19, 1926.

1. The mere fact that the quantity of morphine dispensed by a registered physician by a prescription to a morphine addict without a written order, exceeds what would be required by the patient for a single dose, does not constitute a violation of the Anti-Narcotic Act. *Linder v. United States*, 268 U. S. 5. P. 106.
 2. An ambiguous statement in a charge in a criminal case, which, interpreted one way, would be erroneous, but which, considered with the charge as a whole, probably was understood by the jury in a harmless sense, is not a ground for reversal, where the defendant did not object and seek a correction in the trial court. P. 107.
- 4 Fed. (2d) 1014, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction of the petitioner of violations of the Anti-Narcotic Act.

Mr. Sam E. Whitaker for petitioner.

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

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a prosecution under the Harrison Anti-Narcotic Act, c. 1, 38 Stat. 785, as amended, c. 18, 40 Stat. 1130. The indictment contained thirteen counts. The defendant was acquitted on seven and convicted on six; and the conviction was affirmed by the Circuit Court of Appeals, 4 Fed. (2d) 1014. The case is here on writ of certiorari.

In each of the six counts the defendant was described as a physician, registered as such under the Act and credited with paying the special tax required of physicians, and was charged with unlawfully dispensing—through his written prescription—a stated quantity of morphine sulphate to a particular person, in the absence of a written order from the recipient on an authorized form and not in the course of professional practice only, but to enable the recipient to obtain, as actually was done, possession of that quantity of the drug contrary to law. The prescriptions as set forth were: To Annie Davis, an addict to the use of the drug for 21 years, 48 grains on August 2, 48 grains on August 9, and 40 grains on August 13, all in 1923; and to Frank O'Hara, an addict for 18 years, 30 grains on August 18, 30 grains on August 24, and 30 grains on August 30, all in 1923.

On the trial the government proved and the defendant admitted, that he was a physician, was registered under the Act, and had paid the special tax required of a physician; that he issued the prescriptions without written orders from the recipients on an authorized form; that he intended the recipients should obtain the drug in the quantities specified from a local dealer; that they did so obtain it under the prescriptions; that they had been coming to the defendant for long periods and he knew they were confirmed addicts whose wills had come to be subservient to their acquired craving for the drug; that they were in a position after the prescriptions were filled where they could administer the drug to themselves according to their own inclinations or dispose of it to others; and that each prescription was for a quantity greatly in excess of what would be appropriate for immediate administration.

The disputed question was whether the defendant issued the prescriptions in good faith in the course of his professional practice. On this point the evidence was con-

flicting. That for the government tended strongly to show that the prescriptions were for quantities many times in excess of what, according to any fair medical standard, reasonably could be put into the possession of confirmed addicts, even when treating them for the addiction or endeavoring to relieve them from suffering incident to it, and that the prescriptions could only have been issued to enable the recipients to indulge their acquired longing for the drug and its effects. Much of that for the defendant tended to show that he issued the prescriptions in good faith in the course of professionally treating the recipients for their addiction and endeavoring to relieve them from its incidents. But some of the evidence in his behalf was pronouncedly corroborative of that for the government. Thus the testimony of other physicians whom he called as witnesses, while tending to approve his asserted method of treatment, also tended to show that the prescriptions in question were grossly excessive and unreasonable according to any fair medical standard. And his personal testimony contained contradictions and admissions tending materially to detract from his claim of good faith. Among other things his testimony showed that he was both distributing and prescribing most unusual quantities of the drug; that he purchased and distributed over 15,000 grains from May 1 to September 30, 1923, and that he issued prescriptions on much the same scale during that period. There was much testimony that his professional and private character were good and widely respected.

In its charge to the jury the court said that the determinative question was whether the defendant issued the prescriptions in good faith "as a physician to his patients in the course of his professional practice only"; that if they were issued in good faith "for the purpose of curing disease or relieving suffering" he should be acquitted; and that if on the evidence that question was left in rea-

sonable doubt he should be given the benefit of the doubt and acquitted. There was more along this line, in the course of which the court said that it was admissible for the defendant in his professional practice to prescribe the drug either for "the curing of morphinism" or for "the relief of suffering from morphinism," if he did so in good faith, and that in determining the question of his good faith the jury should consider the quantity prescribed—whether it conformed to medical standards, and, if it was in excess of such standards, whether there was reason or occasion for the excess. Thus far the charge was in accord with what this Court said in *Linder v. United States*, 268 U. S. 5, where prior decisions were reviewed and explained.

Further on in the charge the court indicated that it was not admissible for the defendant to issue prescriptions to a known addict "for amounts of morphine for a great number of doses, more than was sufficient for the necessity of any one particular administration of it." Complaint is now made of this. It appears ambiguous, and if not taken with the rest of the charge might be regarded as meaning that it never is admissible for a physician in treating an addict to give him a prescription for a greater quantity than is reasonably appropriate for a single dose or administration. So understood, the statement would be plainly in conflict with what this Court said in the *Linder Case*. But we think it could not well have been so understood in this instance. It did not stand alone, but was to be taken in connection with what preceded it and also with what followed. At the conclusion of the charge counsel for the defendant made no objection and took no exception to it, but simply asked the court to add the following, which was done:

"I am requested to say to you, gentlemen, that in determining whether or not the defendant in prescribing morphine to his patients was honestly seeking to cure

them of the morphine habit, while applying his curative remedies, it is not necessary for the jury to believe that defendant's treatment would cure the morphine habit, but it is sufficient if defendant honestly believed his remedy was a cure for this disease."

"I instruct you that if this is true, regardless of whether the course of treatment given by this defendant is a cure, the question is, was he honestly and in good faith in the course of his professional practice and in an effort to cure disease issuing these prescriptions."

With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor. It evidently was regarded as consistent and satisfactory. Besides, in view of what was said in other parts of the charge, we are justified in assuming that had the court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly after permitting it to pass as satisfactory then the defendant is not now in a position to object to it. *McDermott v. Severe*, 202 U. S. 600, 610; *United States v. U. S. Fidelity Co.*, 236 U. S. 512, 529; *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 119-120.

This disposes of the only contention made by the defendant in this Court.

Judgment affirmed.

Syllabus.

NEW YORK LIFE INSURANCE COMPANY v.
EDWARDS, COLLECTOR.

EDWARDS, COLLECTOR, v. NEW YORK LIFE
INSURANCE COMPANY.

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

Nos. 712, 804. Argued March 2, 3, 1926.—Decided April 19, 1926.

1. The proviso of the Revenue Act of 1913, § II G (b), "That . . . life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year . . .," does not apply to overpayments by deferred-dividend policyholders of a mutual level premium company, which though formally credited to the respective policyholders are held in the aggregate for apportionment and distribution to the survivors in good standing at the end of a prescribed period of time. P. 115.
 2. Annual additions made by a life insurance company to a fund accumulated for the amortization of the premiums paid on its investments in bonds above par, are not deductible from gross income under § II G (b), *supra*, as "losses actually sustained within the year." P. 116.
 3. The estimated value of the future premiums waived by a policy stipulation exempting the insured from further premiums on proof of total and permanent disability, *held* not deductible from gross income, under § II G (b), *supra*, as part of "the net addition required by law to be made within the year to reserve funds." P. 117.
 4. A special fund required by a state Superintendent of Insurance to be set aside to meet unreported losses due to death of policyholders, *held* not an addition to reserve funds, required by law. P. 119.
 5. The compensation which an insurance company agrees to pay soliciting agents has no relation to the reserve held to meet maturing policies; and, when it sets aside a fund to provide payments to such agents, this cannot be regarded as a reserve within intentment of the statute. P. 119.
- 8 Fed. (2d) 851, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed in part a judgment of the District Court (3 Fed. (2d) 280) allowing recovery on various items demanded by the Insurance Company in a suit against the Collector to regain alleged excessive income tax payments. Certiorari was applied for and allowed on both sides.

Mr. James H. McIntosh for petitioner, in No. 712 and respondent in No. 804.

Penn Mutual Life Insurance Co. v. Lederer, 252 U. S. 523, involved dividends, and dividends only. This case involves over-payments of premiums and overpayments only.

The accounting made in 1913 disclosed that the petitioner's deferred dividend policy holders over-paid it in 1912, \$8,189,918. This sum the petitioner distributed among its individual deferred dividend policy holders by a mathematical calculation based on the amount of deferred dividend insurance in force, the year of issue of the several policies, the plan of the policy, and the age at issue. By this calculation was ascertained the amount of overpayment made by each individual deferred dividend policy holder on each one thousand dollars of insurance for each year of issue, on each insurance plan, and at each age at issue; and the overpayment was credited to each individual policy holder on the form in use for this purpose.

This clause is one of the few additions to the Corporate Excise Tax Act of 1909 which Congress made in passing the Revenue Act of 1913. Congress was enacting a law to tax income. The federal court had lately held and demonstrated that these over-payments were not income of the company; and, as Congress was authorized to tax income only and had no power, without apportionment, to tax something that was not income, it framed this clause to exclude from income all these over-payments of

premium. *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. 199; *Herold v. Mutual Benefit Life Ins. Co.*, 201 Fed. 918.

No part of any premium is ever paid back, credited or treated as an abatement of the premium in the year in which the policy holder pays it. He pays the premium in one year, the accounting is taken after the end of the year, and the amount of the over-payment, if any, thereby ascertained is then paid back, credited or treated as an abatement of premium. This is necessarily true of all policies, both annual and deferred dividend policies. Hence the clause would have no meaning for any policy or for any company if it required the portion of premium to be both received and credited within the taxing year.

The credited over-payments are none the less credits because the policy holder may lose his credit by dying or lapsing his policy before the dividend date named in it. A taxing statute is strictly construed in favor of the taxpayer. Why should a credit be any less a credit because it is subject to be lost by the happening of a condition subsequent? When the amount of the over-payment is first ascertained, it is credited to each individual policy holder and will be paid with interest to each such policy holder whose insurance is in force on the date agreed upon in the policy for returning it to him, plus his proportionate share of the accumulated credits of those of his class who lost their credits by dying or lapsing their policies.

To hold that this clause applies to annual dividend policies only, and not equally to deferred dividend policies, is not merely contrary to the plain and unambiguous terms of the law, but discriminates between taxpayers of the same class, and between different groups of policy holders of the same taxpayer.

Subdivision II G (b) of the Revenue Act of 1913 authorizes the deduction from gross income of "all losses

actually sustained within the year and not compensated by insurance or otherwise." The petitioner each year amortizes its securities purchased at a premium and treats the deduction from the premium paid as an annual loss. In making its return it deducted from its gross income the total loss by amortization. The respondent claims this procedure was wrong,—that what the petitioner should have deducted was the amount of the premium paid on only those securities purchased above par that became due in the taxing year. The petitioner's method of taking this loss annually instead of taking it at the due date of the security is the method followed by all large investors.

The valuation here referred to is the yearly valuation; the loss is the yearly loss. This practice obtained and laws in harmony with it were in force in New York and many other States when Congress passed this law, and Congress is presumed to have legislated with reference to the prevailing business customs and the legal requirements imposed upon business at the time the law was passed. This question often arises in trust estates. *Matter of Stevens*, 187 N. Y. 471; *New York Life & Trust Co. v. Baker*, 38 A. D. 417, aff'd. 165 N. Y. 484. On securities purchased at a premium there was an intrinsic change in the value of the securities each year which was perfectly susceptible of calculation; and the aggregate sum shown by the petitioner's return was the true amount of the intrinsic change and actual loss on securities purchased at a premium. No authoritative decision has been made on this subject by the federal courts. Cf. *Fink v. Northwestern Mutual Life Ins. Co.*, 267 Fed. 968; *Northwestern Mutual Life Ins. Co. v. Fink*, 248 Fed. 568. Securities sell at a premium because they are sound and pay a high interest return. A part of the high interest return must be put aside each year to reimburse for the premium paid, that is, for the yearly

loss of the premium. But the entire interest was taxed as income. Hence, if the part of the interest used to reimburse for the yearly loss of premium is deducted, then by the deduction only that part of the interest is taxed which was in fact interest income.

As to "the net addition, if any, required by law to be made within the year to reserve funds." If Congress had intended to limit this clause to the policy reserve, we have a right to assume they would have said so. What are reserve funds as the phrase is used in this law and in the business of insurance? Already the Court has answered this question. *Maryland Casualty Co. v. United States*, 251 U. S. 342. When is a reserve fund required by law? When it is required directly by statute, or by a public official who has authority to require it.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for respondent in No. 712 and petitioner in No. 804.

The over-payments of premiums made by deferred dividend policy holders in 1912, ascertained in 1913, and added to the amount held for future distribution, were not deductible from plaintiff's 1913 income, because the amount thereof was neither paid back or credited to the individual policy holders who made them, nor treated as an abatement of premium of such individual policy holders in 1913.

The Revenue Act of 1913 does not permit the deduction from plaintiff's gross income for 1913 of the sum representing amortization of securities purchased at a premium.

Sums representing liability arising (a) because of waived premiums under special benefit disability contracts, (b) from unreported loss claims, and (c) upon pension contracts with agents, are not reserves within the meaning of the Revenue Act of 1913.

See *Fink v. Northwestern L. Ins. Co.*, 267 Fed. 968; *Lumber Mut. L. Ins. Co. v. Malley*, 256 Fed. 383; *Mutual Benefit L. Ins. Co. v. Herold*, 198 Fed. 199, aff'd. 201 Fed. 918; *McCoach v. Ins. Co. of North America*, 244 U. S. 585; *Maryland Casualty Co. v. United States* 251 U. S. 342; *N. Y. Life Ins. Co. v. Anderson*, 263 Fed. 527; *Penn Mut. Ins. Co. v. Lederer*, 252 U. S. 523; *United States v. Boston Ins. Co.*, 269 U. S. 197; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The Insurance Company brought suit in the District Court at New York to recover of Edwards, Collector, the alleged excessive sum demanded of it as income tax for the year 1913, and obtained judgment for a part. 3 Fed. (2d) 280. The Circuit Court of Appeals affirmed this except as to one item. 8 Fed. (2d) 851. Both parties are here by certiorari, and five questions require consideration. All involve the construction or application of the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, 172. Section II G (a) imposed an annual tax of one per centum upon the net income of "every insurance company organized in the United States," and (b) directed—

"Such net income shall be ascertained by deducting from the gross amount of the income of such . . . insurance company, 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; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; . . . and in 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: *Provided*, That . . . life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year. . . .”

1. The Company, a New York corporation without capital stock, does business on the mutual, level premium plan and issues both “annual dividend” and “deferred dividend” policies. Under this plan each policyholder pays annually in advance a fixed sum which, when added to like payments by others, probably will create a fund larger than necessary to meet all maturing policies and estimated expenses. At the end of each year the actual insurance costs and expenses incurred are ascertained. The difference between their sum and the total of advance payments and other income, then becomes the “overpayment” or surplus fund for immediate *pro rata* distribution among policyholders as dividends or for such future disposition as the contracts provide. An “annual dividend” policyholder receives his proportionate part of this fund each year in cash or as a credit upon or abatement of his next premium. “Deferred dividend” or, as sometimes called, “distribution” policies provide—

“That no dividend or surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force. That surplus or profits derived from such policies on the distribution policy plan as shall not be in force at the date of the completion of their respective distribution periods, shall be apportioned among such policies as shall complete the distribution periods.”

Accordingly, all overpayments by deferred dividend policyholders must await apportionment until the prescribed period ends; and no one of them will receive anything therefrom if his policy lapses or if he dies before that time. The whole of this fund goes to the survivors.

Overpayments by deferred dividend policyholders for 1912 amounted to \$8,198,918. The Collector refused to deduct this sum from the total receipts, and demanded the prescribed tax of one per centum thereon. We think he acted properly. Both courts below so held.

The applicable doctrine was much considered in *Penn Mutual Life Insurance Co. v. Lederer*, 252 U. S. 523. We there pointed out the probable reason for the permitted non-inclusion in the net income of a life insurance company of "such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year." Here it is insisted that within the meaning of the quoted provision each deferred dividend policyholder's overpayment was actually credited to him during the year; but we cannot accept this theory. The aggregate of all such payments was held for distribution among policyholders alive at the end of the period. The receipts for the year were not really diminished.

2. The Company owned many bonds, etc., payable at future dates, purchased at prices above their par values, and to amortize these premiums a fund was set up. It claimed that an addition to this fund should be deducted from gross receipts. The District Court thought the claim well founded, but the Circuit Court of Appeals took another view. Unless the addition amounted to a loss "actually sustained within the year" no deduction could be made therefor. Obviously, no actual ascertainable loss had occurred. All of the securities might have been sold thereafter above cost. The result of the venture could not be known until they were either sold or paid off.

3. In 1910 the Company introduced a clause into some policies by which it agreed to waive payment of premiums after proof of total and permanent disability. The estimated value on December 31, 1913, of future premiums so waived amounted to \$16,629. It claimed this should be added to the reserve fund and deducted from gross income. Insurance companies may deduct "the net addition, if any, required by law to be made within the year to reserve funds."

The pertinent portion of the agreed statement of facts follows—

"In 1910 the plaintiff introduced into some of its contracts of life insurance a clause under which it agreed that upon receipt, before default in the payment of premium, of due proof that the insured had become totally and permanently disabled, the plaintiff would waive payment of any premium thereafter falling due. In taking its account at the end of the calendar year 1913, the plaintiff had then received due proof that the insured under a number of these policies were totally and permanently disabled in accordance with the terms of said contracts providing for the waiver of the payment of future premiums. The value at December 31, 1913, of the future premiums waived on account of total and permanent disability was the sum of \$16,629. The value at December 31, 1912, of the future premiums so waived was the sum of \$5,637.

"In the calculation of the general reserve fund at the end of any calendar year, the Company and the Insurance Department of the State of New York make the computation by deducting from the value of the contractual benefits under each policy the then value of all future premiums under the policy. The general reserve fund of the plaintiff stated in its Annual Statement is thus the reserve computed by deducting the value of all future premiums

from the valuation of all policy obligations. But, under the policies on the lives of those who had become totally and permanently disabled and whose contracts provided for the waiver of the payment of future premiums, no future premiums will be received by the plaintiff and therefore, the net reserve reported for these policies is understated to the extent of the value of these future premiums.

“In the official blank for the plaintiff’s Annual Statement to be used at December 31, 1913, there was an item of liabilities, #9-*a* entitled, ‘Present Value of Future Premiums Waived on Account of Total and Permanent Disability,’ and in the plaintiff’s Annual Statement the sum reported under this item was \$16,629 at December 31, 1913. The sum of \$16,629 reported under Item #9-*a* was not included in the plaintiff’s general reserve. In the official blank for use at December 31, 1912, there was no such item as #9-*a*, and the plaintiff included the value at December 31, 1912, of future premiums waived on account of total and permanent disability (viz: \$5,637) as a part of the general reserve at that date.

“If said sum of \$5,637 had not been included as a part of the general reserve at December 31, 1912, the net addition to the value of future premiums waived on account of total and permanent disability would have been the excess of \$16,629 over \$5,637. Since, however, owing to the change in the form of the official blank, the said \$5,637 was deducted as a part of the plaintiff’s general reserve in obtaining the net addition to the general reserve, the sum to use in obtaining the net addition to the value of future premiums waived on account of total and permanent disability is the sum of \$16,629.”

The Circuit Court of Appeals held the deduction should have been allowed, but we think otherwise.

The Superintendent of Insurance of New York required this item to be reported as a liability and did not treat

it as part of the general reserve. Upon the agreed facts we cannot say that it was part of any reserve required by the laws of New York. There is nothing to show how "the value of the contractual benefits" under these policies was arrived at and, considering the evidence presented, we must accept the Superintendent's conclusion. The Company has not shown enough to establish its right to the exemption.

4. A number of policyholders died during the calendar year, but their deaths were not reported before it terminated. The Superintendent of Insurance required the Company to set aside a special fund to meet these unreported losses, and it claimed that this was an addition to the reserve fund required by law. We think this claim was properly rejected by the Commissioner, although the courts below held otherwise. *McCoach v. Insurance Co. of North America*, 244 U. S. 585, and *United States v. Boston Insurance Co.*, 269 U. S. 197, pointed out that "the net addition, if any, required by law to be made within the year to reserve funds," does not necessarily include whatever a state official may so designate; that "reserve funds" has a technical meaning. It is unnecessary now to amplify what was there said. The item under consideration represented a liability and not something reserved from premiums to meet policy obligations at maturity.

5. The Company also claimed deduction for additions to a fund set aside to provide for payment of annuities to former soliciting agents as provided by their contracts of employment. The Commissioner properly rejected this item, although both courts below held a different view. The agreed statement of facts shows—

"The plaintiff has a form of contract of employment with many of its soliciting agents under which, if such agents for a period of twenty years continuously devote their entire time, talents and energies in soliciting appli-

cations for insurance, and if they shall for the twenty years accomplish certain prescribed minimum results, then at the end of twenty years of such service each such agent becomes entitled to an income for life payable monthly, the amount of the payment being based upon the results obtained by each such agent during the twenty year period. The laws of New York require the Superintendent of Insurance, in making a valuation of the obligations of the plaintiff, to value annuities on the standard of McClintock's 'Table of Mortality among Annuitants,' with interest not exceeding four per centum per annum. Said Superintendent of Insurance after making an examination of the plaintiff and valuing its liabilities, required the plaintiff to carry, and it does carry, a fund to meet its said liabilities on said contracts with its soliciting agents; and this fund it increased during the year 1913. The net addition to said fund for said year was the sum of \$160,641, which the plaintiff, in making its said return deducted from gross income under that clause of the law which authorizes a life insurance corporation to deduct the net addition required by law to be made within the year to reserve funds. But in amending said return the Commissioner refused to allow said deduction, and thereby made the plaintiff's net income for the year appear to be \$160,641 more than it would have been if said deduction had been allowed, and he assessed and collected an additional tax on account thereof accordingly in the sum of \$1,606.41, which forms a part of the tax in controversy in this suit."

As pointed out above, the term "reserve funds," in the taxing Act, has a technical meaning. The compensation which an insurance company agrees to pay soliciting agents has no relation to the reserve held to meet maturing policies; and when it sets aside a fund to provide payments to such agents this cannot be regarded as a reserve within intendment of the statute.

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

Reversed.

UNION INSULATING & CONSTRUCTION COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 263. Submitted April 21, 1926.—Decided April 26, 1926.

1. Stipulations by the United States, in a construction contract, to furnish a right of way for ingress and egress to and from the places where materials to be furnished by the United States were stored and the place of their use in the work, *construed*, in relation to other facts, as allowing the contractor to use a right of way on which was a railroad, but not as obliging the Government to put the railroad in repair. P. 122.
 2. Damages will not be awarded for a slight delay in starting work under a contract, not satisfactorily shown to have been caused wholly by the Government, where the contractor made no protest at the time and no claim until nine months later. P. 124.
- 59 Ct. Cls. 582, affirmed.

APPEAL from a judgment of the Court of Claims rejecting claims under a building contract.

Messrs. Edmund D. Adcock and George I. Haight were on the brief for appellant.

Solicitor General Mitchell and Assistant Attorney General Galloway were on the brief for the United States.

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

The appellant sued the United States in the Court of Claims for \$30,697.73, for breach of a contract made by it with the United States for certain construction work at the government nitrate plant No. 2 at Muscle Shoals,

Alabama. The work was done and the contract price paid. The amount here sued for was made up of nine claims for damages for breaches and extras. The Court of Claims found against the claimant on every cause of action alleged. Appeal to this Court relates to only two of them.

The first is for \$3,059.65, and is based on the alleged failure of the United States to furnish a right of way as stipulated in the contract for use in hauling materials to the place of construction.

After providing that the contractor should furnish certain materials for construction, the contract read:

“The U. S. of America to furnish at its present location on the reservation at U. S. Nitrate Plant No. 2, all other construction materials, the Contractor to perform all necessary labor required in transporting such materials to the proper place for use in construction, the U. S. of America at all times to furnish the necessary right of way for ingress and egress to the place of present storage of such materials and the place of ultimate use in construction.

“The United States Government further agrees to furnish to the Contractor for the purpose of transporting materials and performing the necessary construction work, such tools and equipment including locomotives, flat cars, dump cars, hoisting engines, locomotive cranes, steam shovels, concrete mixers, air compressors, automobile trucks, clam shell buckets, etc., as are now the property of the United States Government and available at U. S. Nitrate Plant No. 2, and in such quantities as in the discretion of the Constructing Quartermaster, may be reasonably necessary for such use in construction and further may be reasonably furnished by the United States Government without material detriment or inconvenience to the United States Government. The Contractor to accept such equipment as is and to assume all responsibility

for placing such equipment in first class working condition and the proper care and maintenance of such equipment from the time it is turned over to him by the Constructing Quartermaster.”

Finding No. 2 by the court is

“The right of way furnished by the United States consisted of railroad tracks running from the site of the work to the storage yards. These tracks were used by others and were not in good condition when the plaintiff submitted its bid, nor were they in any worse condition when it began its work under the contract. The United States did not keep the tracks in good condition during the period of the performance of the contract, but turned them over to the plaintiff for its use with the necessary rolling stock. The plaintiff expended the sum of \$705.50 for labor in repairing railroad tracks, and \$700.66 for making repairs to equipment damaged by reason of the defective tracks; it also expended the further sum of \$1653.49 for labor in connection with derailments.”

What the Government agreed to furnish was a right of way, not a railroad for transportation. It agreed that ingress and egress by this right of way should at all times during the performance of the contract, be given the contractor, and such ingress and egress were afforded it. The defective track on the right of way was evident to the contractor when it made the contract, and the reasonable construction of the contract is that the contractor, in order to avail itself of the right of way with constant ingress and egress, took over the track as it was as part of the equipment for transportation, just as it did the locomotive and cars, and as it found it, with sole responsibility for placing it in working condition and maintaining it for its use. It is clear that the Court of Claims was right in rejecting this claim.

The other claim was for damages for delay by the Government in arranging for the contractor's start upon the

work. The contract provided that the work should be commenced on June 10, 1920, and by that time the contractor had its executive office force at the plant. The contractor was able to begin work on June 13. The delay resulted from the inability to get material issued to the contractor. The actual amount expended for salary and services to the persons kept waiting was \$360. No complaint and no protest were made by the contractor at the time and no claim was filed by the contractor until March 14, 1921. The holding of the Court of Claims was that because it did not satisfactorily appear that the delay was due wholly to the Government and in view of the absence of a claim or protest for nine months thereafter, the claim should be rejected. We concur in this.

Judgment affirmed.

NEW YORK CENTRAL RAILROAD COMPANY ET
AL. *v.* NEW YORK AND PENNSYLVANIA COM-
PANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

No. 230. Argued April 13, 14, 1926.—Decided April 26, 1926.

1. The provision of the Transportation Act, 1920, § 208a, forbidding reductions of rates during six months following termination of federal control unless approved by the Interstate Commerce Commission, was applicable to intrastate rates, was valid as so applied, and included indirect reductions through reparation orders attempted by state authority. P. 125.
2. Whether a federal right was lost by failure to comply with state procedure, is open to re-examination by this Court on review of a state court's judgment. P. 126.
3. The state court sustained on appeal an order of a commission granting reparation in clear violation of the Transportation Act. *Held* that the railroad was entitled to relief in this Court on review of the judgment, although the state court based it on the ground that the railroad waived its right by not appealing from

an earlier order, in which the commission held the rate unreasonable and announced that, upon presentation of a petition with supporting data, it would grant reparation. P. 126.

281 Pa. 257, reversed.

CERTIORARI to a judgment of the Supreme Court of Pennsylvania which affirmed a judgment enforcing an order of reparation granted by the Public Service Commission of Pennsylvania to the respondent against the Railroad and based on alleged excess charges paid by the respondent for the transportation of coal. Writ of error dismissed and certiorari allowed.

Mr. Parker McCollester, with whom *Messrs. Henry Wolf Bicklé* and *Frederic D. McKenney* were on the brief, for plaintiffs in error.

Mr. Thomas Raeburn White for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought in a court of Pennsylvania to recover the amount of alleged excess charges paid by the defendant in error for the carriage of coal in commerce within the State, and ordered by the Public Service Commission of Pennsylvania to be repaid by way of reparation. A judgment on the order in favor of the defendant in error was affirmed by the Supreme Court of Pennsylvania. 281 Pa. 257. The charges in question were for shipments between March 1, 1920, and September 1, 1920, the six months following the termination of federal control of the railroads. The rates charged were those that were in effect on February 29, 1920. By § 208(a) of the Transportation Act, 1920, (February 28, 1920, c. 91; 41 Stat. 456, 464,) prior to September 1, 1920, no such rate could be reduced unless the reduction was approved by the Interstate Commerce Commission, the six months

concerned being the period during which the United States guaranteed certain income to the railroads by § 209. The Interstate Commerce Commission has not approved any reduction and therefore it is plain that the State Commission had no authority to intermeddle with the rates that it undertook to cut down. It is true that regulating rates and awarding reparation are different matters. But the prohibition in the statute covers either method of reducing the pay received by the roads. The language of the statute and the reasons for the enactment too clearly apply to intrastate as well as to interstate rates, to admit debate. *Missouri Pacific R. R. Co. v. Boone*, 270 U. S. 466. Whether the rates were right, or were wrong as the State Court thinks, they could be changed only in one way.

It may be that some of the questions before us would be proper matters for a writ of error, but as the rights asserted under the statute of the United States are more fully open upon a writ of certiorari we shall consider the case upon the last mentioned writ.

The State Courts were of opinion that the plaintiffs in error had waived their rights by their failure to appeal from a decision on an earlier complaint to the State Commission in which that Commission held that a lower rate was reasonable and stated that upon presentation of a petition accompanied by the supporting data reparation would be awarded for freight charges paid in excess of the rates thus fixed. Whether the federal rights asserted were lost in this way is open to examination here. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246. *Ward v. Love County*, 253 U. S. 17, 22. *Davis v. Wechsler*, 263 U. S. 22, 24.

In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to state procedure, but if the Railroads were too late to argue their case before that

Court they are not too late to argue it here. There was no order in the former hearing before the State Commission that the Railroads could have brought before us. This is the first moment when they have had a chance to raise what we regard as a perfectly clear point, as it is the first moment when their rights have been infringed. There now is an order which is in the teeth of the statute. It would not be reasonable to hold that they are precluded from getting the protection that this Court owes them, by their having failed to go as far as they now learn that they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought here. "The judgment under review was the only final judgment . . . from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review." *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214. *Smith v. McCullough*, 270 U. S. 456.

Writ of certiorari granted.

Writ of error dismissed.

Judgment reversed.

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

VENNER *v.* MICHIGAN CENTRAL RAILROAD
COMPANY.

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

No. 190. Argued January 28, 1926.—Decided April 26, 1926.

1. A suit against a railroad by a minority stockholder to enjoin the company from carrying out an agreement for obtaining additional equipment and issuing certificates therefor as permitted by an order of the Interstate Commerce Commission which the plaintiff assails

as invalid, is essentially a suit to set aside the order, of which a state court has no jurisdiction. P. 128.

2. Suits to set aside orders, mandatory or permissive, of the Interstate Commerce Commission can be brought only against the United States and only in the federal courts. P. 130.

Affirmed.

APPEAL from a decree of the District Court dismissing an injunction suit for want of jurisdiction.

Mr. Frederick A. Henry for appellant.

Mr. S. H. West for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is an appeal from a decree of a federal district court dismissing a suit for want of jurisdiction. The suit was begun in a state court and then removed into the federal court, on the defendant's petition, by reason of the diverse citizenship of the parties. Want of jurisdiction was adjudged because the court was of opinion that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission made under § 20a of the Interstate Commerce Act, c. 91, 41 Stat. 494; that the United States was a necessary defendant and had not consented to be sued in a state court; and that the removal did not give the federal court jurisdiction when the state court had none.

A short description of the suit as displayed in the plaintiff's amended bill will suffice to show its nature. The plaintiff is a minority stockholder of a railway company which owns and operates an interstate railroad, and that company is the sole defendant. The purpose with which the suit is brought is to enjoin the defendant company from carrying out an agreement with two other railroad companies under which the three, collectively

styled "New York Central Lines," are to acquire a large number of locomotives for use on their respective roads in both interstate and intrastate commerce; are to obtain money to pay for this equipment by issuing certificates, payable at intervals during a period of 15 years, with semi-annual dividend warrants representing interest; and are to covenant jointly and severally to pay rentals for the equipment sufficient to pay the certificates and dividend warrants as they mature. On application by the three companies pursuant to § 20a the Interstate Commerce Commission, after notice and investigation, made an order approving the agreement and authorizing the acts contemplated therein. The order was made the day before the suit was begun.

The plaintiff alleges in his amended bill that to issue the certificates and provide for their payment in the manner proposed will be in violation of the laws of the State wherein the defendant company was incorporated and of the other States into which its road extends, unless the approval of designated agencies of those States be secured; that such approval has not been and is not intended to be secured; and that the defendant company is relying on the order of the Interstate Commerce Commission and is proceeding to carry out the agreement as approved by that order. He also alleges that the order and the provisions of § 20a, under which it was made, transcend the limits of federal power and encroach on the power of the States before named. The prayer is that the defendant company be enjoined from carrying out the agreement, notwithstanding its approval by the Interstate Commerce Commission under that section.

The defendant challenged the court's jurisdiction by a motion to dismiss on the grounds before stated, and it was on consideration of that motion that the decree of dismissal was entered. The decree was entered and the

present appeal was allowed prior to the change made in our appellate jurisdiction by the Act of February 13, 1925.

By § 20a the Commission is empowered to entertain an application by any carrier by railroad engaged in interstate commerce for authority to issue bonds or other evidences of indebtedness, or to assume obligations or liabilities as a lessor or lessee, or as a guarantor or surety of another carrier; and is further empowered, after notice to "the Governor of each State in which the applicant carrier operates" and on due investigation, to grant or refuse such authority in whole or in part, and thereafter, for good cause shown, to make such supplemental orders in the premises as it may deem necessary or appropriate. The section also provides: "(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 380, 382. Such a suit must be brought against the United States as the representative of the public and may be brought only in a federal district court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; *Illinois Central R. R. Co. v. State Public Utilities Commission*, 245 U. S. 493, 504-505; *North Dakota v. Chicago & Northwestern Ry. Co.*, 257 U. S. 485, 487; *Texas v. Interstate Com-*

merce Commission, 258 U. S. 158, 164; *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, *supra*. That the order is not mandatory but permissive makes no difference in this regard. *Chicago Junction Case*, 264 U. S. 258, 263. And as the state court was without jurisdiction the federal court acquired none by the removal. *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, *supra*.

The plaintiff cites *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, and *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, as showing jurisdiction below; but neither case is open to such an interpretation. In the first no order of the Commission was involved either directly or indirectly. In the second this Court dealt in a single opinion with two distinct proceedings. One was a suit to set aside an order of the Commission and was brought against the United States and a railroad company in the proper federal district court. The other was a prior and related suit brought in a state court against the railroad company and removed into another federal district court before the order was made by the Commission. Afterwards, when the order was made, its interpretation and operation were drawn in question in that suit. The question of jurisdiction with which we are concerned here was not raised there, and there is doubt that it could have been.

We hold that the dismissal for want of jurisdiction was right.

Decree affirmed.

PATTERSON ET AL. *v.* MOBILE GAS COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA.

No. 226. Argued March 19, 1926.—Decided April 26, 1926.

1. Failure to make up a record in accordance with the rule is cause for dismissing an appeal. P. 132.

2. Decree *affirmed*, in so far as it enjoined enforcement of an order establishing confiscatory gas rates; but *reversed* in so far as it undertook to adjudge a basic valuation of the company's property, as of a specified date, conclusive on the State for future rate-making purposes, and in so far as it undertook to specify the per cent. of net profit, the depreciation, and other allowances to which the company should be entitled, including amortization of expenses of the suit and of losses resulting from the enjoined rates, and to restrain further examination of the company's books and papers for the purpose of impairing the aforesaid basic valuation. P. 134.
 3. Prior to the Jurisdictional Act of February 13, 1925, a single District Judge, holding the court on final hearing, had power to award a permanent injunction at variance with the views held by Circuit Judges when the same matter was considered by the special court on application for preliminary injunction; but such power was to be cautiously exercised. P. 136.
- 290 Fed. 476, affirmed in part; reversed in part.

APPEAL from a decree of perpetual injunction in a suit in the District Court brought by the Gas Company to restrain the members of the Alabama Public Service Commission from enforcing a confiscatory rate schedule, and for other relief.

Mr. Hugh White, with whom *Messrs. Harwell G. Davis*, Attorney General of Alabama, and *F. J. Yerger* were on the briefs, for appellants.

Mr. Harry T. Smith for appellee.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The record in this cause has been made up with such disregard of the rules that we cannot undertake to examine the evidence or to discuss seriatim the thirty-four jumbled assignments of error. It would be permissible to dismiss the appeal, *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 174; but, considering the public interest and with purpose to prevent any serious miscarriage of

justice, we have examined the pleadings, the master's report, the opinions and the decrees. In the circumstances we think the proper course is to modify and then to affirm the decree of the court below.

By an original bill of August 14, 1922, the Gas Company asked that members of the Alabama Public Service Commission be restrained from attempting to enforce a rate schedule which it alleged was confiscatory.

A supplemental bill, filed April 18, 1923, after referring to the original bill and proceedings thereunder, among other things, alleged: That, as provided by the Act of the Alabama Legislature approved October 1, 1920, the Commission ascertained and declared the value of the Company's property for rate-making purposes as of December 31, 1921, at the latter's request and expense. That this valuation was made under a valid contract with the State and she was obligated to accept it for rate-making purposes. That by an unconstitutional Act approved February 13, 1923, the Legislature undertook to authorize, and the Commission intended to make, another valuation. That so to do would violate the contract which the State deliberately entered into and greatly injure the Company. In addition to the relief originally asked the prayer was for a decree declaring the Commission's valuation final for all rate-making purposes and the challenged Act invalid. Also for an injunction restraining the Commission from attempting to establish any new valuation for rate-making purposes.

Upon application for an injunction under the supplemental bill the District Court—composed of two circuit judges and one district judge—held (June 4, 1923) that no continuing contract between the State and the Company resulted from the Commission's action in respect of the first valuation and refused to enjoin the proposed revaluation. District Judge Clayton expressed another view.

Later—October 31, 1923—the District Court, Judge Clayton only presiding, entered the following final decree—

“ 1. That the value of the properties of the Mobile Gas Company as of December 31st, 1921, has been definitely fixed for the future rate-making purpose by contract entered into by the State of Alabama, acting by and through the Alabama Public Service Commission, on the one part, and the Mobile Gas Company, on the other part, and that the defendants in this case and their successors in office, are hereby forever enjoined from attempting to impair the obligations of this contract by failing or refusing to accept the said valuation as a permanent basic valuation as of December 31st, 1921, for all future rate-making purposes.

“ 2. Also, that the tariff of rates established by the Alabama Public Service Commission, by its order of July 24th, 1922, is confiscatory and void, and further that the Mobile Gas Company is entitled to earn a net profit of eight per cent. (8%) per annum upon \$2,007,520.68, consisting of \$1,969,565.00, which was established as the permanent basic valuation of the plaintiff's property as of December 31st, 1921, and \$37,955.68, which covers additions to property from December 31st, 1921, to December 31st, 1922, and that in ascertaining said net profit the plaintiff must be allowed a depreciation reserve of two and one-half per cent. (2½%) upon the value of the property, and a further credit of \$25,000.00, amortized over a period of five years, on account of the expenses incurred in resisting the enforcement of said confiscatory tariff of rates; and also to a further credit of \$27,025.77, amortized over a period of five years, being losses imposed upon the plaintiff between August 12th, 1920 and November 1st, 1920, by reason of the refusal of the Alabama Public Service Commission to permit the operation of a schedule of rates filed by the plaintiff on August 12th, 1920.

" 3. That defendants, Andrew G. Patterson, Fitzhugh Lee and Frank P. Morgan, and their successors in office, as members of the Alabama Public Service Commission be and they are hereby forever enjoined from enforcing or attempting to enforce the said tariff of rates promulgated by the order of the Alabama Public Service Commission on July 24th, 1922, or from establishing or attempting to enforce any other tariff of rates which is insufficient to produce a return of eight per cent. (8%) per annum upon the then value of the plaintiff's properties used and useful in the public service, assuming as a basic valuation of said company's property on the 31st day of December, 1922, the sum of \$2,007,520.68. The Court reserves the power to modify said injunction at any time when, by reason of changed conditions, any tariff of rates, the establishment and enforcement of which is hereby forbidden, may become compensatory.

" 4. Also that the defendants, and their successors in office, are hereby forever enjoined from compelling or attempting to compel the plaintiff to submit its properties, books, documents, accounts and vouchers, to examination by the Alabama Public Service Commission, or its representatives for the purpose of repudiating or in any wise impairing the valuation of the plaintiff's properties as of the 31st day of December, 1921, as a basic valuation for future rate-making purposes.

" 5. Also, that a writ of permanent injunction issue from this Court in accordance with this decree.

" 6. The exceptions to the report of the Special Master are hereby overruled, and the said report is hereby approved and confirmed."

To that portion of this decree which adjudged the rate schedule prescribed by the Commission's order of July 24, 1922, confiscatory and enjoined any attempt to enforce it we find no reason to object, and to that extent it is affirmed.

The remaining portions of the decree must be eliminated. We think they were improvident and go materially beyond what the circumstances require. But whether or not they announce correct conclusions of law, we do not decide. The matters to which they relate are left open and subject to further and future original consideration by any proper tribunal. While within his powers as the law then stood, the District Judge went very far when he entirely disregarded the views of the circuit judges who sat on the specially-constituted court. The statute was materially changed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, and now causes like this must be finally adjudicated by a court composed of three judges. To such a court we think the questions to which those portions of the decree relate ought to go before we undertake finally to pass upon them.

The approved portion of the decree will protect the Company against immediate danger of serious injury; and if hereafter its rights are threatened by further unlawful interference application for relief may be made to the proper specially-constituted district court.

With the indicated modifications the decree below is affirmed. All costs will be charged against the appellants.

MR. JUSTICE SANFORD concurs in the result.

ISELIN ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 291. Argued April 29, 1926.—Decided May 3, 1926.

1. Offer by letter to buy airplane linen from the Government on terms specified, including a warranty of quality, *held* not to have been accepted by a letter, on behalf of the Government, not acknowledging the other, differing in terms, and presumably based on intervening negotiations not disclosed. P. 138.

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Opinion of the Court.

2. An acceptance upon terms varying from those offered is a rejection of the offer. P. 139.

60 Ct. Cls. 255, affirmed.

APPEAL from a judgment of the Court of Claims rejecting appellants' claim, based on an alleged warranty of quality in a sale of goods by the United States.

Mr. Dallas S. Townsend for appellants.

Solicitor General Mitchell and *Mr. W. Marvin Smith*, Attorney in the Department of Justice, were on the brief for the United States.

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

The appellants, partners as William Iselin & Company, sued the United States for \$30,000 for breach of a warranty of quality in a sale to them by the United States of airplane linen. On January 15, 1920, the United States, through the Materials Disposal & Salvage Division of the Office of the Director of Air Service, advertised for bids for 168,400 yards of aircraft linen, to be submitted February 2, 1920. The bidders were to be notified February 5th of the yardage awarded, and were then to forward a check for 10 per cent. of the purchase price, remainder within thirty days. The advertisement also stated that the materials would be sold "as is" at points of storage, that inspection was invited, that specifications and quantities on hand were based upon best information available, but that no guaranty on behalf of the Government was given.

The representative of the appellants at New York, on February 2, 1920, after seeing the advertisement, sent the following letter to the Salvage Division, office of the Director of Air Service, Washington:

"I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp

and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts. This offer is for immediate acceptance on usual Government terms."

Under date of February 10th, there was sent to the plaintiff's representative the following communication from the New York office of the Salvage Division:

"This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879 item 6—85,000 yards.

"2. Inasmuch as we have your check for \$13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for \$125,884.80 to cover the balance due together with your shipping directions.

"3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

"4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

It does not appear, and it is not claimed, that there was any acceptance of appellants' bid of February 2nd otherwise than as embodied in the communication last above quoted.

Upon resale of the linen, the appellants found that it was not of the quality of "firsts," and brought this suit. The linen delivered was of grade A, which term describes a particular texture. The terms "first" and "seconds" are terms of quality.

The only question in this case is whether the expression "Said linen as per sample submitted; goods to be firsts," contained in the letter of February 2nd was ac-

cepted so as to bind the Government to a warranty that the linen sold was to be of first quality.

We do not think that the letter of February 10th was an acceptance of the offer of February 2nd. It does not acknowledge its receipt. It does not purport to be an answer to it. It differs from it in the yardage of the linen mentioned by 18,000 yards. It contains no reference to the quality of the linen. It refers to a check for 10 per cent. of the price bid on 150,400 yards of linen, which could not have been sent in the letter of February 2nd, for it was for a less amount. This shows, as indeed the counsel for the appellants himself points out, that there must have been some negotiations, or inquiries or communications between the appellants and the Government after the letter of February 2nd before the exact amounts of the linen and the deposit check could be fixed. The contract is not found in the letter of February 2nd. It is evidenced by the tender of the deposit check, by the letter of February 10th only, and by the payment of the balance due on the contract price. It is reasonable to infer that the letter of February 10th was a belated award under the advertisement rather than an acceptance of the letter of February 2nd.

It is well settled that a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. *Beaumont v. Prieto*, 249 U. S. 554; *Minneapolis Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151; *National Bank v. Hall*, 101 U. S. 43, 50; *Carr v. Duvall*, 14 Pet. 77, 82; *Eliason v. Henshaw*, 4 Wheat. 225.

We must conclude that the Government never entered into a warranty of the quality of the linen, and so that no obligation arose from a breach. The judgment of the Court of Claims is

Affirmed.

EARLY & DANIEL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 299. Argued April 30, 1926.—Decided May 3, 1926.

When a contractor, upon demand of the Government, delivers under protest goods in an amount exceeding that which his contract calls for at the time, and, the protest being ignored, thereafter accepts without protest the contract price, there is no ground for implying a contract upon the Government's part to pay the market price, though higher. P. 142.

59 Ct. Cls. 932, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for the difference between the contract and market prices of hay delivered to the Government.

Mr. Benton S. Oppenheimer, with whom *Mr. Ewing H. Scott* was on the brief, for appellant.

Solicitor General Mitchell and *Assistant Attorney General Galloway* were on the brief for the United States.

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

This is a suit against the United States for \$22,000, balance due for hay delivered. Appellant made a contract with the Government, on the 31st day of July, 1917, by which it agreed to furnish, during the period beginning August 1, 1917, and ending September 30, 1917, such hay as might be required by the Government during July and the first half of August, 1917, not to exceed 6,000,000 pounds, at 97½ cents per 100 pounds, and such hay as might be required during the last half of August, and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per 100 pounds, to be delivered f. o. b. cars at Newport News, Virginia, subject to call of the Government in lots not to exceed 1,000,000 pounds per lot. The

Government made calls which the plaintiff filled as follows:

Call No. 1, 500,000 lbs. August 15, 1917.

Call No. 2, 1,050,000 lbs. August 20, 1917.

Call No. 3, 2,000,000 lbs. September 5, 1917.

Call No. 4, 4,450,000 lbs. September 12, 1917.

These calls were all filled without protest, though the later calls were for amounts greater than 1,000,000 lbs. When the final and fifth call was made for 4,000,000 pounds, the appellant objected that the call was for more pounds of hay than the contract allowed for any one call. That objection was not made until it was too late for the defendant to amend the call. The appellant's vice-president then wrote to the government officer in charge that the fifth call was not deemed by the plaintiff to be in accord with the contract, and that the plaintiff did not intend to fill it. Under the terms of the contract, appellant had until November 15th, being three months from the date of the first call, to complete its deliveries. On November 19th, the Camp Quartermaster wired to the appellant, "Amount hay on hand will supply needs to December 4th. Require prompt delivery 4,000,000 pounds. Advise at once your action, otherwise must buy in open market." After further exchange of telegrams, plaintiff sent the following telegram to the Camp Quartermaster under date of November 21, 1917:

"We will start shipping hay immediately, and in case you need any before arrival will arrange to have Hiden loan us a supply. Want it distinctly understood that we are doing this under protest and are going to put the matter up to proper authorities in Washington; and if they rule in our favor, want settlement at fair market price for amount we overfill. Will you wire C. S. Ruttle, General Agent, D. B. C. & W. Railway, to furnish equipment immediately as we request for hay to ship to you? Answer."

The plaintiff delivered under protest the remaining 4,000,000 pounds of hay. Thereafter the plaintiff accepted without protest the sum of \$38,000, which was all that was due under the contract. The plaintiff then filed this claim for \$22,000 with the acting Quartermaster General of the United States Army, with the Auditor for the War Department, with the Secretary of War, with the Comptroller of the Treasury, and with the Board of Contract Adjustment, all of whom in turn decided that the claim could not be paid.

The appellant had the option of delivering the remainder of the hay under the terms of the contract, or of not delivering it at all, if the contract had been broken. It chose to deliver. It made a protest, but that was ignored by the officers of the Government, and, when the Government tendered the contract price, it was accepted by the appellant and without protest. Under such circumstances there is no ground for implying a contract to pay more than the contract price. *New York & New Haven v. United States*, 251 U. S. 123, 127; *Nelson Company v. United States*, 261 U. S. 17, 23; *Willard, Sutherland & Company v. United States*, 262 U. S. 489, 494; *Atwater & Company v. United States*, 262 U. S. 495, 498.

The judgment of the Court of Claims is

Affirmed.

UNITED STATES EX REL. HUGHES *v.* GAULT,
MARSHAL.

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

No. 513. Argued April 22, 1926.—Decided May 3, 1926.

1. The Constitution does not require any preliminary hearing before removal of an accused person for trial to the federal court having jurisdiction of the charge. Pp. 149, 152.

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Statement of the Case.

2. A commitment for removal under Rev. Stats. § 1014, ordered by a United States Commissioner after a finding of substantial grounds for the charge in an indictment, is not assailable in *habeas corpus* because of his refusal to hear defensive evidence and weigh it against the Government's evidence of probable cause. P. 150.
3. An indictment plainly showing the intention of the grand jury to charge the defendant with violating the Sherman Act, *held* sufficient for removal purposes. P. 151.

Affirmed.

APPEAL from a judgment of the District Court denying a discharge in *habeas corpus*. The relator, Hughes, was held for removal to the Northern District of Ohio for trial there under an indictment charging him and forty-six other natural persons and forty-six corporations with having engaged in a combination in restraint of interstate commerce in malleable iron castings, in violation of § 1 of the Sherman Law. At the hearing in the removal proceedings the relator admitted his identity and the Government rested its case on this and a certified copy of the indictment, which alleged that the corporate defendants produced some 75% of the malleable castings product of the United States, and were members of a voluntary trade association through and by means of which they carried out an agreement to eliminate competition among themselves as to prices, terms, and conditions of sale and customers, and that the relator and the other individual defendants (other than one employed as the Secretary of the association,) were officers and agents of the corporations, managing and controlling their affairs. The commissioner, after hearing testimony of two customers of the relator's company, struck it out as purely defensive, declined to hear more testimony of the same character, and ordered a commitment on the indictment and on the testimony given by relator on his direct and cross-examinations.

Mr. Charles E. Hughes, with whom *Messrs. Herbert Pope* and *Frank E. Harkness* were on the brief, for appellant.

The District Court erred in its decision as to the nature and scope of the issue in removal proceedings, in holding that the indictment, and proof of appellant's identity, established the Government's right to an order of removal, and wholly disregarding the evidence showing want of probable cause introduced before the Commissioner, and in so doing the court denied the appellant's constitutional right to a proper hearing on the issue of probable cause. *Tinsley v. Treat*, 205 U. S. 20; *Harlan v. McGourin*, 218 U. S. 442. If the evidence on behalf of appellant demonstrated the lack of probable cause, the Commissioner had no power or authority to commit him, and he was entitled as a matter of constitutional right to his discharge in *habeas corpus* proceedings.

The evidence on behalf of appellant fully met the case made by the indictment and demonstrated that there was no probable cause to believe him guilty of any violation of the Sherman Act. Apart from a formal charge that all the defendants named in the indictment have violated the Sherman Act, which follows the language of the statute, and cannot possibly be held to state any specific offense which would justify a prosecution, the indictment merely states that the corporations named as defendants have carried on their interstate trade pursuant to an agreement to eliminate competition, have by agreement "from time to time" fixed excessive and non-competitive prices for malleable iron castings and quoted and sold castings at such prices, and have "assigned and allotted their customers to one another" and enforced such allotments by refraining from competing for such customers." This Court has held in *Weeds, Inc. v. United States*, 255 U. S. 109, that the word "excessive" as applied to prices has no proper place in a penal proceeding, and it has also

held in *Chicago Board of Trade v. United States*, 246 U. S. 231, that the fixing of non-competitive prices does not necessarily constitute a violation of the Sherman Act. As to the charge that the corporate defendants allotted and assigned customers to one another, it is to be observed that the indictment does not even allege that this was done by agreement and is apparently based on the view that the Sherman Act imposes a duty to compete—a theory which this Court has definitely repudiated. *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Reading Co.*, 226 U. S. 324. The appellant and the other natural persons named in the indictment are not charged with having authorized or done any act claimed to be illegal, but merely with having been officers or agents of the defendant corporations.

The only basis for the jurisdiction of the District Court for the Northern District of Ohio to which removal is sought, is the charge that the corporate defendants were members of an association with headquarters at Cleveland in that district, and while it is alleged that the association was an instrumentality of the supposed combination, there is no statement of what it did in pursuance thereof, or indeed that it did anything.

It stands out clearly upon the record that the Government abandoned the charge of price-fixing and the allotment of customers made in the indictment. It could do nothing else in the face of appellant's uncontradicted and unimpeached testimony. There remains nothing except the fact that appellant's company was a member of a trade association which maintained a bureau of information, and there is not a shred of evidence that appellant or any one else ever made use of this bureau for any improper or unlawful purpose. We insist that upon such evidence the Commissioner had no power or authority to hold the appellant, that the District Court erred in refusing to discharge him from custody, and that the order appealed from should be reversed.

Rodman v. Pothier, 264 U. S. 399, held merely that disputed and doubtful questions should not be decided in removal proceedings, and counsel for the Government fail to point to the existence of any doubtful or disputed question in the case at bar which would bring it within that rule.

In *Charlton v. Kelly*, 229 U. S. 447, there was competent legal evidence produced to show the commission of the crime. The question arose as to the defense of insanity.

In *Collins v. Loisel*, 259 U. S. 309, another extradition case, the court found that the evidence to support the charge of obtaining property by false pretenses was adequate. The court reviewed the evidence and said that it was clear that this evidence would justify a conviction not only for cheating, but also of obtaining property under false pretenses.

In *Gayon v. McCarthy*, 252 U. S. 171, the court reviewed the evidence at length and reached its decision in the case, which was one of *habeas corpus*, only on the ground that there was "substantial evidence" before the Commissioner showing probable cause.

This Court has held, *Tinsley v. Treat*, 205 U. S. 20, and cases following, that, while the indictment, if it is a valid and sufficient one on its face, may be regarded as enough to put the defendant to his proof, the defendant has a constitutional right to show the absence of probable cause. Of course, this constitutional right is a substantial one. It is not a matter of form. But of what consequence is the right, if the defendant's evidence destroys the basis for a finding of probable cause and his evidence is ignored?

This Court has held in *habeas corpus* cases that the indictment is not conclusive, and that it is a denial of a constitutional right to regard it as conclusive. But to receive evidence which leaves no basis for a finding of prob-

able cause and then to sustain the removal is to make the indictment conclusive. We submit that this is what the court below did.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. Clifford H. Byrnes*, Special Assistant to the Attorney General, were on the brief, for appellee.

In a removal proceeding in the federal courts the committing magistrate must determine three questions: (1) Whether an offense appears to have been committed; (2) whether it appears to have been committed in the judicial district to which the removal is sought; and (3) whether there is any evidence tending to show that it was committed by the accused.

The production of a certified copy of the indictment which states an offense and alleges jurisdiction in the court in which it was found, together with proof of identity, furnishes *prima facie* but not conclusive evidence of all of these three elements.

The court before which removal proceedings are pending, or the court reviewing its action on *habeas corpus*, should not attempt to pass on the technical sufficiency of the indictment as a criminal pleading, but should consider whether it, as evidence, tends satisfactorily to show the commission of an offense, and jurisdiction in the court where it was found, to try the accused for such offense. In the case at bar such questions as are raised as to the sufficiency of the indictment are of a character which should be left to be resolved by the trial court, and not decided on removal proceedings. As the court in which this indictment was found had previously passed on and sustained the indictment, its decision was properly recognized as controlling in the removal proceedings.

The indictment in this case is sufficient, in any event, to meet every test which can be applied. It has been sus-

tained in numerous cases. *United States v. Nat. Malleable & Steel Castings Co.*, 6 Fed. (2d) 40; *Fitzgerald v. United States*, 6 Fed. (2d) 156, certiorari denied 269 U. S. 570; *McGrath v. Mathues*, 6 Fed. (2d) 149; *United States v. Moore*, 2 Fed. (2d) 734; *Steeves v. Rodman*, 10 Fed. (2d) 212; *Meehan v. United States*, 11 Fed. (2d) 847. Other cases presenting different phases of removal proceedings upon the same indictment are: *Nourse v. White*, 11 Fed. (2d) 843; *Rutz v. Anderson*, 11 Fed. (2d) 845; *Rutz v. Levy*, 268 U. S. 390.

The accused has a constitutional right to rebut the evidence against him. The scope of such rebuttal evidence is largely in the discretion of the committing magistrate. In the case at bar there was no abuse of such discretion. The court in the *habeas corpus* proceedings had before it the same evidence which was before the Commissioner, and seems to have concluded upon such evidence that probable cause existed. But whatever reason it had for discharging the writ, the order should be affirmed, since the record shows that if the evidence as well as the indictment be considered, the action of the Commissioner was correct.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The relator was indicted for violation of the Anti-trust Act of July 2, 1890, (c. 647,) in the Eastern Division of the Northern District of Ohio. He appeared, upon notice, before a Commissioner of Ottumwa, Iowa, and after a hearing he was ordered to be held for removal. Rev. Stat. § 1014. The relator thereupon applied to the judges of the District Court for a writ of *habeas corpus* on the grounds that the indictment was bad and that the Commissioner rejected evidence that the relator was innocent and that therefore there was no probable cause to

believe him guilty of a crime in Ohio. He also prayed for a writ of certiorari to bring the proceedings below before the Court. The writs were issued and after a hearing the District Court denied the relator his discharge and directed an order of removal to be prepared. The relator appeals under § 238 of the Judicial Code, March 3, 1911, c. 231, 36 Stat. 1087, 1157, before the Act of February 13, 1925, c. 229, went into effect. The grounds alleged are that, by the refusal to hold that the indictment did not show probable cause to believe the relator guilty, and by the exclusion of the evidence, the relator was deprived of his right to be tried in the District wherein the crime was committed, Constitution, Art. 3, § 2, and Amendment VI, and that he was detained without due process of law. Amendment V.

The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime. In *Tinsley v. Treat*, 205 U. S. 20, 33, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the Constitution.'

As that instrument does not provide for bringing the accused into the power of the Court authorized to try him, a statute was necessary and is found in Rev. Stat. § 1014. This might have been interpreted as contemplating a summary order without other hearing than was necessary, when there was an indictment, to show that fact and that the person present was the person charged.

The hardship of removal, however, has grown with the growth of the United States, and there is a natural desire to prevent it when possible, if a preliminary sifting will show that there is no probable cause for the charge. Accordingly it is held that the District Judge on application to remove acts judicially and that probable cause must be shown. *Beavers v. Henkel*, 194 U. S. 73, 83. *Tinsley v. Treat*, 205 U. S. 20, 27, 29, 32. It is to be noticed, however, that "where any offender . . . is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender . . . is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal," &c. But the commitment, supposed by these words already to have taken place, is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any 'mayor of a city, justice of the peace, or other magistrate, of any State where he may be found.' Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice. He is not intended to hold a preliminary trial, and, if probable cause is shown on the government side, he is not to set it aside because on the other evidence he believes the defendant innocent. The rule that would apply to a mayor applies to a commissioner of the United States.

The relator testified before the Commissioner both in general terms and in detail that he and his company were innocent. The Commissioner excluded further details from him confirmatory of what he had sworn and evi-

dence of customers that they were acquired in the way of competitive trade, seemingly on the ground that they would not, or at least might not, know that they were held as customers because of an agreement among the defendants, and also on the ground that he was not called on to listen to merely defensive proof; an opinion that he expressed. On a summary proceeding like this, even if the exclusion was wrong, it would not be enough to invalidate the order of removal, as the Commissioner indicated by his finding that he thought there were substantial grounds for the charge of guilt and that it was not for him to decide whether they were met by the denials of the defendant, even if they seemed convincing. *Collins v. Loisel*, 259 U. S. 309, 314, 315.

We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of District Courts and by the Circuit Court of Appeals for the Sixth Circuit as sufficient for removal purposes. It alleges that the Iowa Malleable Iron Company under the charge of the relator was party to an agreement to eliminate competition in interstate trade and to fix excessive and noncompetitive prices, and that the company and the relator are engaged in a conspiracy in restraint of trade among the States. The relator is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act.

It is pointed out in *Beavers v. Henkel*, 194 U. S. 73, 83, that there are much stronger reasons for caution in surrendering an alleged criminal to a foreign nation than are required before removing a citizen from one place to another within the jurisdiction, yet in the latest case on extradition it is said that '*habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any

BRANDEIS, J., dissenting.

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evidence warranting the finding that there was reasonable ground to believe the accused guilty.' *Fernandez v. Phillips*, 268 U. S. 311, 312. So far as the attack upon the order of removal is by *habeas corpus* this would seem to apply. *Price v. Henkel*, 216 U. S. 488, 492.

But to recur to what we intimated at the beginning, the requirements of the statute, be they greater or less, are not requirements of the Constitution but only in aid of the Constitution, made, in rather a remote sense, 'in order that any one accused shall not be deprived of this constitutional right' to be tried in the District wherein the crime shall have been committed. 205 U. S. 32. A statement in *Harlan v. McGourin*, 218 U. S. 442, 447, that *Tinsley v. Treat* held the exclusion of evidence to be a denial of a right secured under the Federal Constitution is inaccurate as we have shown. The relator's contention that he has been deprived of constitutional rights fails.

It follows that the order of the District Court must be affirmed.

Order affirmed.

MR. JUSTICE SUTHERLAND concurs in the result.

MR. JUSTICE BRANDEIS is of the opinion that, by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the Commissioner did not merely commit error, but deprived the petitioner of his liberty without due process of law in violation of the Fifth Amendment, because he was denied a fair hearing. *Tinsley v. Treat*, 205 U. S. 20, 28, 30. Compare *Chin Yow v. United States*, 208 U. S. 8; *Kwock Jan Fat v. White*, 253 U. S. 454; *United States v. Tod*, 263 U. S. 149.

MR. JUSTICE STONE took no part in the decision of this case.

Syllabus.

COLORADO *v.* UNITED STATES *ET AL.*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO.

No. 195. Argued March 5, 8, 1926.—Decided May 3, 1926.

1. Under § 1, pars. 18–20, of the Interstate Commerce Act, as amended by Transportation Act, 1920, § 402, the Interstate Commerce Commission has power to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad, lying wholly within the State of the owning company's incorporation, upon the ground that local conditions are such that public convenience and necessity do not require continued operation, and that such operation will result in large deficits constituting an undue burden upon interstate commerce. P. 161.
2. The exercise of federal power in authorizing such abandonment is not an invasion of the field reserved by the Constitution to the State, for the paramount power of Congress over interstate commerce enables it to determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. P. 165.
3. In a suit to enjoin an order of the Interstate Commerce Commission, the court may consider the objections that essential findings were not made and that findings made were not supported by evidence, if all the evidence before the Commission was introduced in the court below and is substantially incorporated in the record on appeal. P. 166.
4. While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. P. 167.
5. The sole test prescribed by the Act is that abandonment be consistent with public necessity and convenience; in determining this the Commission must have regard for the needs of both intrastate and interstate commerce. P. 168.

Affirmed.

APPEAL from a decree of the District Court which dismissed the bill brought by the State of Colorado, against the United States, the Interstate Commerce Commission, and the Colorado & Southern Railway Company, seeking to enjoin and in part set aside an order of the Commission,—a certificate permitting the Railway to abandon a branch line in Colorado.

Mr. Barney L. Whatley, with whom *Messrs. William L. Boatright*, Attorney General of Colorado, and *S. E. Naugle*, Assistant Attorney General, were on the brief, for appellant.

It is the duty of a railroad company doing business as a common carrier to provide reasonably adequate facilities for serving the public, and the State has the power to compel it to do so as long as the powers and privileges granted to the carrier by the State are retained and enjoyed. *C. & O. Ry. Co. v. Public Service Comm.*, 242 U. S. 603; *A. C. L. R. R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1; *Missouri Pac. R. R. Co. v. Kansas ex rel. etc.*, 216 U. S. 262; *Ore. R. R. & Nav. Co. v. Fairchild*, 224 U. S. 510; *P. & S. Coal Co. v. Del. & N. R. Co.*, 289 Fed. 133; *Colo. & Sou. Ry. Co. v. Railroad Comm.*, 54 Colo. 54. The State may compel the performance of that duty even though it results in a financial loss to the carrier, unless all of its charter rights and privileges are surrendered. Cases cited, *supra*, and *Brooks-Scanlon & Co. v. Railroad Comm.*, 251 U. S. 396; *Railroad Comm. of Texas v. Eastern Texas R. R. Co.*, 264 U. S. 79; *Ft. Smith Lt. & Tr. Co. v. Bourland*, 267 U. S. 330. Where the State has ordered the carrier to provide a certain service, the question of financial loss is an important circumstance in determining the reasonableness of the order; but in advance of such an order the question of financial loss is not involved.

Neither the Interstate Commerce Act nor Transportation Act, 1920, takes from the State the right to regulate

and control its intrastate commerce; and to the extent that they or either of them may attempt to do so they are unconstitutional. *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Railroad Comm. of Texas v. Eastern Texas R. R. Co.*, 264 U. S. 79; *Ft. Smith Lt. & Trac. Co. v. Bourland*, 267 U. S. 330. The Interstate Commerce Commission is without power to authorize the abandonment, as respects intrastate business, of a line of railroad wholly within a State, which is owned and operated by a corporation of that State; and at the same time permit the company to retain and enjoy its charter rights and privileges.

This is not a case of discrimination against interstate and foreign commerce, nor of the construction of any new plant or facility, nor of rates; and decisions of this court involving these questions do not change the rule announced in the cases above cited. Where it is shown that a railroad company chartered by a State has for seven years enjoyed an average annual net operating income of practically \$2,450,000, and there is no showing or finding as to the value of its properties used and useful in the public service, and no showing that it is not earning and getting a fair return on the present fair value of those properties, an order of the Interstate Commerce Commission authorizing the abandonment, as respects intrastate business, of a portion of one of the company's lines located wholly within that State, is not supported by sufficient evidence or findings, and should be set aside as arbitrary action.

An order of the Interstate Commerce Commission for the total abandonment of a line of railroad wholly within a State, owned and operated by a corporation of that State, made without any evidence concerning, and without giving consideration to, property values, revenues and expenses of the intrastate business of the carrier considered separately from the interstate business, and without a finding concerning such matters, is not supported

by proper evidence or findings and should be set aside. *B. & O. R. R. Co. v. United States*, 264 U. S. 258; *Simpson v. Shepard*, 230 U. S. 352; *St. Louis & S. F. R. R. Co. v. Gill*, 156 U. S. 649; *Cumberland Tel. & Tel. Co. v. Pub. Ser. Comm.*, 283 Fed. 215. Such an order based solely on the past operating results of the particular line when the company was engaged in both interstate and intrastate business and under schedules of operation voluntarily inaugurated and maintained by it, and where there is no showing or finding as to how many trains will be required in the future for the service and accommodation of purely intrastate business nor of the financial results of operating such train or trains, is not supported by sufficient evidence or findings, and should be set aside. An order of the Interstate Commerce Commission based, in part, upon the fact that the railroad corporation offered to lease its line for a nominal rental to those who protested its abandonment, should be set aside as arbitrary and unwarranted.

Messrs. Blackburn Esterline, Assistant to the Solicitor General, and *R. Granville Curry*, with whom *Solicitor General Mitchell* and *Mr. P. J. Farrell* were on the briefs, for the United States and the Interstate Commerce Commission.

The staggering deficits in the operation of the Buena Vista-Romley branch constitute such a drain on an artery of interstate commerce as to call for the issuance of the certificate. *Texas v. Eastern Tex. R. R.*, 258 U. S. 204; *R. R. Comm. v. Eastern Tex. R. R.*, 264 U. S. 79. In *Texas v. Eastern Tex. R. R.*, *supra*, this Court said of the Eastern Texas Railroad, (thus clearly distinguishing it from the case at bar,): "It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of inter-

state and foreign commerce." These words precisely describe the situation in the present case and the Commission acted accordingly.

The fact that commerce both interstate and intrastate may move over the branch does not invalidate the certificate. *United States v. Village of Hubbard*, 266 U. S. 474; *Railroad Commission of Wisconsin v. C. B. & Q. R. R.*, 257 U. S. 563; *New York v. United States*, 257 U. S. 591; *Shreveport Case*, 234 U. S. 342; *American Express Co. v. Caldwell*, 244 U. S. 617; *United States v. Tennessee*, 262 U. S. 318.

The contract claimed between the State and Colorado & Southern may not prevail against the paramount power of Congress through the Commission to regulate interstate and foreign commerce. *State of New York v. United States*, 257 U. S. 591; *United States v. Village of Hubbard*, 266 U. S. 474.

Mr. Bruce Scott, with whom *Messrs. Kenneth F. Burgess, J. Q. Dier, and J. H. Barwise, Jr.* were on the brief, for The Colorado & Southern Railway Company.

Appellee railway company contends that the certificate and order of the Interstate Commerce Commission authorizing this abandonment were clearly within its statutory authority, Interstate Commerce Act, § 1, par. 18-20, 41 Stat. 477; that this statutory authority to the Commission authorizing abandonment was part of a comprehensive scheme of railroad regulation wherein Congress sought to provide an adequate system of interstate transportation, *R. R. Comm. of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456; *R. R. Comm. of Calif. v. Southern Pacific*, 264 U. S. 331; *D. & M. Ry. Co. v. Boyne City G. & A. R. Co.*, 286 Fed. 540; that the constitutionality of the Transportation Act, 1920, has been repeatedly upheld

by this Court, *R. R. Comm. of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563; *New York v. United States*, 257 U. S. 591; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Texas v. Interstate Commerce Comm.*, 258 U. S. 158; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456; *R. R. Comm. of Calif. v. Southern Pacific*, 264 U. S. 331; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274; that the courts will not review determinations of the Interstate Commerce Commission made within the scope of its power, or substitute their judgment for its findings, *United States v. New River Co.*, 265 U. S. 533; *Illinois Central v. Int. Comm. Comm.*, 215 U. S. 452; *Interstate Commerce Comm. v. Union Pacific Co.*, 222 U. S. 541; *Kansas City Sou. Ry. Co. v. United States*, 231 U. S. 423; *United States v. L. & N. Ry. Co.*, 235 U. S. 314; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57; *New England Divisions Case*, 261 U. S. 184; that the final order of the Interstate Commerce Commission was entered after full hearing and argument, rehearing and reargument, upon consideration of the evidence of record, 72 I. C. C. 315; 82 I. C. C. 310; 86 I. C. C. 393; that the Commission made an administrative finding of the existence of an undue burden upon interstate commerce through the operation of this branch, which finding was based upon substantial evidence, 86 I. C. C. 393; that similar burdens have been frequently enjoined by the courts both prior and subsequent to the Transportation Act of 1920, as undue interference with interstate commerce, *C. B. & Q. R. R. Co. v. R. R. Comm. of Wis.*, 237 U. S. 220; *Mississippi R. R. Comm. v. Illinois Cent. R. R. Co.*, 203 U. S. 335; *Atlantic Coast Line v. Wharton*, 207 U. S. 328; *Herndon v. C. R. I. & P. Ry. Co.*, 218 U. S. 135; *Roach v. A. T. & S. F. Ry. Co.*, 218 U. S. 159; *Davis, Director Gen. v. Farmers Cooperative Co.*, 262 U. S. 312; *A. T. & S. F. Ry. Co. v. Wells*, 265 U. S. 101.

The facts in this case differentiate it from the *Eastern Texas Case*, 258 U. S. 204, appellee being an artery of interstate commerce in several States, the utility of which would be burdened by operation of this branch line. The other points relied upon by appellant have already been ruled upon by this Court adversely to appellant's contention; (a) contract or charter obligation of a carrier yields to the power of Congress to regulate interstate commerce and to administrative orders of the Interstate Commerce Commission entered thereunder, *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467; *New York v. United States*, 257 U. S. 591; *P. B. & W. R. R. Co. v. Schubert*, 224 U. S. 603; (b) no duty rested on the Interstate Commerce Commission under the law to separate property values and revenue and expenses as between intrastate and interstate operations.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought by Colorado against the United States, in the federal court for that State, to enjoin and set aside, in part, an order of the Interstate Commerce Commission issued February 11, 1924. The order is a certificate that present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company, six months thereafter, of a branch line located wholly in that State. The certificate was issued under Interstate Commerce Act, § 1, pars. 18-20, as amended by Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477.

The Company is a Colorado corporation. It owns and operates in intrastate and interstate commerce a railroad system located partly in Colorado and partly in other States. The branch was constructed under the authority of Colorado and was acquired by the Company under its authority. The line is narrow gauge. It is now physi-

cally detached from other lines of the Company; but it is operated in both intrastate and interstate commerce as a part of the system by means of connections with other railroads. The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation; that for years operation of the branch had resulted in large deficits; that future operation would likewise result in large deficits; that the operating results of the branch are reflected in the Company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus continued operation would constitute an undue burden upon interstate commerce. *Abandonment of Branch Line by Colorado & Southern Ry.*, 72 I. C. C. 315; 82 I. C. C. 310; 86 I. C. C. 393.

The application for the certificate was filed September 1, 1921. Before any hearing thereon, the State moved that the proceeding be dismissed on the ground, among others, that, as the branch was wholly intrastate, the Commission was without jurisdiction of the application. This objection was overruled. Thereafter, the State opposed, on the merits, the granting of the certificate. The case was first heard before Division 4 of the Commission on exceptions filed by the Company to the examiner's proposed report. On July 28, 1922, the application was denied, with leave to renew it "if the improvement in operating results, confidently anticipated by protestants, should not materialize." 72 I. C. C. 315. On May 19, 1923, the Company filed a petition praying that the case be reopened and set for further hearing. Division 4 heard it. On September 24, 1923, an order was entered that the certificate issue. 82 I. C. C. 310. A hearing before the full Commission was then sought by the State and the other protestants. Compare *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 281. The

request was granted. On February 11, 1924, the order was affirmed with the modification that the certificate should not take effect until six months from that date. 86 I. C. C. 393. The effective date of the certificate was later extended to September 11, 1924; and finally to October 11, 1924. 94 I. C. C. 657, 661.

Meanwhile, this suit had been begun. The Commission and the Company intervened as defendants. On August 19, 1924, a decree dismissing the bill on the merits was entered, upon final hearing, without opinion. A motion for a suspension of the order of the Commission pending an appeal was denied. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220. The order is assailed as void insofar as it authorizes abandonment and discontinuance of operation in intrastate traffic. The remedy pursued is the appropriate one. See *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204.

First. The main contention of the State is that the Commission lacks power to authorize the Company to abandon, as respects intrastate traffic, a part of its line lying wholly within the State. The argument is this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a State to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may, therefore, without such consent, abandon all lines within the State. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396; *Bullock v. Florida*, 254 U. S. 513, 520; *Railroad Commission v. Eastern Texas R. R. Co.*, 264 U. S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the State; *Chesapeake & Ohio Ry. Co. v. Public Service Commission*, 242 U. S. 603; *Fort Smith Light & Traction Co. v. Bourland*, 267 U. S. 330. The

charter of the Colorado & Southern is a contract with the State. By accepting the charter, the Company assumed the obligation of providing intrastate service on every part of its line within the State, *Colorado & Southern Ry. v. Railroad Commission*, 54 Colo., 64, 92-3. The extent and character of this service is subject to regulation by the State. The inherent power of a State to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an important circumstance bearing upon the reasonableness of the State's order requiring the service. In the case at bar no question of the reasonableness of the State's action can arise, because the State has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the State its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the State from its primary obligation to furnish service. If par. 18 of § 1 should be construed as authorizing the Commission to do so without the consent of the State, the provision would be unconstitutional. Compare *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 217. Such is the argument.

The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an ob-

struction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry. v. Tennessee*, 262 U. S. 318; or when the

state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co. v. United States*, 222 U. S. 20; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of "spur, industrial, team, switching or side tracks located . . . wholly within one State." See *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, *supra*. But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate com-

merce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by § 20a over the issuance of securities. Compare *Venner v. Michigan Central R. R. Co.*, ante, p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194. And upon it rests likewise the power exerted by this Court in setting aside the state regulations involved in *Union Pacific R. R. Co. v. Public Service Commission*, 248 U. S. 67, and *St. Louis & San Francisco Ry. Co. v. Public Service Commission*, 254 U. S. 535. See also *United States v. Ferger*, 250 U. S. 199; *Stafford v. Wallace*, 258 U. S. 495; *Chicago Board of Trade v. Olsen*, 262 U. S. 1.

The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R. R. Co.*, 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States*, 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate

commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

Second. The State contends further that the order is void, so far as it relates to intrastate traffic, because essential findings were not made and, also, because essential findings made were not supported by evidence. *The Chicago Junction Case*, 264 U. S. 258. The findings alleged to be essential and lacking are that by continued operation of the branch interstate or foreign commerce will be discriminated against, or that the Company will be prevented from earning a fair return on the value of its properties as a whole, or that the entire intrastate business in Colorado will not earn such a return upon the property used in conducting that business. The other objections urged are that the evidence of past operating deficits on the branch, which include both interstate and intrastate traffic, does not support the finding that operation in intrastate traffic alone will result in like deficits; and that the decision of the Commission was improperly influenced by an offer to lease the line to the protestants at a nominal rental. All the evidence before the Commission was introduced below and is, in substance, incorporated in the record on appeal. Both classes of objections must, therefore, be considered. *New England Divisions Case*, 261 U. S. 184, 203.

Before examining the specific objections, the nature of the determination to be made by the Commission upon an application for leave to abandon should be further con-

sidered. As every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, the consent of the Commission must be obtained by the railroad in every case. To ensure due consideration of the local interests, Congress provided that a copy of every application must be promptly filed with the Governor of the State directly affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities should have "the right to make before the Commission such representations as they may deem just and proper for preserving the rights and interests of their people and the States, respectively, involved in such proceedings." In practice, representatives of state regulatory bodies sit, sometimes, with the representatives of the Commission at hearings upon the application for a certificate. Occasionally, the Commission leaves the preliminary enquiry to the state body. And always consideration is given by the Commission to the representations of the state authorities.¹

While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against

¹ From the enactment of Transportation Act, 1920, to February 18, 1926, the number of applications for abandonment acted on was 191. Of these, 9 were dismissed by the Commission for want of jurisdiction; 11 were denied; 170 were granted. Of these 170, only 6 were granted contrary to the recommendation of the state authorities. Of the 47 cases in which state authorities made specific recommendations, the Commission acted in 38 in accordance therewith. In 2 cases in which the State recommended postponement, the Commission denied the application. In one, in which the State recommended denial of the application, the Commission postponed decision pending the result of operation during a test period.

interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, 587, 589; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 485; *United States v. Village of Hubbard*, 266 U. S. 474. The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare *Proposed Abandonment by Boston & Maine R. R.*, 105 I. C. C. 13, 16. The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate.

It is rare that the application for leave to abandon actually involves a conflict between the needs of interstate and of intrastate commerce. In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation.² In some cases, although the vol-

² See e. g., *Abandonment, etc., by Southern Pacific Co.*, 72 I. C. C. 404.

ume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.³ The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect.

An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was ample evidence to support the facts found, and that the judgment of the Commission was not improperly influenced by the offer to lease the line to the protestants at a nominal rental. The case at bar is unlike *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204. There, the railroad was permitted to be relieved only from continuing operations in interstate commerce. It was being operated independently, and not as a branch of any railroad engaged in interstate commerce.

³ Compare *Application of Green Bay & Western R. R. Co.*, 70 I. C. C. 251; *Abandonment of White-Cloud Big Rapids Branch, etc.*, 72 I. C. C. 303; *Proposed Abandonment of Lincoln Branch, etc.*, 94 I. C. C. 624, with *Abandonment, etc., Oregon Trunk Ry.*, 72 I. C. C. 679; *Abandonment of Branch Line by Pere Marquette Ry.*, 90 I. C. C. 100; *Abandonment, etc., by Central New England Ry. Co.*, 94 I. C. C. 405; *Abandonment, etc., by Coudersport & Port Albany R. R. Co.*, 99 I. C. C. 310; *Abandonment, etc., by Chicago & Northwestern Ry. Co.*, 105 I. C. C. 273.

Losses incurred in its operation would not be reflected in the accounts of any interstate carrier; and no interstate carrier would have had to make good deficits so incurred. Its continued operation could not burden or prejudice interstate commerce, for the Commission in issuing its certificate had adjudged that public necessity and convenience did not demand the continuance of its interstate services.

Affirmed.

BOWERS, COLLECTOR, *v.* KERBAUGH-EMPIRE
COMPANY.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

No. 173. Argued January 25, 1926.—Decided May 3, 1926.

Plaintiff borrowed money from a bank in Germany before the War, repayable in marks or their equivalent in gold coin of the United States, lost the borrowed money in business, and repaid the loan to the Alien Property Custodian in 1921, when marks had greatly depreciated, the amount of the depreciation, however, being less than the losses sustained on the entire transaction. *Held* that the difference, resulting from the depreciation, between the amount borrowed and the amount repaid, in American money, was not taxable as "income." P. 173.

300 Fed. 938, affirmed.

ERROR to a judgment of the District Court recovered by the Company from the Collector in an action for money paid under protest as income tax.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Messrs. Sewall Key, A. W. Gregg*, and *F. W. Dewart* were on the brief, for plaintiff in error.

The cash gain realized by plaintiff as the result of borrowing foreign money and discharging its debt at a rate of exchange lower than that at which the loan was made

is taxable income to it for the year in which the debt was paid. *Stratton's Independence v. Howbert*, 231 U. S. 399; *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179; *Hays v. Gauley Mt. Coal Co.*, 247 U. S. 189; *Eisner v. Macomber*, 252 U. S. 189; *Carbon Steel Co. v. Lewellyn*, 251 U. S. 501.

The fact that defendant in error was not a dealer in foreign exchange, or that the transaction was not entered into by it with any idea of gain, is immaterial. This Court has definitely decided that increase in capital assets resulting from isolated or casual transactions outside a taxpayer's ordinary business operations is constitutionally taxable. *Merchants L. & T. Co. v. Smietanka*, 255 U. S. 509; *Eldorado Coal Co. v. Mager*, 255 U. S. 522; *Goodrich v. Edwards*, 255 U. S. 527; *Walsh v. Brewster*, 255 U. S. 536; *Baldwin Locomotive Wks. v. McCoach*, 221 Fed. 59.

The reality of the transaction is that defendant in error sold its promise to pay a certain number of marks for \$764,867.30, and later bought this promise back for \$80,411.12. *People ex rel. Keim v. Wendell*, 193 N. Y. Supp. 143; *Great Northern Ry. v. Lynch*, 202 Fed. 903. The case of *United States v. Oregon-Washington R. R. & Nav. Co.*, 251 Fed. 211, is not in point.

Mr. Franklin Nevius, with whom *Messrs. Harvey D. Jacob* and *Asa B. Kellogg* were on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Defendant in error, a New York corporation, sued to recover \$5,198.77 paid under protest on account of income taxes for 1921. Revenue Act of 1921, c. 136, 42 Stat. 227, 252, *et seq.*

It owned all the capital stock of H. S. Kerbaugh, Incorporated, engaged in the performance of large construction contracts, and applied to the Deutsche Bank of Germany,

through its New York representative, for loans to finance the work being done by its subsidiary. The bank agreed that it would make the loans by cabling to the credit of its New York representative German marks equivalent in dollars to the requirements of defendant in error, upon condition that the loans would be evidenced by notes payable as to principal and interest in marks or their equivalent in United States gold coin at prime bankers' rate in New York for cable transfers to Berlin. June 8, 1911, defendant in error advised the New York representative of the amount in dollars then needed; he notified his principal and it put to his credit in a New York bank marks equivalent to the amount of money of the United States applied for. Then he drew his check payable in dollars against the credit and gave it to defendant in error, and in exchange received the promissory note of the latter payable in marks or their equivalent in gold coin of the United States. Prior to July 2, 1913, twenty-four loans were made in this manner amounting in all to \$1,983,000. The equivalent in marks was 8,341,337.50. September 1, 1913, there remained unpaid 6,740,800 marks. The notes of defendant in error then outstanding were surrendered and its new note for that amount was given. And when that note became due it was renewed. Partial payments were made and, by March 31, 1915, the principal was reduced to 3,216,445 marks.

The several amounts from time to time borrowed by defendant in error were contemporaneously advanced to its subsidiary and were expended and lost in and about the performance of the construction contracts. These losses were sustained in 1913, 1914, 1916, 1917 and 1918, and were allowed as deductions in the subsidiary's income tax returns for those years. The excess of its losses over income was more than the amount here claimed by plaintiff in error to be income of defendant in error in 1921.

After the United States entered the War the Deutsche Bank was an alien enemy. In 1921, on the demand of the Alien Property Custodian, defendant in error paid him \$113,688.23 in full settlement of principal and interest owing on the note belonging to the bank. Of that amount \$80,411.12 represented principal. The settlement was on the basis of two and one-half cents per mark. Measured by United States gold coin the difference between the value of the marks borrowed at the time the loans were made and the amount paid to the Custodian was \$684,456.18. The Commissioner of Internal Revenue, notwithstanding the claim of defendant in error that the amount borrowed had been lost in construction operations carried on by it and its subsidiary and that no income resulted from the transaction, held the amount to be income and chargeable to defendant in error for 1921. Excluding that item the tax return for 1921 shows a deficit of \$581,254.77.

The defendant in error by its complaint set forth the facts above stated and asserted—as it still insists—that the diminution in value of the marks was not income within the meaning of the Sixteenth Amendment; that the item in controversy is not within the Revenue Act, and that, if construed to include it, the Act would be unconstitutional. Plaintiff in error moved to dismiss on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The court denied the motion and gave judgment for defendant in error. This writ of error was taken under § 238, Judicial Code, before the amendment of February 13, 1925, c. 229, 43 Stat. 936, 938.

The question for decision is whether the difference between the value of marks measured by dollars at the time of payment to the Custodian and the value when the loans were made was income.

The Sixteenth Amendment declares that Congress shall have power to levy and collect taxes on income, "from

whatever source derived" without apportionment among the several States, and without regard to any census or enumeration. It was not the purpose or effect of that Amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes. But taxes on incomes from some sources had been held to be "direct taxes" within the meaning of the constitutional requirement as to apportionment. Art. I, § 2, cl. 3, § 9, cl. 4; *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601. The Amendment relieved from that requirement and obliterated the distinction in that respect between taxes on income that are direct taxes and those that are not, and so put on the same basis all incomes "from whatever source derived." *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 17. "Income" has been taken to mean the same thing as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the various revenue acts subsequently passed. *Southern Pacific Co. v. Lowe*, 247 U. S. 330, 335; *Merchants L. & T. Co. v. Smietanka*, 255 U. S. 509, 519. After full consideration, this Court declared that income may be defined as gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. *Stratton's Independence v. Howbert*, 231 U. S. 399, 415; *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 185; *Eisner v. Macomber*, 252 U. S. 189, 207. And that definition has been adhered to and applied repeatedly. See e. g. *Merchants L. & T. Co. v. Smietanka*, *supra*, 518; *Goodrich v. Edwards*, 255 U. S. 527, 535; *United States v. Phellis*, 257 U. S. 156, 169; *Miles v. Safe Deposit Co.*, 259 U. S. 247, 252-253; *United States v. Supplee-Biddle Co.*, 265 U. S. 189, 194; *Irwin v. Gavit*, 268 U. S. 161, 167; *Edwards v. Cuba Railroad*, 268 U. S. 628, 633. In determining what constitutes income substance rather than form is to be given controlling weight. *Eisner v. Macomber*, *supra*, 206.

The transaction here in question did not result in gain from capital and labor, or from either of them, or in profit gained through the sale or conversion of capital. The essential facts set forth in the complaint are the loans in 1911, 1912, and 1913, the loss in 1913 to 1918 of the moneys borrowed, the excess of such losses over income by more than the item here in controversy, and payment in the equivalent of marks greatly depreciated in value. The result of the whole transaction was a loss.

Plaintiff in error insists that in substance and effect the transaction was a "short sale" of marks resulting in gain to defendant in error. But there is no similarity between what was done and such a venture. A short seller borrows what he sells, and the purchase price goes to the lender and is retained as security for repayment. The seller receives nothing until he repays the loan. Such a transaction would not meet the requirements of defendant in error. It needed the money for use and received the amount borrowed and expended it.

The contention that the item in question is cash gain disregards the fact that the borrowed money was lost, and that the excess of such loss over income was more than the amount borrowed. When the loans were made and notes given, the assets and liabilities of defendant in error were increased alike. The loss of the money borrowed wiped out the increase of assets, but the liability remained. The assets were further diminished by payment of the debt. The loss was less than it would have been if marks had not declined in value; but the mere diminution of loss is not gain, profit or income.

Judgment affirmed.

MR. JUSTICE BRANDEIS concurs in the result.

TAYLOR, TRUSTEE, ET AL. *v.* VOSS, TRUSTEE.

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

No. 199. Argued March 8, 9, 1926.—Decided May 3, 1926.

1. The "controversies arising in bankruptcy proceedings" referred to in § 24a of the Bankruptcy Act, include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate. P. 180.
2. In such "controversies" the decrees of the court of bankruptcy may be reviewed by appeals which bring up the whole matter and open both the facts and the law for consideration. P. 181.
3. The "proceedings" in bankruptcy referred to in § 24b are those matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate. In such administrative matters—as to which the courts of bankruptcy proceed in a summary way in the final settlement and distribution of the estate—their orders and decrees may be reviewed by petitions for revision which bring up questions of law only. P. 181.
4. The essential distinction between the different methods provided for reviewing the orders and decrees of the courts of bankruptcy is, that "controversies" in bankruptcy proceedings, arising between the trustee representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, affecting the extent of the estate to be distributed, may be reviewed both as to fact and law; while "proceedings" in bankruptcy affecting merely the administration and distribution of the estate, may be reviewed in matter of law only, except as to the three classes of such "proceedings" enumerated in § 25a, as to which a short right of appeal is given, both as to fact and law. P. 181.
5. Although a petition for revision cannot be treated as an appeal for the purpose of enlarging the scope of the review so as to extend to questions of fact, where a matter which is only reviewable in law is taken up by an appeal, the Circuit Court of Appeals, if the question of law is sufficiently presented on the record, may treat

the appeal as a petition for revision and dispose of it accordingly. P. 182.

6. A petition filed by the trustee, in the bankruptcy proceeding, to determine an adverse claim to an interest in the bankrupt's real estate, based on the statutory rights of his wife, is a "controversy" which may be reviewed by appeal under § 24a of the Bankruptcy Act. P. 182.
 7. Section 4 of the Jurisdictional Act of 1916, providing that no appellate court "shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out," can not be extended by implication to the special provisions of the Bankruptcy Act as to appeals and petitions for revision. P. 182.
 8. In a "controversy" in a bankruptcy proceeding, when the facts are undisputed or no longer in question, it is not necessary to resort to an appeal under § 24a, but the controlling questions of law may also be reviewed by a petition for revision under § 24b, whether they relate merely to the jurisdiction of the bankruptcy court or to the merits of the controversy. P. 182.
 9. Such a review by petition for revision, is a concurrent remedy merely, and cannot, irrespective of any other limitation, be deemed an additional remedy which may be resorted to after the time for an appeal has expired. P. 187.
 10. The right of inheritance, free from demands of creditors, granted by Indiana Rev. Stats. (1881), §§ 2483, 2491, to a widow upon the death of her husband, remains contingent during his life and can not be held to mature at his bankruptcy upon the theory that the adjudication brings about his "civil death." P. 187.
 11. The adjudication of a husband as a bankrupt, followed by appointment of a trustee in bankruptcy, operates as a "judicial sale" of his real estate within the meaning of the Indiana Judicial Sales Act, (Rev. Stats. 1887, §§ 2508, 2509,) in virtue of which the wife's inchoate interest in his real estate (not exceeding \$20,000) thereupon becomes absolute and free from the demands of creditors as, and to the extent, provided by §§ 2483-2491 in case of his death. P. 188.
- 1 Fed. (2d) 149, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed, on a petition to revise, an order of the District Court sustaining the claim of Taylor, as testamentary trustee of a bankrupt's deceased wife, to an

interest in her husband's real estate. The controversy was initiated by a petition filed in the bankruptcy proceedings by the trustee in bankruptcy, Voss.

Mr. Daniel H. Ortmeier, with whom *Mr. Harold Taylor* was on the brief, for petitioners.

Mr. Henry B. Walker, with whom *Mr. James T. Walker* was on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

In December, 1921, Wilbur Erskine, a married man, residing and owning real estate in Indiana, was adjudged a bankrupt on his voluntary petition in the federal District Court for that State. In February, 1922, the respondent Voss was appointed the trustee in bankruptcy. In March, before any sale of the real estate, the bankrupt's wife, Mary E. Erskine, died testate, leaving by her will her entire property to the petitioner Taylor, as testamentary trustee. In May, the trustee in bankruptcy filed a petition in the bankruptcy proceeding, alleging that the testamentary trustee claimed an interest in the real estate of the bankrupt, and praying that he be required to set up this claim, and that such interest be fixed by the court and the right to sell the real estate free from such claim be declared. The testamentary trustee answered, alleging that upon the adjudication in bankruptcy Mrs. Erskine had become absolutely vested under the state laws and the Bankruptcy Act, with a wife's interest in the real estate of her husband, to which she was entitled at the time of her death; and also praying that the court fix this interest. Pending a hearing as to this claim, the real estate was sold by the trustee in bankruptcy, by consent, for \$36,870; under an agreement that not less than one-fifth of the proceeds should be held by

him to protect whatever rights the testamentary trustee might have in the real estate, and that, if the final decision should be in favor of the latter, the trustee in bankruptcy should pay over to him the amount found to be due on account of his interest in the real estate. Thereafter, the question as to the disposition of the proceeds of sale was submitted to the referee under the foregoing agreement and a stipulation as to the facts, as they have been set out. Upon this hearing the referee held that the testamentary trustee was entitled to receive one-fifth of the proceeds of sale, amounting to \$7,374, and directed that this sum be paid to him by the trustee in bankruptcy. This order was confirmed by the District Judge. Within two months thereafter the trustee in bankruptcy filed a petition in the Circuit Court of Appeals for a revision of this order in matter of law, under § 24b of the Bankruptcy Act.¹ The testamentary trustee moved to dismiss this petition on the ground that it presented a controversy arising in the bankruptcy proceeding which could be reviewed only by an appeal under § 24a of the Act. The Court of Appeals denied this motion, on the ground that, while the petition presented such a controversy the matter might nevertheless be considered as though it had been brought up by appeal, in accordance with the provisions of § 4 of the Jurisdictional Act of 1916.² And, thus considering the matter, the court held, that upon the death of Mrs. Erskine before the real estate had been sold, all her right therein had been extinguished, and no interest had passed to the testamentary trustee; and accordingly reversed the order of the District Court. 1 F. (2d) 149. This writ of certiorari was then granted. 267 U. S. 588.

The contentions of the testamentary trustee are: (1) That the Circuit Court of Appeals had no jurisdiction to

¹ 30 Stat. 544, c. 541.

² 39 Stat. 726, c. 448.

review the order of the District Court under the petition for revision; and (2) that, even if such jurisdiction existed, the decree reversing that order was erroneous as a matter of law.

1. The first of these contentions requires a consideration of the provisions of the Bankruptcy Act dealing with the review of proceedings in courts of bankruptcy in the exercise of the appellate and supervisory jurisdiction of the Circuit Courts of Appeals.

By § 24a of the Act the Circuit Courts of Appeals are "invested with appellate jurisdiction of controversies arising in bankruptcy proceeding from the courts of bankruptcy." By § 24b they are given jurisdiction "to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy . . . on due notice and petition by any party aggrieved." And by § 25a it is provided that appeals "in bankruptcy proceedings" may be taken to them, within ten days, from judgments as to adjudications of bankruptcy, discharges, and claims of five hundred dollars or over.

These provisions—which are to be read in the light of the provision in § 23a, giving the District Courts, as the successors of the Circuit Courts, general jurisdiction in plenary actions of "controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees,"—have given rise to much conflict of opinion in the various Circuit Courts of Appeals in respect of the distinction between "controversies arising in bankruptcy proceedings" and mere "proceedings" in bankruptcy, and the procedure by which they may be brought up for review.

It is now settled by the decisions of this Court, that the "controversies arising in bankruptcy proceedings" referred to in § 24a, include those matters arising in the course of a bankruptcy proceeding, which are not mere

steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300; *Coder v. Arts*, 213 U. S. 223, 234; *Tefft & Co. v. Munsuri*, 222 U. S. 114, 118; *Swift & Co. v. Hoover*, 242 U. S. 107, 109. In such "controversies" the decrees of the court of bankruptcy may be reviewed by appeals which bring up the whole matter and open both the facts and the law for consideration. *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 302; *Houghton v. Burden*, 228 U. S. 161, 165.

On the other hand, the "proceedings" in bankruptcy referred to in § 24b are those matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate. *Matter of Loving*, 224 U. S. 183, 189. In such administrative matters—as to which the courts of bankruptcy proceed in a summary way in the final settlement and distribution of the estate, *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 218³—their orders and decrees may be reviewed by petitions for revision which bring up questions of law only. *Duryea Power Co. v. Sternbergh*, *supra*, 302.

It thus appears that the essential distinction between the different methods provided for reviewing the orders and decrees of the courts of bankruptcy is, that "controversies" in bankruptcy proceedings, arising between the trustee representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, affecting the extent of the estate to be distributed, may be reviewed both as to fact and law; while "proceedings" in bankruptcy affecting merely the administration and distribution of the estate, may be reviewed in matter of law only,

³ Many of these administrative matters are enumerated at p. 207.

except as to the three classes of such "proceedings" enumerated in § 25a, as to which a short right of appeal is given, both as to fact and law. Furthermore, apart from the scope of the review permitted by the Act, the distinction between an appeal and a petition for revision in the mere matter of form, is immaterial. Thus, although a petition for revision cannot be treated as an appeal for the purpose of enlarging the scope of the review so as to extend to questions of fact, *Duryea Power Co. v. Sternbergh*, *supra*, 302, where a matter which is only reviewable in law is taken up by an appeal, the Circuit Court of Appeals, if the question of law is sufficiently presented on the record, may treat the appeal as a petition for revision and dispose of it accordingly. *Bryan v. Bernheimer*, 181 U. S. 188, 193; *Holden v. Stratton*, 191 U. S. 115, 118, 119; *Duryea Power Co. v. Sternbergh*, *supra*, 301.

Coming then to the procedural question involved in the present case, it is clear, in the first place, that, as was held by the Circuit Court of Appeals, the matter presented is a "controversy" between the trustee in bankruptcy and the testamentary trustee, as an adverse claimant, in respect to the title to the bankrupt's estate, which might have been reviewed by an appeal under § 24a of the Bankruptcy Act. *Hewit v. Berlin Machine Works*, *supra*, 300; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 553; *Houghton v. Burden*, *supra*, 165; *Greay v. Dockendorff*, 231 U. S. 513, 514; *Globe Bank v. Martin*, 236 U. S. 288, 296; *Bailey v. Baker Machinery Co.*, 239 U. S. 268, 270; *Moody v. Century Bank*, 239 U. S. 374, 377; *Benedict v. Ratner*, 268 U. S. 353, 358. And if, under the provisions of the Bankruptcy Act, an appeal was the only method by which this "controversy" could be reviewed, we think it is clear that there was no warrant for treating the petition for revision as bringing the matter up on appeal, under the provision of § 4 of the Jurisdictional Act of

1916, that no appellate court "shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out." This remedial provision, as plainly appears from the language used and the entire context, was intended to apply only to the general distinction between appeals and writs of error, obtaining from the foundation of our judicial system and cannot be extended by implication to the special provisions of the Bankruptcy Act as to appeals and petitions for revision, to which no reference whatever was made.

On the question whether the method of reviewing a "controversy" in bankruptcy provided by § 24a of the Bankruptcy Act, is necessarily exclusive of that provided by § 24b, that is, whether a controversy which may be reviewed both as to fact and law by an appeal under § 24a, may also, when the facts are undisputed, be reviewed in matter of law by a petition for revision under § 24b, there has been an irreconcilable conflict of decisions in the various Circuit Courts of Appeals. This had led to much confusion and to the determination of many cases upon the procedural question merely, without reference to the merits. See cases collected in 8 Remington on Bankruptcy, 3d ed., §§ 3704, 3706, 3734.⁴

⁴ It was said in *Re Holmes* (C. C. A.), 142 Fed. 391, 392, that the question whether the appellate and revisory jurisdiction of the courts of appeals are exclusive of each other "has resulted in such contrariety of decision relative to the proper method of review of specific orders and such confusion and uncertainty in the practice that it has become necessary for lawyers in many instances to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged. . . . Moreover, . . . a large share of the time and labor of the judges of the courts of appeals, and of the lawyers who assist them, and no insignificant portion of the means of the litigants, all of which are imperatively demanded for the decision of the merits of the questions the parties

This precise question, in the broad form in which it is now presented, has not been specifically decided by this Court. It is true that in *Matter of Loving, supra*, 188, there was general language, incidentally used, which if taken broadly, indicates that "controversies" which are appealable under § 24a cannot be reviewed by petitions for revision under § 24b. But, according to a familiar rule, this language should be regarded as limited by the circumstances in which it was used. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Bailey v. Baker Ice Machine Co., supra*, 272. The case did not present a "controversy" appealable under § 24a, but, as was explicitly stated, a "proceeding" in bankruptcy relating to a proof of claim filed by a creditor, with the incidental assertion of a statutory lien, as to which a special appeal was granted by § 25a, to be taken with ten days. The trustee contested both the amount of the claim and the existence of the lien. The bankruptcy court allowed the claim for its full amount as a lien against the bankrupt estate. Thereupon, more than ten days thereafter, the trustee filed a petition for a revision of this order, abandoning his contest as to the amount of the claim, and insisting merely that there was error in matter of law in allowing the lien as security. On a certificate from the Circuit Court of Appeals, presenting the single question whether, under these circumstances, the order of the bankruptcy court could be reviewed upon a petition for revision, it was held that § 24b "was not intended to give an additional remedy to those whose rights could be protected by an appeal under § 25 of the Act." And, since no question as to the effect of § 24a was presented by the certificate

seek to present, or of still more important issues of law, are consumed in the litigation, determination, and preparation of opinions concerning the question whether an order or proceeding in bankruptcy which is clearly reviewable must be reviewed by appeal or by petition for revision."

or involved in the decision, it is clear that its effect must be limited, as a controlling authority, to the holding that when the ten days had expired within which the special appeal might have been taken under § 25a, bringing up both the facts and the law, the trustee could not thereafter, by abandoning his contention of fact, obtain by a petition for revision a review of the question of law which he might have obtained by an appeal taken within the prescribed time, and thereby extend, as to the question of law, the time within which he was entitled to obtain a review of the order.

On the other hand, in *Hewit v. Berlin Machine Works*, *supra*, 299, presenting a "controversy" in a bankruptcy proceeding in which the facts were not disputed that had been reviewed by an appeal under § 24a, it was distinctly recognized that a review might also have been had in matter of law by a petition for revision under § 24b. And it is well settled by other decisions of this Court that a "controversy" in bankruptcy proceedings may be reviewed by a petition for revision as to some matters of law, at least. Thus, where a trustee has instituted a summary proceeding in a bankruptcy court for the recovery of property in the possession of a third person asserting a claim adverse to the bankrupt estate, a petition for revision will lie to bring up for review the question of law whether the court of bankruptcy has jurisdiction to adjudicate the merits of such controversy in a summary proceeding. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 25; *Schweer v. Brown*, 195 U. S. 171, 172; *Galbraith v. Valley*, 256 U. S. 46, 48; *Taubel Co. v. Fox*, 264 U. S. 426, 429. An analogous rule was also applied in *Weidhorn v. Levy*, 253 U. S. 268, 270. There the trustee had filed in the bankruptcy suit a bill in equity against an adverse claimant, thereby instituting a "controversy" in the bankruptcy proceeding. The referee, over an objection to his jurisdiction, had entertained the bill and en-

tered a final decree in favor of the trustee. The District Judge, considering the jurisdictional question alone, dismissed the bill upon the ground that the referee had exceeded his powers. This question was taken to the Circuit Court of Appeals by a petition for revision, and, while this Court said that, if the District Court had sustained the jurisdiction and passed upon the merits, the decree could only have been reviewed by an appeal—evidently referring to a review both of fact and law—it was held that “since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under § 24b.” And, subsequently, it was tacitly assumed by this Court, in two decisions, without question, that where trustees had instituted summary proceedings in the bankruptcy courts involving controversies with third persons asserting adverse claims to the property of the bankrupts, the Circuit Courts of Appeals had jurisdiction under petitions for revision to determine all the questions of law presented on the undisputed facts, both as to the summary jurisdiction of the bankruptcy courts and the merits of the controversies; and this Court based its judgments upon a review of the questions of law thus presented, both as to the existence of summary jurisdiction and the merits. *Chicago Board of Trade v. Johnson*, 264 U. S. 1, 6; *May v. Henderson*, 268 U. S. 111, 112.

In the light of these decisions,—bearing in mind that the only distinction in matter of substance between an appeal and a petition for revision is that the one brings up for review questions both of fact and law, and the other, those of law merely, and finding nothing in the letter of the Act which necessarily makes the comprehensive remedy of an appeal as to both fact and law, exclusive of the narrower remedy of a petition for revision in matter

of law,—we conclude that, in a “controversy” arising in a bankruptcy proceeding, it is not essential to a review, when the facts are undisputed or no longer questioned, that resort should be had to an appeal under § 24a; but that in such case the controlling questions of law may also be reviewed by a petition for revision under § 24b, whether they relate merely to the jurisdiction of the bankruptcy court or to the merits of the controversy. Such a review, however, by petition for revision, is a concurrent remedy merely, and in conformity with the decision in the *Loving Case*, cannot, irrespective of any other limitation, be deemed an “additional remedy” which may be resorted to after the time for an appeal has expired. This construction of the Act is, we think, consistent with its letter; accords with its spirit and manifest purpose; and gives it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities.

It results that, as the controversy in the present case was presented in the bankruptcy proceeding by consent of the parties, for determination as a matter of law on stipulated facts, it was properly reviewable by the Circuit Court of Appeals in such matter of law under the petition for revision.

2. This brings us to the questions presented upon the merits, whether Mrs. Erskine at the time of her death was vested with any interest in the real estate of the bankrupt; and if so, the extent of such interest.

The testamentary trustee contends, alternatively, that under the statutes of Indiana she became vested with a one-fifth interest in all the real estate when her husband was adjudged a bankrupt; or, if not, then with a lesser interest when the trustee in bankruptcy was appointed.

The first contention is based upon the Indiana statute of descent, which provides that: "If a husband die . . . leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: *Provided, however,* That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors." Ind. Rev. Stat. (1881), § 2483; also § 2491, to the same effect. This contention lacks any substantial basis. The statute creates no estate in the wife during her husband's lifetime, but merely an inchoate and contingent interest, which depends upon her survivorship and is extinguished if she dies before him. *Thompson v. McCorkle*, 136 Ind. 484, 495, 497; *Fry v. Hare*, 166 Ind. 415, 420. The argument that the adjudication of a husband as a bankrupt brings about his "civil death," so that his wife is to be regarded as a "widow" within the meaning of the statute, vested by virtue of the adjudication with the interest in his real estate which would have descended to her if she had survived him, is inconsistent with the provisions of the Bankruptcy Act, the language of the Indiana statute, and the decisions of the courts of the State; and the contention was rightly denied by the Circuit Court of Appeals.

The alternative contention of the testamentary trustee is based upon the Indiana Judicial Sales Act, which provides that: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, . . . such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband . . . shall become absolute and vested in the purchaser thereof"; but this provision shall not

apply to so much of such real property as exceeds in value twenty thousand dollars. Ind. Rev. Stat. (1881), §§ 2508, 2509.⁵

It is settled by repeated decisions of the Supreme Court of Indiana that under the Bankruptcy Act of 1867⁶ a conveyance made by the judge or register in bankruptcy of the real estate of an adjudged bankrupt to his assignee in bankruptcy, was "a judicial sale" within the meaning of the Indiana statute, and that the inchoate interest of the bankrupt's wife in such real estate thereupon became absolute and vested in her in the same manner as it would have done in case of his death. *Roberts v. Shroyer*, 68 Ind. 64, 67; *Ketchum v. Schicketanz*, 73 Ind. 137, 143; *McCracken v. Kuhn*, 73 Ind. 149, 151; *Haggerty v. Byrne*, 75 Ind. 499, 502; *Lawson v. DeBolt*, 78 Ind. 563, 565; *Leary v. Shaffer*, 79 Ind. 567, 570; *Straughan v. White*, 88 Ind. 242, 246; *Mattill v. Baas*, 89 Ind. 220, 222; *Ragsdale v. Mitchell*, 97 Ind. 458, 460; *Mayer v. Haggerty*, 138 Ind. 628, 634. This rule was also followed by the federal court in Indiana, in *Warford v. Noble* (C. C.), 2 Fed. 202, 203. In *Roberts v. Shroyer*, *supra*, 67, it was said that "the foundation of all subsequent proceedings in bankruptcy, including the conveyance by the judge or register to the assignee, is the previous adjudication of the debtor's bankruptcy. That adjudication gives character to the conveyance made by the judge or register to the assignee, and makes it a judicial sale. It is judicial because it is founded on the judgment of the court That the conveyance thus made by the judge or register must be regarded as a sale within the meaning of our statute, we think is equally clear."

⁵ The Circuit Court of Appeals, misapprehending, it appears, the position taken by the testamentary trustee, and thinking that he did not claim any title under the Judicial Sales Act, did not pass upon this contention.

⁶ 14 Stat. 517, c. 176.

In *Harlin v. American Trust Co.*, 67 Ind. App. 213, 220, it was held by the Appellate Court of Indiana that these decisions applied with full force to cases arising under the present Bankruptcy Act, and that an adjudication in bankruptcy followed by the appointment of a trustee, in whom, under § 70 of the Act, title to the bankrupt's property was vested by operation of law, likewise operated as a "judicial sale" within the meaning of the Indiana statute and made absolute the interest of the bankrupt's wife in the real estate.

We see no substantial distinction, so far as the reasoning of the Indiana courts is concerned, between the cases arising under the Bankruptcy Act of 1867 and under the present Bankruptcy Act, since under both Acts the transfer of title to the bankrupt's property is based, in its last analysis, upon the adjudication in bankruptcy, that is, rests upon the judgment of the bankruptcy court, carried into effect in the one case by a conveyance to the assignee, and in the other by transfer to the trustee by operation of the law.

In the absence of any conflicting provision in the Bankruptcy Act the question of a wife's interest in the bankrupt's property is governed by the local law. See *Stellwagen v. Clum*, 245 U. S. 605. And, following the construction placed upon the Indiana statute by the courts of that State, we conclude that the adjudication of Erskine as a bankrupt, when followed by the appointment of the trustee in bankruptcy, operated as a "judicial sale" of his real estate within the meaning of the statute, and made absolute his wife's interest therein.

Since, however, the application of this statute is expressly limited to \$20,000 in value of the husband's real estate, and by the statute of descent the widow's share in real estate exceeding \$10,000 and not exceeding \$20,000 in value, is one-fourth, it follows that the testamentary trustee was only entitled to receive out of the proceeds of

the sale, one-fourth of \$20,000, that is, \$5,000, and not the one-fifth of the entire proceeds which was awarded to him by the District Court.

The decree of the Circuit Court of Appeals is accordingly reversed, and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.

HARRISON, TRUSTEE, v. CHAMBERLIN.

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

No. 168. Argued January 22, 1926.—Decided May 3, 1926.

1. A proceeding instituted by a trustee in bankruptcy, in the bankruptcy suit, to recover property in the possession of an adverse claimant, is a controversy in bankruptcy reviewable by the Circuit Court of Appeals, both as to fact and law, by an appeal taken under § 24a of the Bankruptcy Act. P. 193.
2. A court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy over property held adversely to the bankrupt estate, unless the adverse claimant consent, or the claim be merely colorable. P. 193.
3. An actual claim may be adverse and substantial even though in fact fraudulent and voidable. P. 194.
4. A claim is to be deemed substantial when the claimant's contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense. P. 195.

298 Fed. 926, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing an order made by the District Court summarily in a bankruptcy case, requiring the respondent Chamberlin to deliver money, adversely claimed by her, to Harrison, the trustee in bankruptcy.

Mr. Philip Kates, with whom *Mr. S. A. Mitchell* was on the brief, for petitioner.

Mr. Henry B. Martin for respondent, submitted.

MR. JUSTICE SANFORD delivered the opinion of the Court.

In the course of the administration of the estate of the bankrupt corporation in the District Court for Eastern Oklahoma, the petitioner Harrison, the trustee in bankruptcy, filed a petition for a summary order requiring Mrs. Chamberlin, the respondent, a stranger to the proceeding, to deliver to him certain money in her possession which, he alleged, was the property of the bankrupt, held by her fraudulently and without color or claim of title. She filed a demurrer for want of jurisdiction in the court to proceed summarily. This was overruled. She then answered, asserting that the money was her individual property, acquired and held by her in good faith; and renewing her jurisdictional objection. The matter was referred to the referee in bankruptcy to report his findings of fact and conclusions of law. He reported, upon the evidence, that the respondent's claim was based on fraud and merely colorable; and that the money was an asset of the estate and subject to the summary jurisdiction of the court. The District Judge confirmed this report and entered a decree finding that the money was an asset of the estate, held by the respondent without color of title and in fraud of the rights of the trustee; and ordering that she deliver it to him forthwith. She appealed from this order to the Circuit Court of Appeals, and also filed a petition for revision in matter of law. The Circuit Court of Appeals, being of opinion that, as questions of fact were involved in the hearing, the method of review was by appeal, dismissed the petition to revise. On the appeal, it held that the claim of

the respondent was adverse to the trustee and not merely colorable, and that the District Court was therefore without jurisdiction to proceed against the respondent summarily; and the order of the District Court was reversed, with instructions to dismiss the proceeding without prejudice to the institution of a plenary action by the trustee in any court of proper jurisdiction. 298 Fed. 926. This writ of certiorari was then granted. 266 U. S. 598.

The contentions of the trustee are: (1) That the Circuit Court of Appeals had no jurisdiction to review the order of the District Court under the appeal; and (2) that, even if such jurisdiction existed, the decree reversing that order was erroneous.

1. It is clear that the proceeding instituted by the trustee for the recovery of property in the possession of the respondent, to which she asserted an adverse claim, presented "a controversy arising in a bankruptcy proceeding,"—as distinguished from an administrative "proceeding" in bankruptcy—which might be reviewed by the Circuit Court of Appeals, both as to fact and law, by an appeal taken under § 24a of the Bankruptcy Act. *Taylor v. Voss*, ante, p. 176, and cases therein cited; *Hinds v. Moore* (C. C. A.), 134 Fed. 221, 223; *Re Eilers Music House* (C. C. A.), 270 Fed. 915, 925.

2. It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit. *Mueller v. Nugent*, 184 U. S. 1, 15; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 24; *Jaquith v. Rowley*, 188 U. S. 620, 623; *Schweer v. Brown*, 195 U. S. 171, 172; *Galbraith v. Vallely*, 256 U. S. 46, 48; *Taubel Co. v. Fox*, 264 U. S. 426, 433; *May v. Henderson*, 268 U. S. 111, 115; *Board of Education v. Leary* (C. C. A.), 236 Fed. 521, 524; *Lynch v. Roberson* (C. C. A.), 287

Fed. 433, 435, 437. However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding. *Mueller v. Nugent, supra*, 15; *Louisville Trust Co. v. Cominger, supra*, 25; *Taubel Co. v. Fox, supra*, 433; *May v. Henderson, supra*, 16; *Board of Education v. Leary, supra*, 525; *Lynch v. Roberson, supra*, 436.

In the present case the holding of the District Court that the adverse claim was merely colorable was evidently based upon its conclusion, upon the entire evidence, that the claim was fraudulent; and was, in effect, an adjudication upon the merits. And, on the other hand, the holding of the Circuit Court of Appeals that the claim was of such a substantial character as to require its determination in a plenary suit, was based upon the view "that a claim alleged to be adverse is only colorably so when, admitting facts to be as alleged by the claimant, there is, as matter of law, no adverseness in the claim." It is clear, however, that an actual claim may be adverse and substantial even though in fact "fraudulent and voidable." *Mueller v. Nugent, supra*, 15; *Johnston v. Spencer* (C. C. A.), 195 Fed. 215, 220; *Board of Education v. Leary, supra*, 525. And, on the other hand, a claim is merely colorable if "on its face made in bad faith and without any legal justification." *May v. Henderson, supra*, 109.

Without entering upon a discussion of various cases in the Circuit Courts of Appeals in which divergent views have been expressed as to the test to be applied in deter-

mining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy," *Board of Education v. Leary, supra*, 527, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense. Compare *Binderup v. Pathe Exchange*, 263 U. S. 291, 295; and *Moore v. New York Cotton Exchange*, 270 U. S. 593.

In the present case it clearly appears that the validity of the respondent's claim depended upon disputed facts, as to which there was a conflict of evidence, as well as a controversy in matter of law. Its determination involved "fair doubt and reasonable room for controversy" both as to fact and law. It was therefore substantial, and not merely colorable; and its merits could only be adjudged in a plenary suit.

As the respondent's objection to the summary jurisdiction of the bankruptcy court was well taken, and there was no waiver of her right in this respect, *Galbraith v. Vallely, supra*, 50, the decree of the Circuit Court of Appeals is

Affirmed.

HASSLER, INC. v. SHAW.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF SOUTH CAROLINA.

No. 278. Argued April 27, 1926.—Decided May 10, 1926.

1. A petition to remove from state to federal court is not a general appearance. P. 199.
2. Pleading to the merits, after overruling of motion to dismiss for lack of jurisdiction over defendant which defendant does not waive, is not submission to the jurisdiction. P. 200.

3. Where objection to the jurisdiction appears in the record proper it is not necessary to reiterate it in a bill of exceptions. P. 200.
3 Fed. (2d) 605, reversed.

ERROR to a judgment of the District Court on a verdict recovered in an action on contract brought in a South Carolina court by a resident of that State against an Indiana corporation, and removed to the federal court.

Mr. Charles Martindale, with whom *Messrs. Benjamin H. Rutledge* and *Simeon Hyde* were on the brief, for plaintiff in error.

Mr. A. S. Harby, with whom *Mr. L. D. Jennings* was on the brief, for defendant in error.

If the bill of exceptions be stricken out in accordance with the motion made, the record shows merely that the defendant in the first instance appeared by answer containing objections to the jurisdiction of the court and a general defense to the merit, upon which it went to trial without making any exception to the court's rule on the jurisdictional point, or without preserving this ruling, and attempts now, after all other issues are decided against it, to raise the question of jurisdiction of its person in this Court. If, on the other hand, the motion to strike out the bill of exceptions fails, the record shows that the summons and complaint were served personally upon defendant, though such service was made without the State of South Carolina. Thereafter the defendant appearing especially in the state court moved to set aside the service. The motion was refused without prejudice, leaving the question of jurisdiction still open. Promptly thereafter the defendant filed in the state court a petition and bond for removal. Thereafter, without renewing its motion to set aside the service, or without saving the right to do so, the defendant filed its answer, which contained a first defense to the jurisdiction of the court, and a second defense upon the merits. Thereafter the cause was tried, at

which trial the court refused to direct a verdict in favor of the defendant on the question of jurisdiction, and refused to peremptorily charge the jury that the court would have no jurisdiction if the attached property was not that of the defendant Hassler. This trial resulted in a mistrial, and when the cause came on for trial again the record shows that the defendant entered into the trial, offered testimony and took no steps to raise the jurisdictional question, or to except to the judge's rulings thereon, or to preserve its rights under the first defense of its answer.

The question involving the jurisdiction of a federal court is not controlled by state statutes or decisions. *Mechanical Appliance Co. v. Casselman*, 215 U. S. 437. See also *Western Loan & Savings Co. v. Butte & Boston, etc.*, 210 U. S. 681.

Defendant's privilege to be sued in Indiana could have been waived. *Ex parte Schollenberger*, 96 U. S. 378. The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the court. Filing a petition for removal was such a waiver, and amounted to a consent to the jurisdiction. *Ex parte Moore*, 209 U. S. 490. Defendant's plea to the merits was also a waiver, and submitted it to the jurisdiction of the court. *St. Louis Ry. Co. v. McBride*, 141 U. S. 127; *Western Loan & Savings Co. v. Butte & Boston Min. Co.*, 210 U. S. 368. See also *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593.

Defendant relies upon the order in the state court, which refused a motion to set aside the service of the summons "without prejudice, however, to the right of defendant to set up such special defense in its answer as to the jurisdiction of the court as it may deem advisable." This proviso manifestly conferred no new rights on defendant. It merely left the way clear for it to assert the alleged lack of jurisdiction of the court, provided it did not waive its right to so do.

The defendant further submitted itself to the jurisdiction of the court by going to trial without saving an exception as to the court's ruling on this point. *German Alliance Ins. Co. v. Hale*, 219 U. S. 307.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a writ of error upon a judgment *in personam* against the plaintiff in error on the ground that there never was any valid service of process against it and that therefore there was no jurisdiction in the Court. The writ was transferred from the Circuit Court of Appeals to this Court, the case being one in which the jurisdiction of the District Court and that alone was in issue within the meaning of § 238 of the Judicial Code, under the decisions in *Shepard v. Adams*, 168 U. S. 618; *Remington v. Central Pacific R. R. Co.*, 198 U. S. 95, and *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424; and therefore not open to review in the Circuit Court of Appeals. *The Carlo Poma*, 255 U. S. 219.

The suit is for an alleged breach of contract and was brought in a Court of the State of South Carolina against a corporation of Indiana. The only personal service was by delivery of copies of the summons and complaint in Indiana, on May 12, 1919, as the record shows. An attachment was levied on property alleged to belong to the defendant and within the State. The record further shows that in the same month the defendant moved to set aside the service, and that the motion was refused, without prejudice to the defendant's right to set up the special defense in its answer, this being a right clearly given by the statutes of South Carolina. The case then was removed to the District Court of the United States and subsequently, in September of the same year, an answer was filed alleging the above mentioned motion and order, and setting up that the Court had no jurisdiction,

because the defendant was an Indiana corporation doing no business and having no property within the State upon which attachment could be levied so as to give the Court jurisdiction, and also, reserving its right to object to the jurisdiction, pleading to the merits. In March, 1921, an amended complaint was filed alleging that the defendant had property in the State and setting forth the cause of action. The defendant answered denying the jurisdiction as before and denying that it had property within the State, and saving its right to object to the jurisdiction, again answering to the merits. With regard to the attachment, it is enough to say that a third party intervened, claimed the goods and finally got judgment for them. But before that happened, there was a trial on the merits between the plaintiff and defendant and a verdict for the plaintiff, in 1921. The motion for judgment was delayed until May, 1924. In the same month the defendant moved to set aside the verdict and to dismiss the complaint for want of jurisdiction. The judge then sitting thought that the question of jurisdiction should be left to the decision of the appellate court and ordered judgment. A motion to vacate the judgment was overruled on the same ground.

Thus it is manifest that the record shows a judgment against a defendant never served with process and without any attachment of property—a judgment void upon its face unless the record discloses that the defendant came in and submitted to the jurisdiction, although not served. The record discloses no general appearance in terms, but on the contrary a continuous insistence by the defendant that it had not been brought within the power of the Court. But acts and omissions are relied upon as having the effect of a general appearance. First in order of time it is said that the petition to remove had that effect. This if true would be unjust, but the contrary is

established. *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 268, 269. *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271, 279. Then it is said that pleading to the merits was an appearance, notwithstanding the effort of the defendant to subordinate its denial of the cause of action to its protest against the jurisdiction, and notwithstanding the statute of South Carolina and the order in the case purporting to save its rights. This again would be unjust; but such is not the law. *Harkness v. Hyde*, 98 U. S. 476, 479. *Southern Pacific Co. v. Denton*, 146 U. S. 202, 209. It is said that going to trial on the merits without saving an exception submitted to the jurisdiction. The plaintiff, (the defendant in error,) objects to our seeking any explanation in a bill of exceptions that he says was allowed too late, but the record shows that at the time of the trial the attachment was outstanding, not having been vacated until later, and that it no doubt may have been, as the bill of exceptions shows that it was, the expectation of the trial judge that the verdict would be satisfied out of the attached goods. The record showed the defendant's denial of the right to proceed, and the grounds for it. It was not necessary to reiterate the denial in a bill of exceptions, in order to get it on the record. It already was there.

There was some suggestion that the emphasis, at least, of the answer denying jurisdiction was on the absence of the defendant from the State and its having no property there. But the answer and the amended answer elaborately set out the motion to set aside the service and the reservation of the defendant's rights by the State judge. It seems to us impossible to doubt that this was meant to save the question and that it would be hypertechnical to require a more explicit statement that the grounds of the motion as well as the other matters mentioned were still the basis on which jurisdiction was denied. The other

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Counsel for Parties.

matters were added simply to give further force to the failure to serve within the State. We are of opinion that the record does not disclose an appearance by the defendant, or any submission to the jurisdiction that it sought and had a right to avoid.

Judgment reversed.

UNITED STATES *v.* NOVECK.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

No. 169. Argued January 25, 1926.—Decided May 10, 1926.

1. That part of Rev. Stats. § 1044, as amended November 17, 1921, which provides a six year period of limitation "in offenses involving the defrauding or attempts to defraud the United States," does not apply where such fraud is not an element of the offense as defined by the penal statute on which the indictment is based. P. 202.
2. The Act of July 5, 1884, as amended, and Rev. Stats. § 1046, fixing limitations for offenses arising under the internal revenue laws, do not apply to perjury under Criminal Code, § 125. P. 203.
3. Section 125 of the Criminal Code, defining perjury, does not make intent to defraud the United States an element of the crime. *Id.*
4. Therefore, a prosecution for perjury under § 125 is subject to the three year limitation of Rev. Stats. § 1044, and is not made subject to the six year limitation by allegations of the indictment showing that the false oath was made in an income tax return for the purpose of defrauding the United States. *Id.*

Affirmed.

ERROR to a judgment of the District Court quashing a count charging perjury, upon the ground that prosecution was barred by statute of limitations.

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

Mr. Ben A. Matthews for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Defendant in error was indicted November 5, 1923. The first count alleges the commission of perjury on March 13, 1920,—more than three years before indictment. The District Court quashed that count on the ground that the prosecution was barred by the statute of limitations. The case is here under the Criminal Appeals Act of 1907, c. 2564, 34 Stat. 1246.

The count charges "the crime of perjury as defined by section 125 of the United States Criminal Code." That section provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, . . ." 35 Stat. 1088, 1111. The substance of the charge is that defendant in error on oath stated that the income tax due from S. Noveck & Co., Inc., for 1919, was \$1,484.84 on an income of \$16,251.66, whereas in fact the tax due was \$45,664.91 on an income of \$124,127.13. And it is alleged that the perjury was committed "for the purpose of defrauding the United States."

Section 1044 of the Revised Statutes, as amended by the Act of November 17, 1921, c. 124, 42 Stat. 220, provides: "No person shall be prosecuted, . . . for any offense, not capital, except as provided in section 1046, unless the indictment is found . . . within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States . . . the period

of limitation shall be six years." The amendatory Act added the proviso. Section 1046, Revised Statutes, declares that no person shall be prosecuted for any crime arising under the revenue laws unless the indictment is found within five years after the committing of such crime. The Act of July 5, 1884, c. 225, 23 Stat. 122, as amended by the Revenue Act of 1921, c. 136, 42 Stat. 227, 315, fixes a three-year period of limitation for offenses arising under the internal revenue laws of the United States. Section 125 of the Criminal Code, under which the indictment was found, is not a part of and does not refer to the revenue laws. The limitations fixed in respect of offenses arising under those laws do not apply. See *United States v. Hirsch*, 100 U. S. 33; *United States v. Rabinowich*, 238 U. S. 78.

Plaintiff in error contends that, as the perjury in this case is charged to have been committed in the making of an income tax return, and is specially alleged to have been committed for the purpose of defrauding the United States, the offense is brought within the proviso to §1044, and that the six year period of limitation applies. But the alleged purpose to defraud the United States is not an element of the crime defined in § 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage. *In re Lane*, 135 U. S. 443, 448. The construction of §§ 125 and 1044 contended for by the Government divides perjury into two classes. It makes one include offenses having the elements specified in § 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three year period fixed by § 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of

November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration. But perjury as defined by § 125 does not contain any such element.

Judgment affirmed.

LEITER ET AL., TRUSTEES, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 251. Argued April 19, 1926.—Decided May 10, 1926.

1. A lease to the Government for a term of years, made without specific authority of law, under an appropriation for but one fiscal year, is binding on the Government only for that year. Rev. Stats. § 3732; § 3679, as amended February 27, 1906. P. 206.
2. To make such a lease binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. P. 207.

59 Ct. Cls. 907, affirmed.

APPEAL from a judgment of the Court of Claims dismissing, on demurrer, a petition to recover rentals under leases to the United States.

Mr. Christopher B. Garnett for appellants.

Solicitor General Mitchell and *Assistant Attorney General Galloway* were on the brief for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by the trustees of the Levi Z. Leiter estate, under the Tucker Act,¹ to recover rentals under four leases to the United States. The petition was dismissed, on demurrer, for failure to state a cause of action. 59 Ct. Cls. 907. The appeal was taken in January, 1925.

The leases, which were for space in an office building, were made by the trustees and the Treasury Department, in 1920 and 1921, for terms of four and five years, for the use of the Bureau of War Risk Insurance and other federal agencies that were subsequently merged, in August, 1921, in the Veterans' Bureau.² The leases provided for stipulated annual rentals, to be paid in monthly installments. At the time they were made, however, there were no appropriations available for the payment of the rent after the first fiscal year during the term of each lease; and each provided that the term of occupancy should extend to June 30, 1925, "contingent upon" the making available by Congress of appropriations out of which the rent might be paid after the current fiscal year; and that, if such appropriation was not made for any fiscal year, the lease should terminate as of June 30 of the year for which an appropriation was last available.

On May 29, 1922,—before any appropriation had been made out of which the rent could be paid for the next fiscal year—the Director of the Veterans' Bureau gave written notice to the trustees that the premises described in the leases would be "vacated, relinquished and returned" to them on June 30. On June 1 the trustees wrote to the Bureau denying the right of the Government to terminate the leases, and stating that the surrender

¹ 24 Stat. 505, c. 359; Jud. Code § 145.

² Act of August 9, 1921, c. 57, 42 Stat. 147.

would not be accepted and claim would be made against the Government for their full period, whether the premises were occupied or not. By an Act of June 12, 1922,³ a lump sum appropriation was made for the expenses of the Bureau, including rentals, for the next fiscal year, commencing July 1. On June 30, however, the Bureau vacated the premises in accordance with its previous notice. All rentals due to and including that date were duly paid. Thereafter, the trustees, being unable to re-lease the premises, presented to the Bureau bills for the rentals for July and succeeding months, the payment of which was refused; and these claims were also disallowed by the Comptroller General. The trustees thereafter instituted the present action to recover the rent claimed to be due from July 1, 1922 to June 30, 1923, inclusive.

We are of opinion that the demurrer to the petition was rightly sustained.

Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. . . ." And § 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510,⁴ provides that "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

It is not alleged or claimed that these leases were made under any specific authority of law. And since at the

³ 42 Stat. 635, 648, c. 218.

⁴ 34 Stat. 27, 48.

time they were made there was no appropriation available for the payment of rent after the first fiscal year, it is clear that in so far as their terms extended beyond that year they were in violation of the express provisions of the Revised Statutes; and, being to that extent executed without authority of law, they created no binding obligation against the United States after the first year. See *Chase v. United States*, 155 U. S. 489, 502, 503; *Sutton v. United States*, 256 U. S. 575, 579; *United States v. Doullut* (C. C. A.), 213 Fed. 729, 737; and *Abbott v. United States* (C. C.), 66 Fed. 447, 448. A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. *McCullum v. United States*, 17 Ct. Cls. 92, 104; *Smoot v. United States*, 38 Ct. Cls. 418, 427. And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. This conclusion is in entire accord with *Bradley v. United States*, 98 U. S. 104, 114, 115. There, a building having been leased to the Post Office Department for three years at a stipulated annual rental of \$4,200, subject to an appropriation by Congress for payment of the rental, and Congress, before the expiration of the second year, having made a specific appropriation of \$1,800 only for the payment of rent for the third year, and the Department having continued to occupy the building for the third year, it was held the lessor could recover only the amount thus specifically appropriated for the occupancy of the building during the third year, and not the full amount of the rent stipulated in the lease.

In the present case, in accordance with the notice of the Veterans' Bureau that it would surrender the premises on June 30, 1922, the Government did not occupy the premises after that date. That is, although a lump sum appropriation had meanwhile been made for the rental expenses of the Veterans' Bureau for the next fiscal year—in which no reference was made to these specific leases—the leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or by the occupation of the premises. So, the Government did not become liable for the payment of rent after the surrender of the premises.

The judgment of the Court of Claims is

Affirmed.

BOOTH FISHERIES COMPANY ET AL. v. INDUSTRIAL COMMISSION OF WISCONSIN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 313. Argued May 5, 1926.—Decided May 24, 1926.

1. The Wisconsin Workmen's Compensation Act, (Ls. 1921, §§ 2394–19,) which makes the findings of fact of the Industrial Commission conclusive if there be any evidence to support them, does not thereby violate the rights of an employer under the Fourteenth Amendment by depriving him of a judicial review of the facts on which an award is made against him, because the Act is elective and does not bind an employer who has not voluntarily accepted its provisions. P. 210.
2. An employer who has made such election, accepting the burdens of the Act with its benefits and immunities, is estopped from questioning its constitutionality. P. 211.
3. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, distinguished. P. 211.
185 Wis. 127, affirmed.

ERROR to a judgment of the Supreme Court of Wisconsin sustaining an award under the state Workmen's Compensation Act.

Mr. George A. Schneider for plaintiffs in error.

Messrs. Herman L. Ekern, Attorney General of Wisconsin, and *Winfield W. Gilman* were on the brief, for defendant in error Industrial Commission of Wisconsin.

Mr. Lynn D. Jaseph for defendant in error, *Mary McLaughlin*.

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

This was a suit begun in the Circuit Court of Dane County, Wisconsin, to review and set aside the findings and award under the Wisconsin Workman's Compensation Act of a death benefit in favor of *Mary McLaughlin* as widow of *William McLaughlin*, against his employer, the Booth Fisheries Company, and that company's surety, the Zurich General Accident & Liability Company.

The petition avers that the Industrial Commission in making the award "acted without and in excess of its powers" in finding that the personal injuries and death of *William McLaughlin* were proximately caused by accident and not intentionally self-inflicted, and that this finding was contrary to the evidence and contrary to the law. The Circuit Court and the Supreme Court of the State held that the findings of fact by the Commission were supported by evidence, and so were conclusive.

The only question raised on the appeal to the Supreme Court of Wisconsin was the constitutionality under the Fourteenth Amendment of the Workman's Compensation Act of Wisconsin in its limitation of the judicial review of the findings of fact of the Industrial Commission to cases in which "the findings of fact by the Commission do not support the order or award." Wisconsin Statutes, 1921, §§ 2394-19. This limitation has been held by the state Supreme Court to mean that the findings of fact

made by the Industrial Commission are conclusive, if there is any evidence to support them. *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97; *Milwaukee v. Industrial Commission*, 160 Wis. 238; *Milwaukee C. & G. Co. v. Industrial Commission*, 160 Wis. 247; *William Rahr Sons Co. v. Industrial Commission*, 166 Wis. 28; *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127. It follows that the court may not in its review weigh the evidence or set aside the finding on the ground that it is against the preponderance of the testimony.

It is argued that the employer in a suit for compensation under the Act is entitled under the Fourteenth Amendment to his day in court, and that he does not secure it unless he may submit to a court the question of the preponderance of the evidence on the issues raised.

A complete answer to this claim is found in the elective or voluntary character of the Wisconsin Compensation Act. That Act provides that every employer who has elected to do so shall become subject to the Act, that such election shall be made by filing a written statement with the Commission, which shall subject him to the terms of the law for a year and until July 1st following, and to successive terms of one year unless he withdraws. Wisconsin Stat. § 2394—3, 4, 5. It is conceded by the counsel for the plaintiffs in error that the Act is elective, and that it is so shown by the decisions of the Wisconsin court in *Borgnis v. Falk Company*, 147 Wis. 327, 350, and in the present case. 185 Wis. 127. If the employer elects not to accept the provisions of the compensation Act, he is not bound to respond in a proceeding before the Industrial Commission under the Act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an op-

portunity for choice, the employer who elects to accept the law may not complain that, in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. This is clearly settled by the decision of this Court in *Hawkins v. Bleakly*, 243 U. S. 210, 216.

More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. *Daniels v. Tearney*, 102 U. S. 415; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17.

The counsel for the plaintiff in error relies chiefly on the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287. That case does not apply. An order of a public service commission in fixing maximum rates for a water company was there attacked on the ground that the rates fixed were confiscatory. It was held that the law creating the commission, which had operated to withhold opportunity for appeal to the courts to determine the question, as a matter of fact and law, whether the rates were confiscatory, could not be sustained, and was in conflict with the due process clause of the Fourteenth Amendment. But in that case, the water company was denied opportunity to resort to a court to test the question of the confiscatory character of its rates and of its right to earn an adequate income. Here the employer was given an election to defend against a full court proceeding but accepted the alternative of the compensation Act.

The judgment of the Supreme Court of Wisconsin is

Affirmed.

UNITED STATES *v.* MINNESOTA MUTUAL INVESTMENT COMPANY.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 348. Submitted May 6, 1926.—Decided May 24, 1926.

Collection of interest by the United States from a national bank, as a United States depository, on a fund belonging to a private litigant which had been paid into the District Court and deposited in the bank for safe keeping, did not create a contract upon the part of the United States to pay over the interest to the owner of the fund, even if the United States had no right to the interest. P. 217.

Reversed.

APPEAL from a judgment of the District Court against the United States in a suit under the Tucker Act.

Solicitor General Mitchell and *Mr. Gardner P. Lloyd*, Special Assistant to the Attorney General, were on the brief for the United States.

Mr. Edwin H. Park for defendant in error.

The opposing argument is based entirely upon § 5155, Rev. Stats., which provides for the designations of depositories of public moneys of the United States. The Act of May 30, 1908, 35 Stat. 552, provides for rates of interest upon public funds deposited in such depositories. Section 995, Rev. Stats., provides that moneys paid into the registry are to be deposited with the Treasurer of the United States or in a designated depository of the United States in the name and to the credit of the court. Section 996 provides the same may be withdrawn by the court, etc.

The complaint charges that the money in controversy here was deposited in a depository designated by the court and not a depository designated by the Secretary of

the Treasury. It was private money *in custodia legis* and held subject only to further orders of the court.

Section 251, Rev. Stats., provides that the Secretary of the Treasury may make rules and regulations relative to public moneys and officers concerned therewith, and it is now claimed that the rules and regulations of the Secretary of the Treasury promulgated in 1913 requiring interest to be paid into the Treasury upon all moneys deposited in registries of the court have the form, force, and power of the statutes of the United States. This result may be true when the subject-matter is within the jurisdiction and within the letter of some statute, but there is no statute permitting any officer of the United States to subject the interest accruing upon private funds to the dominion of the United States or requiring the same to be confiscated because the funds happen to be deposited in the registry of the court.

The government contends there is no contract here, either express or implied, and therefore the complaint does not state a cause of action. The rule is, in both federal and state courts, that where one has received money which in equity and natural justice belongs to the plaintiff he may maintain a suit therefor, as upon an implied contract; and it is not necessary that there be any actual contractual relation. *Lipman, Wolf & Co. v. Phoenix Assur. Co.*, 258 Fed. 544; *Gaines v. Miller*, 111 U. S. 395; *Hill v. United States*, 149 U. S. 593; *Merchants, etc., Bank v. Barnes*, 18 Mont. 335; *Ela v. Express Co.*, 29 Wis. 611; *Klebe v. United States*, 263 U. S. 188; *Bayne v. United States*, 93 U. S. 643; *United States v. State Bank*, 96 U. S. 30; *Omnia Co. v. United States*, 261 U. S. 502.

Interest is an accretion or increment of the fund; and interest on a fund deposited in court belongs to the fund. *United States v. Mosby*, 133 U. S. 273. These moneys were not public funds and, therefore, did not come within

the purview of the regulations of the Secretary. *Branch v. United States*, 100 U. S. 673; *Coudert v. United States*, 175 U. S. 178; *United States v. Ferguson*, 78 Fed. 103; *Brooks v. Kerr*, 223 Fed. 1016; *United States v. McMillan*, 253 U. S. 195.

Rule 20 of the trial court provides that all interest paid on deposits shall become part thereof. Interest was paid on this deposit and under the rule becomes a part of the fund. Rules of court have the force and effect of law. *Rio Grande Irrig. Co. v. Gildersleeve*, 174 U. S. 603. The clerk of the trial court for years prior to 1913 had a contract with the banks to pay interest upon all funds deposited in the bank which had been paid into the registry of the court. *Hendrick v. Lindsay*, 93 U. S. 143.

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

The Minnesota Mutual Investment Company is a corporation of South Dakota, doing business in Colorado. It sued the United States for \$571.26, under the Tucker Act, Judicial Code, § 24, par. 20. Its claim arises under the following circumstances. In a cause pending in the United States District Court for Colorado, the Investment Company was plaintiff, and McGirr and others were defendants. The plaintiff was required to place in the registry of the court \$15,143.92, which the clerk of the court immediately deposited in the First National Bank of Denver, Colorado, designated by the court as one of its depositaries. The money remained in the bank to the credit of the court from June 7, 1918, until May 6, 1920, when it was returned to the Investment Company. During that period the bank paid interest on this deposit of 2 per cent. per annum, semi-annually, into the United States Treasury for the use of the Government. The

petition alleges that, for a long series of years prior to this, interest paid by the bank on such court funds had been added to the deposit for the benefit of the party adjudged to own it, but that, shortly before this deposit, the Secretary of the Treasury, by regulation, required all United States depositaries having court funds to pay interest at 2 per cent. to the Treasurer of the United States for its use.

The petition avers that the United States was not interested in the sum of money so deposited, had no right, title, or interest therein directly or indirectly, and that the interest so paid was and is the property of the plaintiff and was received by the United States for the use and benefit of the plaintiff, and judgment was asked therefor.

The United States filed a demurrer to the complaint, which was overruled. It then answered alleging that the United States through its proper officers had entered into a contract concerning the payment of interest upon all government deposits, including the court funds, carried with the bank by virtue of its designation as a depositary of the United States, under the regulations promulgated by the Secretary of the Treasury under authority conferred upon him by the laws of the United States; that this contract consisted of an offer made on behalf of the United States and its acceptance by the First National Bank by its President; and that, accordingly, \$571.26 was paid to the United States by the Bank; that, in consideration of such payment, the United States allowed the bank the use of all government deposits held on deposit, allowed the bank the prestige and advertising connected with its handling of such government deposits, kept safe in its custody the collateral security pledged by the bank to secure the deposits, and supervised the depositary in all matters in connection with the deposit. Accompanying the answer was the correspondence claimed to em-

body the contract between the United States and the bank. A demurrer to the answer of the defendant was sustained, and the judgment for \$571.26 followed. Direct appeal to this Court was allowed to the United States under the Tucker Act (Act of March 3, 1887, §§ 4 and 9, c. 359, 24 Stat. 505,) because taken before the taking effect of the Act of February 13, 1925, 43 Stat. 936, c. 229, § 14.

Section 995 of the Revised Statutes provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: *Provided*, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Rule 20 of the rules of the District Court of Colorado contains the following:

"1. All moneys brought into court shall be paid to the clerk of the court, unless the court shall otherwise direct, and when not immediately paid to the party entitled, be deposited by said clerk, in his name of office, with such depository as may be designated by law, or by the court, when no place is so designated. The amount so received, the purpose for which it was paid into court, together with the fact of the deposit, as herein provided, shall be noted by the clerk in the civil or criminal dockets of the court in the particular cause in which it is received. All interest paid on said deposits shall become a part thereof."

Section 251 of the Revised Statutes provides that the Secretary of the Treasury may make rules and regulations relative to public moneys and officers concerned therewith. Section 5153 of the Revised Statutes, as amended by later acts, provides in effect that all national

bank associations designated for that purpose by the Secretary of the Treasury shall be depositaries of public money under such regulations as may be prescribed by the Secretary, and they are to perform all such reasonable duties as depositaries of public money as may be required of them. The Secretary is to require them to give satisfactory security, by the deposit of United States bonds, for the safe keeping of the public money deposited with them.

The court below found that the Secretary of the Treasury had no power under these two sections to direct national banks to pay interest on deposits of court funds to the United States, and that his authority to make such a regulation for interest extended only to public moneys, and not to court funds belonging to the parties to the litigation awaiting adjudication as to ownership or proper disposition. The conclusion of the court was that the United States had therefore received interest which should have been paid to the defendant in error, the Investment Company, and which it may recover from the United States.

But the Solicitor General argues that, even if the United States had no right to collect the interest from the Bank, no cause of action was created in favor of the Investment Company against the United States for this illegal collection; that there was no contract of the Government, express or implied, by reason of that collection to pay it to the Investment Company; and that without this, no recovery can be had. This seems to us to be sound reasoning. An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law. *Merritt v. United States*, 267 U. S. 338, 340, 341; *Tempel v. United States*, 248 U. S. 121; *Sutton v. United States*,

256 U. S. 575, 581. There is nothing in the averments in the pleadings in this case to show that the officers of the Government collected this interest or that it was received into the Treasury for the benefit of the Investment Company.

The judgment is

Reversed.

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.*
NIXON, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE
STATE OF VIRGINIA.

No. 306. Argued May 3, 1926.—Decided May 24, 1926.

A railroad section foreman, one of whose duties was to go over and inspect the track and keep it in repair, assumed the risk of being run down by a train while going to his work over a part of the track that was in his charge, riding (by permission of a superior) the railway velocipede which he used in track inspections. P. 219. 140 Va. 351, reversed.

CERTIORARI to a judgment of the Supreme Court of Appeals of Virginia, which affirmed a recovery of damages in an action under the Federal Employers' Liability Act.

Messrs. S. H. Williams and Randolph Harrison, with whom *Mr. A. R. Long* was on the brief, for petitioner.

Mr. Duncan Drysdale, with whom *Mr. Aubrey E. Strode* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover damages for the death of the plaintiff's husband, the intestate, from the Railroad Company upon whose tracks the death occurred. The plaintiff, (the respondent here,) obtained a verdict and

judgment in the trial Court and upon a writ of error the judgment was affirmed by the Supreme Court of Appeals of Virginia. 140 Va. 351. As the recovery was based upon the Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, the death having occurred in interstate commerce, a writ of certiorari was granted by this Court to review certain questions of law that arose in the case. 267 U. S. 590.

The deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used a three wheeled velocipede that fitted the rails and was propelled by the feet of the user. He had obtained from his immediate superior, the Supervisor of Track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at seven in the morning and at half-past six on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed. For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout, and the question raised is whether as toward the deceased the defendant owed a duty to keep a lookout, or whether on the other hand the deceased took the risk.

If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees. *Aerkfetz v. Humphreys*, 145 U. S. 418; *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441, 445, 446. *Connolly v. Pennsylvania R. Co.*, 201 Fed. 54; *Davis v. Philadelphia & R. Ry. Co.*,

276 Fed. 187; *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395; 4 Elliott on Railroads, 3d ed., § 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others.

The permission to use the velocipede in going to his work did not make the defendant's obligation to the deceased greater than it would have been after he got there. We assume that it was as effective to make the use of the car lawful as would have been a stockholders' vote spread upon the records of the company. But the implications are not necessarily the same. It was a trifling incident of daily life by which a subordinate officer of the company allowed one lower in grade to enlarge his customary use of the machine by an hour for his own convenience, although even then, in the opinion of the Court of Appeals of Virginia, already engaged in his duties. It seems to us to have been no more than an extension of his ordinary rights and his usual risks.

Judgment reversed.

VIRGINIAN RAILWAY COMPANY *v.* MULLENS.

CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY,
WEST VIRGINIA.

No. 163. Argued January 21, 22, 1926.—Decided May 24, 1926.

1. A railroad company is not liable for floodings of private land resulting from a condition of the railroad structure amounting to a nuisance, when the nuisance was created by its predecessor in title, and where the injurious consequences occurred when the railroad had been taken over and was being operated by the Government under the Federal Control Act. P. 223.
2. A plaintiff who has brought and tried an action for damages to his land upon the ground that the defendant was liable as a tortfeasor, can not shift, on appeal, to a theory of contract liability. P. 227.

Reversed.

CERTIORARI to a judgment of the Circuit Court of West Virginia, (which the Supreme Court of Appeals declined to review,) awarding damages against the Railway for injuries to the land of the plaintiff, Mullens, found to have resulted from obstruction and diversion of a stream by a railroad embankment.

Messrs. H. T. Hall and W. H. T. Loyall, with whom *Messrs. E. W. Knight, G. A. Wingfield, and M. P. Howard* were on the brief, for petitioner.

Mr. J. Albert Toler for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action in a state court in West Virginia to recover for injuries to the plaintiff's land resulting from a nuisance alleged to have been created and maintained by the defendant. The action was begun June 14, 1921. The case stated in the complaint was to the effect that the defendant constructed in 1904, and operated up to the time of suit, a railroad through West Virginia, a short section of which was located on a right of way acquired for the purpose and extending laterally into a natural stream bounding the plaintiff's land; that this section was constructed by filling in and building up the outer part of the bed of the stream opposite his land and placing the track on the embankment so made; that the embankment and track narrowed the former channel, crowded the current against the bank on the plaintiff's side and exposed his land to overflow and injury; and that on divers occasions thereafter, particularly in the years 1918 and 1919, this obstruction caused the waters to wash away portions of the bank and to overflow and injure his land.

The defendant interposed a plea putting in issue the allegations in the complaint, and by a further plea insisted

that the road was under federal control from December 28, 1917, to March 1, 1920, and that no liability attached to the defendant for such of the injuries as occurred during that control.

The trial resulted in a verdict and judgment for the plaintiff; and the Supreme Court of Appeals of the State, although petitioned by the defendant to review the judgment, declined so to do, thus making the trial court the highest court of the State in which a decision could be had. *American Ry. Express Co. v. Levee*, 263 U. S. 19. The case is here on writ of certiorari; and the question presented is whether there was error in holding the defendant liable for injuries done during federal control.

The case shown by the evidence differed from that stated in the complaint. Affirmatively and without dispute the proofs disclosed that the railroad was not constructed by the defendant, but by another railway company, and was purchased by the defendant in 1907, after it was completed and in full operation; that after the purchase the defendant used the embankment and track in the bed of the stream as an integral part of the road, just as it was used before; that the plaintiff, although familiar with the situation, made no complaint of this use or of the presence of the embankment and track in that place; that on December 28, 1917, the United States took possession of the railroad and its appurtenances, and from that time to March 1, 1920, operated and controlled the same to the exclusion of the defendant; that during such operation and control the United States exercised the usual rights of an owner by altering parts of the road-bed, widening tunnels, laying double tracks along parts of the road and using the property as best suited the Government's purposes. As respects the section in the bed of the stream, the evidence showed that the United States made no change therein but continued the use theretofore made of it as part of the road. And as respects the

injuries done to the plaintiff's land, the evidence, taken most favorably to him, disclosed that, while there was some cutting of the bank on his side soon after the road was constructed and also during the defendant's possession and operation, the chief injuries occurred in February, 1918, and July, 1919, during federal control, when in the course of two unusual freshets portions of the bank were washed away and his land was overflowed and materially injured.

At the conclusion of the evidence the defendant, relying on acts of Congress and proclamations of the President bearing on the federal control, requested the court to charge the jury that the defendant was not liable for the injuries occurring during such control and that as to them the finding and verdict must be for the defendant. But the request was refused and the defendant excepted. If the request was well grounded in law, its refusal was plainly prejudicial.

While the evidence may have admitted of a finding that the embankment and track in the bed of the stream tended to obstruct and divert the current in such a way as to constitute a nuisance, it affirmatively and indubitably precluded a finding that the defendant constructed them or did more than use them as an integral part of a completed road which it had purchased as a going concern from a prior owner. Thus there was no basis on which the defendant could be charged with liability as the creator of the nuisance. If liable at all, it was liable only because it continued the use to which the embankment and track were put by its grantor. There has been much contrariety of decision in the courts of the several States as to whether a purchaser who merely continues a prior use of such a structure may be charged, at the instance of one who has made no complaint or objection, with liability for maintaining a nuisance. The question ordinarily is one of local law to be resolved according to

local decisions; and out of deference to the action of the court below we assume that in West Virginia a complaint or objection is not deemed essential, although no decision on the point by the Supreme Court of Appeals has been brought to our attention. But here it was insisted, and the proofs conclusively established, that the defendant's use ceased when federal control began, and that the chief injuries occurred during the period of that control. The questions of the defendant's legal relation to the road and operation thereof while under federal control and of its liability for injuries occurring during that period involved a consideration of the nature of that control and of the operation and effect of federal statutes and proclamations bearing on the subject. In short, they are federal questions.

By the Act of August 29, 1916, c. 418, 39 Stat. 645, Congress empowered the President, in time of war, to take possession and assume control of transportation systems and to utilize the same in the transportation of troops, war material and equipment, and for other needful or desirable purposes incident to such an emergency. War with Germany was declared April 6, 1917, and with Austria-Hungary December 7, 1917; and in both instances Congress pledged all of the resources of the country to bring the conflict to a successful termination. 40 Stat. 1 and 429. Under a proclamation declaring his purpose so to do, 40 Stat. 1733, the President took possession and assumed control, at noon on December 28, 1917, of various systems of transportation, including the defendant's railroad and the appurtenances thereof, to the end that they might be operated and utilized in transporting troops, war material and equipment, and in performing other service in the national interest; and he committed the possession, control, operation and utilization of such systems to a Director General designated by him for the purpose. By the Act of March 21, 1918, c. 25, 40 Stat. 451,

Congress confirmed the President's action in thus taking over the transportation systems; made provision for continuing such federal control under the President's direction, and empowered him to exercise his authority in that regard through agencies of his selection. In General Order No. 50, issued October 28, 1918, (U. S. R. R. Administration Bulletin No. 4, Revised, 334,) which recited that suits were being brought against railroad companies, the roads of which were under federal control, on causes of action arising during such control for which the companies were not responsible, it was directed that actions and suits based on claims for injuries to persons, damage to property, etc., growing out of the possession, use, control or operation of any railroad by the Director General be brought against that officer, and not otherwise.

We heretofore have considered the legislation, proclamation and order just recited and have held that they provided for a complete possession by the United States and contemplated a single and effective control by federal authority to the exclusion of the private owners, *Northwestern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 148; and that during federal control "no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended," *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 557. In the latter case the contention was made that the Act of 1918 should be construed as subjecting the companies to liability for acts or omissions of the agency exercising federal control, notwithstanding they were deprived of all power over the properties, because the just compensation to be paid to them would include any loss resulting to them from such liability. But this Court disposed of the contention by saying (p. 559): "Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power.

It should not be made in the absence of compelling language. There is none such here." And, turning to a provision in the Act of 1918 declaring "carriers while under federal control" liable and suable, the Court said (p. 559): "Here the term 'carriers' is used as it is understood in common speech, meaning the transportation systems as distinguished from the corporations owning or operating them"; and (p. 561): "This means, as matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. . . . All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name." In *Wabash Ry. Co. v. Elliott*, 261 U. S. 457, 462, the decision was to the same effect. In *North Carolina R. R. Co. v. Lee*, 260 U. S. 16, it was held that the Government operated the railroads during federal control "not as lessee, but under a right in the nature of eminent domain"; and in *Dupont de Nemours & Co. v. Davis*, 264 U. S. 456, 462, it was added that "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure."

In principle these decisions are determinative of the question here presented. They show that federal control did not rest on a conventional arrangement with the owner-companies, but on an exertion of supreme governmental power, and that the legislation, proclamation and order before recited contemplated a complete separation of the companies from the roads while under such control, and an absence of responsibility by the companies for losses and injuries resulting from the use, operation and maintenance of the roads during that period.

When the United States took over this road the embankment and track in the bed of the stream were taken over as part of it; and the defendant was deprived of all

power over them while they remained under federal control. Their maintenance and use during that period were exclusively in the hands of federal agents. If a duty rested on anyone to make any change in them it rested on the federal agents; and if maintaining and using them without change was a wrong against the plaintiff it was a wrong committed by those agents, for which no liability attached to the defendant.

The plaintiff relies on cases holding the creator of a nuisance liable for injuries resulting therefrom after he had transferred the premises to another by deed or lease; but they are not in point. They proceed on the theory that by such a transfer the creator expressly or impliedly affirms the right of the transferee to continue the prior situation or use, and also voluntarily disables himself from correcting or abating the same. Here the defendant had neither created the nuisance nor made a voluntary transfer of the premises. The United States, as we have seen, came into possession, not as a conventional transferee, but by an exercise of governmental power in which the defendant had no voice.

The plaintiff also seeks to support the judgment on the theory that the defendant company was under a contract obligation to protect his land from injury, and to make out that obligation he refers to a clause in the deed whereby the defendant's grantor acquired the right of way and to a clause in the deed whereby the defendant afterwards acquired the completed road. But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation; nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the

plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below. Other objections to the contract theory are suggested but they need not be considered.

We conclude that the court should have instructed the jury, as it was requested to do, that the defendant was not liable for the injuries occurring during federal control.

Judgment reversed.

GENERAL INVESTMENT COMPANY *v.* NEW YORK
CENTRAL RAILROAD COMPANY.

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

No. 274. Argued April 27, 1926.—Decided May 24, 1926.

1. A bill by a minority stockholder against a railroad company alleging domination by the defendant, through stock ownership, of parallel and competing railroads engaged in interstate commerce, charging continuous violations, therein, of the Sherman and Clayton Acts, alleging resulting injury to plaintiff and other shareholders, and praying an injunction, *held* a suit arising under the laws of the United States and within the jurisdiction of the District Court. P. 230.
2. The court again points out the difference between jurisdiction on the one hand, and lack of merit or of capacity to sue, on the other, as a ground for dismissing a suit. *Id.*

Reversed.

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

Mr. Frederick A. Henry for appellant.

Mr. S. H. West for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit in equity brought by a minority stockholder against the New York Central Railroad Company

to enjoin it from dominating and controlling, through stock ownership, certain other railroad companies. There are various prayers in the bill, but all make for the attainment of the object just stated.

The suit was begun in the District Court of the United States for the Northern District of Ohio, June 20, 1924. Federal jurisdiction was invoked on the grounds that the parties are citizens of different States—the plaintiff a Maine corporation and the defendant a corporation of Ohio and States other than Maine—and that the suit is one arising under the laws of the United States—there being also a showing that the value involved is adequate.

Shortly described, the bill charges that the defendant was organized pursuant to a consolidation agreement between the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company and nine companies subsidiary to them; that the agreement was made in April, 1914, and carried into effect the following December; that thereby the defendant, besides acquiring the railroad lines of the immediate parties to the agreement, became invested with large amounts of stock in other railroad companies, including the Michigan Central and Big Four, and was thus enabled to dominate and control them and their subsidiaries; that these other companies have railroad lines which are operated in both interstate and intrastate commerce, and many of their lines are parallel and normally and potentially competing; that during the ten years since the agreement became effective the defendant through its ownership of stock in these other companies has dominated and controlled and is now dominating and controlling their properties and business; and that this stock ownership, domination and control is in violation of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209, of the Clayton Act, c. 323, 38 Stat. 730, and of the laws of Ohio and

other States, wherein the railroads lie, forbidding a common control, through stock ownership or otherwise, of parallel or competing railroads.

The defendant moved to dismiss the bill on various grounds, and the court after a hearing on the motion entered a decree of dismissal. Afterwards and in due time the court granted a certificate stating that the dismissal was for want of jurisdiction of the subject matter and allowed a direct appeal to this Court under § 238 of the Judicial Code, which at that time permitted such an appeal where the jurisdiction of the District Court was in issue, but required the jurisdictional question to be certified and limited the review to the ruling on that question.

In the bill, as we have shown, the plaintiff attempts with much detail to set forth a continuing violation of the Sherman Anti-Trust Act and the Clayton Act, asserts that this violation unless restrained will be injurious to the plaintiff and other stockholders and prays for relief by injunction. Such a suit is essentially one arising under the laws of the United States, and, as the requisite value is involved, is one of which the District Courts are given jurisdiction. By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair v. Kohler Die Co.*, 228 U. S. 22, 25; *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 258,) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the

merits, and its determination is an exercise of jurisdiction. *Illinois Central R. R. Co. v. Adams*, 180 U. S. 28, 34; *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 34. If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.

A week or two before entering the decree of dismissal the court considered the motion to dismiss in a carefully prepared memorandum found in the record. What was said in it shows that the court was then of opinion, first, that in view of §§ 4 and 7 of the Sherman Anti-Trust Act, of §§ 7, 8, 11 and 16 of the Clayton Act, and § 5(2) of the Interstate Commerce Act as amended by § 407 of the Transportation Act, c. 91, 41 Stat. 480, the plaintiff, as a private litigant, was without capacity or right to maintain the bill in respect of the alleged restraint of interstate commerce, because the right to maintain such a bill against railroad carriers was lodged exclusively in others who are charged with guarding the public interest; and, secondly, that the interstate and intrastate business of the carriers affected are so inextricably interwoven that it would be impossible to award any relief reaching their intrastate business without equally affecting their interstate business, and therefore to permit the plaintiff to maintain the bill in respect of the alleged violation of state laws would be indirectly permitting a private litigant to do what in effect is prohibited by federal law.

The questions considered in the memorandum pertain to the merits, not to jurisdiction; and if the memorandum were definitive of the grounds on which the court proceeded we should regard the bill as dismissed on the merits. But as the decree was entered a week or two later and the court expressly certified that the dismissal was for want of jurisdiction of the subject matter, we have given effect to the certificate and have examined the question certified. Our conclusion is that the court had

jurisdiction of the subject matter and therefore that the decree of dismissal was put on an untenable ground.

Decree reversed.

MR. JUSTICE SUTHERLAND did not participate in the consideration or decision of this case.

SPERRY GYROSCOPE COMPANY *v.* ARMA ENGINEERING COMPANY.

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

No. 239. Argued April 15, 1926.—Decided May 24, 1926.

In a suit in the District Court against a private party for infringements of a patent, alleged to have been committed, and to be threatened, by manufacture of the patented articles for and their sale to the United States, the question whether the plaintiff's remedy is confined by the Act of July 1, 1918, to a suit against the United States in the Court of Claims, goes to the merits, and is not a ground for dismissing the bill for want of jurisdiction. P. 234.

Reversed.

APPEAL from a decree of the District Court in a patent infringement suit, dismissing the bill for want of jurisdiction.

Messrs. D. Anthony Usina and Melville Church, with whom *Mr. Herbert H. Thompson* was on the brief, for appellant.

Mr. Dean S. Edmonds, with whom *Messrs. Charles Neave, W. Brown Morton, and R. Morton Adams* were on the brief, for appellee.

Solicitor General Mitchell and *Messrs. Harry E. Knight and Henry C. Workman*, Special Assistants to the Attorney General, filed a brief as *amici curiae*, for the United States.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Appellant brought suit against the Engineering Company, in the United States District Court for the Eastern District of New York, for damages, profits, etc., on account of the manufacture by it of gyroscopic compasses, covered by patents, for the United States; also for an injunction against further infringements. The allegation which demands special consideration follows—

“That the defendant, well knowing the premises but with intent to injure the plaintiff, to interfere with its business and to deprive it of the profits derived and to be derived from making, using and selling said inventions, has, within the Eastern District of New York and without the license or consent of plaintiff but against its positive protest, made a number of gyroscopic compasses for and sold them to the United States Navy Department under contract with the said Navy Department, subsequent to the dates of said patents and within six years next preceding the filing of this complaint, to wit: during the years 1918 to 1923, all in infringement of the aforesaid Letters Patent; and that defendant is preparing and threatening to infringe said patents more extensively by the manufacture of said infringing apparatus for and its sale to the United States Navy Department under contract with the said Department and thus to inflict further injury, damage and loss upon the plaintiff; but to what extent the defendant has profited by reason of the aforesaid infringement, plaintiff is ignorant and cannot set forth and prays an account thereof.”

The contract with the United States is not set forth. Whether it undertook to protect them against claims arising under appellant's patents, or whether the compasses were delivered before or after July 1, 1918, or whether the arrangement necessarily involved an infringement of the patents, does not appear.

The trial court dismissed the bill for lack of jurisdiction, and granted this direct appeal December 30, 1924. Such appeals were permitted by § 238 Judicial Code—"in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." We are, now, concerned only with the power of the trial court to decide the controversy revealed by the record.

Under § 24 Judicial Code district courts have original jurisdiction—"Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trademark laws." Appellant charged that the Engineering Company had infringed its patents by making and selling compasses to the United States, under contract, during the years 1918 to 1923, and intended further to infringe by continuing so to do. It asked for damages and an injunction. But for the allegation that the inventions were made and sold under such a contract, this would be but the ordinary patent suit. And so the real question presented is whether that allegation was enough to deprive the District Court of the jurisdiction plainly conferred by § 24.

The Act of June 25, 1910, c. 423, 36 Stat. 851, "to provide additional protection for owners of patents," directed: "That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims."

The Act of July 1, 1918, c. 114, 40 Stat. 704, 705, amended the Act of 1910 to read—

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without

license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further,* That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise; *And provided further,* That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

The argument is that the Act of 1918 deprived the District Court of jurisdiction over the controversy between the present parties because it limited the patent owner's remedy, under circumstances like those here disclosed, to a suit against the United States in the Court of Claims. But we think this contention goes to the merits of the matter, and not merely to the question of jurisdiction. The true intent and meaning of the statute is not free from doubt; but certainly there is nothing therein which shows any clear purpose to take away the power to decide. It became the duty of the court below to consider and determine whether, in the circumstances stated, appellee was relieved of liability and permitted by the statute to do what otherwise would have constituted a

Argument for Petitioner.

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violation of appellant's rights. There was jurisdiction. The judgment below must be reversed and the cause remanded for further proceedings in conformity with this opinion. See *The Pesaro*, 255 U. S. 216; *Smith v. Apple*, 264 U. S. 274; *Smyth v. Asphalt Belt Ry.*, 267 U. S. 326.

Reversed.

MELLON, DIRECTOR GENERAL, *v.* MICHIGAN
TRUST COMPANY, RECEIVER.

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

No. 272. Argued April 27, 1926.—Decided May 24, 1926.

1. In view of § 10 of the Federal Control Act, a claim for transportation charges and for conversion of goods shipped, presented by the Director General of Railroads against an insolvent who made a voluntary assignment, is not entitled to the priority granted the United States by Rev. Stats. § 3466. P. 237.
2. Cause *held* to be reviewable by certiorari and not by appeal. P. 240.
- 2 Fed. (2d) 194, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which sustained the District Court in denying priority of payment to a claim made by the Director General of Railroads in a suit to wind up affairs of an insolvent corporation. An appeal also was taken, and is dismissed.

Mr. Sidney F. Andrews, with whom *Messrs. A. A. McLaughlin, George M. Clapperton, and Charles M. Owen* were on the brief, for appellant and petitioner.

The claims filed by the Director General were claims on behalf of the United States. *In re Hibner Oil Co.*, 264 Fed. 667; *In re Tidewater Coal Exch.*, 280 Fed. 648; *Davis v. Pullen*, 277 Fed. 650; *Davis v. Miller-Link Lumber Co.*, 296 Fed. 649; *United States v. Butterworth-Judson Corp.*, 269 U. S. 504; *DuPont de Nemours & Co.*

v. Davis, 264 U. S. 456; *Davis v. Corona Coal Co.*, 265 U. S. 219.

They were, under § 3466, Rev. Stats., entitled to priority, because the debtor, when insolvent, made a voluntary assignment of all his property for the benefit of his creditors and the receiver was invested with title as trustee for the creditors, and hence bound to give priority to these claims.

Mr. Stuart E. Knappen for appellee and respondent.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Creditors of the Rathbone Manufacturing Company filed a bill against it in the United States District Court, Western District of Michigan, wherein they alleged its inability to pay lawful debts in due course, etc., and asked for a receiver. Answering, the corporation, (which was, in fact, insolvent,) admitted the allegations and gave consent to the relief prayed. Thereupon, the Michigan Trust Company was appointed receiver, took possession of the property and entered upon administration of the trust.

The Director General of Railroads presented claims for transportation charges and conversion of a shipment of pig iron. He asked priority of payment, which was denied by both the trial court and the Circuit Court of Appeals. 2 Fed. (2d) 194.

As pointed out in *United States v. Butterworth-Judson Corporation*, 269 U. S. 504, the things done by the Rathbone Manufacturing Company amounted, in substance, to a voluntary assignment of all its property within the meaning of R. S. § 3466.* Consequently, if the Director

* "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

General is entitled to the priority granted to the United States by that section, the judgment below must be reversed. But it is said here, and was held below, that such priority is inhibited by the provisions of § 10, Act of March 21, 1918, c. 25, 40 Stat. 451, 456, which provides—

“ That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.”

Under *Davis v. Pringle*, 268 U. S. 315, if the estate of the Rathbone Manufacturing Company were being ad-

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.”

ministered under the Bankruptcy Act the claims of the Director General would not be entitled to preference. It is also plain, under *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U. S. 483; *Price v. United States*, *id.* 492; and *United States v. Butterworth-Judson Corporation*, *supra*, that, in proceedings like the present one, debts due directly to the United States, nothing else appearing, are ordinarily entitled to priority under R. S. § 3466. Decision of this cause, therefore, must turn upon the effect to be given § 10, Act of 1918, *supra*.

All agree that the rights of the Director General rest upon statutory provisions, and not upon any sovereign prerogative of the United States. In taking over and operating the railroads, the United States acted in their sovereign capacity. *DuPont de Nemours & Co. v. Davis*, 264 U. S. 456, 462. But it was for Congress to determine whether or not claims arising out of such operation should have priority when the debtor made a voluntary assignment. In cases of bankruptcy the statute then in force prohibited any preference.

In some matters, at least, under § 10, the United States stand exactly as if they were a railroad corporation operating as a common carrier. *Director General v. Kastensbaum*, 263 U. S. 25, 28. As said in *Davis v. Pullen*, 277 Fed. 650, 655, "there is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents." And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the general intent to preserve the substantive rights of all parties concerned as they would have existed but for federal control.

Section 10 subjected the Director General, as an operator of common carriers, to the laws theretofore applicable

to them, except when inconsistent with some provision of the federal control acts or an order of the President, and forbade him to defend, in any suit against him as such operator, upon the ground that he was an instrumentality or agency of the federal government. In the circumstances presented by this record, it is reasonable to say that the statute confined his substantive rights to those which a carrier would have had, and prohibits him, as though he were an actual defendant in a suit, from resisting the demands of others for equal distribution of the insolvent's assets, under the commonly-applied rule, upon the ground that he is an instrumentality of the federal government. To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view together with the recent policy, revealed by the Bankruptcy Act, in respect of priorities.

The cause is properly here on the writ of certiorari. The appeal was improvidently allowed by the circuit judge, and is dismissed.

The decree below is

Affirmed.

FENNER ET AL. v. BOYKIN ET AL.

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

No. 308. Argued May 4, 1926.—Decided May 24, 1926.

Enforcement of a state penal statute, even of one contrary to the federal Constitution, may be interfered with by injunction orders of a federal court only in extraordinary circumstances where the danger of irreparable loss is both great and immediate. P. 243.

3 Fed. (2d) 674, affirmed.

APPEAL from a judgment of the District Court refusing a preliminary injunction in a suit by Fenner and others

to restrain Boykin and Lowry, state officers, from enforcing a criminal law against dealings in agreements for purchase or sale of cotton for future delivery.

Messrs. Arthur G. Powell and Thomas W. Hardwick, with whom Messrs. John D. Little, Marion Smith, and Max F. Goldstein were on the brief, for appellants.

The court had jurisdiction of the controversy. That a federal court of equity has the power to enjoin a criminal prosecution in the state court where business or property rights are involved and that such a suit is not a suit against a State is now well established. *Terrace v. Thompson*, 263 U. S. 197; *Truax v. Raich*, 239 U. S. 33; *Ex parte Young*, 209 U. S. 123; *Louisville & Nashville v. Railroad Commission*, 157 Fed. 944; *Georgia Railroad v. City of Atlanta*, 118 Ga. 486; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *Dobbins v. Los Angeles*, 195 U. S. 223; *C. R. R. v. R. R. Comm. of Ala.*, 161 Fed. 925; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Tucker v. Williamson*, 229 Fed. 201; *Southern Express Co. v. Ensley*, 116 Fed. 760; *Amer. School of Healing v. McNulty*, 187 U. S. 94; *Cutsinger v. Atlanta*, 142 Ga. 555; *Savage v. Jones*, 225 U. S. 501; *Home Tel. Co. v. Los Angeles*, 227 U. S. 278.

If the statute is unconstitutional as a whole or in its directly prohibitory provisions, the same authorities sustain the proposition that there is a duty to grant the injunction.

When the appellants, as citizens of other States, came into the district court seeking relief by an injunction to prevent the destruction of their business by local defendants, who were seeking to destroy it under color of a statute which was either unconstitutional or did not prohibit their business; and it was clearly shown that failure to enjoin would result in at least temporarily dismantling (with great damage), if not permanently de-

stroying, that business, the judges should have granted the temporary injunction.

See *Ex parte Young*, 209 U. S. 123; *Louisville & Nashville v. R. R. Commission*, 157 Fed. 944; *Terrace v. Thompson*, 263 U. S. 197.

The jurisdiction of the federal court is not defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal question in the state court. *Prout v. Starr*, 188 U. S. 537; *C. R. R. v. Railroad Commission*, 161 Fed. 972; *Ex parte Young*, 209 U. S. 123. The bill having been filed in the federal court before the indictments were found in the state court, the federal court has the superior right. *Farmers Loan & Trust Co. v. Lake St. Elev. R. Co.*, 177 U. S. 51; *Foster-Eddy v. Baker*, 192 Fed. 624; *United States ex rel. Butz v. Muscatine*, 8 Wall, 575.

Mr. Hooper Alexander, with whom *Mr. James W. Austin* was on the brief, for appellees.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

This appeal is without merit, and the interlocutory decree below must be affirmed.

By an Act approved August 20, 1906, the Legislature of Georgia declared unlawful certain agreements for the purchase or sale, for future delivery, of designated commodities, and made participation therein a misdemeanor. It also prohibited maintenance of an office where such agreements are offered, and specified what should constitute *prima facie* evidence of guilty connection therewith. Laws 1906, p. 95.

Appellees, Boykin and Lowry, are the Solicitor General and Sheriff of Fulton County, Georgia, charged respectively with the general duty of prosecuting and arresting offenders.

Subsequent to the passage of the Act of 1906, appellants, citizens of States other than Georgia, established in Fulton County a branch office, with the ordinary quotation board, where they solicited and received orders, accompanied by margins, to purchase or sell cotton for future delivery on the New York and New Orleans exchanges. They were threatened with arrest and prosecution for violating the Act of 1906. By a bill in the United States District Court for the Northern District of Georgia they challenged the validity of that statute, upon the ground that it interfered with the free flow of commerce between the States. They alleged that the threatened action would deprive them of rights guaranteed by the federal Constitution, and asked that appellees be enjoined from proceeding therewith.

The District Court, three judges sitting, having heard the matter, concluded that the statute condemned gambling transactions only, did not affect interstate commerce, and that the proposed proceedings against appellants would not deprive them of any right. The request for preliminary injunction was accordingly refused, and this appeal followed. 3 Fed. (2d) 674.

The trial court discovered no necessity for the relief asked. The record discloses no adequate reason for a different conclusion here. There was no abuse of discretion.

Ex parte Young, 209 U. S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and

must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court. *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500.

Affirmed.

ALABAMA & VICKSBURG RAILWAY COMPANY
ET AL. *v.* JACKSON & EASTERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF MISSISSIPPI.

No. 244. Argued April 16, 1926.—Decided May 24, 1926.

1. Judgment of a state court *held* reviewable by writ of error. P. 247.
2. Since the enactment of the Transportation Act, 1920, the jurisdiction to determine whether a junction may be established between the main lines of two railroads, both engaged in interstate as well as local commerce, is exclusively in the Interstate Commerce Commission. P. 249.
136 Miss. 726, reversed.

ERROR and certiorari to a judgment of the Supreme Court of Mississippi, which affirmed a dismissal of the bill in a suit by the Alabama & Vicksburg Railway Company to enjoin proceedings in condemnation, instituted by the Jackson & Eastern Railway Company to accomplish a connection between its main line and that of the other company. See also 129 Miss. 437; 131 *id.* 857, 874.

Mr. J. Blanc Monroe, with whom *Messrs. R. H. Thompson, A. S. Bozeman, S. L. McLaurin*, and *Monte M. Lemann* were on the brief, for plaintiffs in error.

Mr. George B. Neville, with whom *Messrs. Marcellus Green* and *Hardy R. Stone* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Alabama & Vicksburg Railway and the Jackson & Eastern Railway are both Mississippi corporations. Each owns and operates in intrastate and interstate commerce a railroad within that State. The latter instituted a proceeding under a state law to secure by eminent domain a connection with the former's line at a point east of the City of Jackson, called Curran's Crossing. Prior to instituting the eminent domain proceeding the Jackson & Eastern had secured from the Interstate Commerce Commission a certificate under paragraphs 18-20 of § 1, authorizing the extension of its road from Sebastopol, Mississippi, to Jackson. The order made no reference to Curran's Crossing, or to any connection with the Alabama & Vicksburg. *Public Convenience Certificate of Jackson & Eastern Ry. Co.*, 70 I. C. C. 110, 495. Thereafter, but also before instituting the eminent domain proceeding and before building the extension authorized, the Jackson & Eastern applied to the Commission for an order authorizing it to connect with the main line of the Alabama & Vicksburg at Curran's Crossing, and requiring the latter to grant a joint use of its main line from that point into the City of Jackson. This application, which had apparently been filed under paragraph 9 of § 1 of the Interstate Commerce Act, was withdrawn without a hearing. Compare *United States v. Baltimore & Southwestern R. R. Co.*, 226 U. S. 14. No further application was made to the Commission.

By the constitution and statutes of Mississippi a railroad corporation organized under the laws of that State may "cross, intersect, join, or unite its railroad with any other railroad heretofore or hereafter constructed at any points on their routes, and upon the ground of such other railroad company, with the necessary and proper turn-outs, sidings, switches, and other conveniences, and . . . [may] exercise the right of eminent domain for that purpose." Constitution of 1890, §§ 184, 190; Hemingway's Code, §§ 6722, 6725, 6728. This right of eminent domain is exercised by proceedings in a special court which has jurisdiction to determine only the amount of the damages payable. The special court cannot pass upon the right of a plaintiff to institute the proceeding or upon any defense or other objection. Nor can any such question be raised upon an appeal from the judgment of the special court. The sole remedy of the objecting railroad is a separate proceeding to be brought in a court of equity. Hemingway's Code, § 1492; *Louisville & Nashville R. R. Co. v. Western Union Tel. Co.*, 234 U. S. 369, 378-380; *Vinegar Bend Lumber Co. v. Oak Grove & G. R. R. Co.*, 89 Miss. 84; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 131 Miss. 857, 874.

This suit was brought by the Alabama & Vicksburg in the appropriate Chancery Court of the State to enjoin the Jackson & Eastern from pursuing the eminent domain proceeding. The bill alleged willingness to permit a junction, but asserted that the point selected by the defendant was an improper one, would imperil the safety of life and property, would burden interstate commerce and would be prejudicial to the plaintiff's interests. It asserted, among other grounds of relief, the claim that the Interstate Commerce Commission has exclusive jurisdiction over the establishment of junctions or physical connections between railroads engaged in interstate commerce, that the Commission had not authorized the connection

here in question, and that the institution of eminent domain proceedings was therefore in violation of the federal law. A restraining order issued upon the filing of the bill. Later, the Chancellor sustained a demurrer to the bill for want of equity; dissolved the injunction; and denied supersedeas pending an appeal to the Supreme Court of the State. That court allowed a supersedeas, 129 Miss. 437; overruled the demurrer; reversed the decree; and remanded the case for further proceedings. It did this on the ground that, while under the state law the connection might ordinarily be made at such point on the other's line as the railroad seeking the junction might desire, the place selected must be a proper one, and the bill alleged that the particular junction sought was not. 131 Miss. 857, 874. Upon that issue the Chancellor then heard the case on the evidence; found that the proposed connection was a proper one; dissolved the injunction; and dismissed the bill. That decree was affirmed upon a second appeal to the Supreme Court. 136 Miss. 726. In affirming the decree, the highest court of the State overruled the contention of the Alabama & Vicksburg that the Interstate Commerce Commission had exclusive jurisdiction over the establishment of junctions between railroads engaged in interstate commerce; held that Congress had not taken full control of the subject; and concluded that the authority granted by the state law to secure junctions did not interfere with interstate commerce to an appreciable degree, if at all. The case is here on writ of error with supersedeas granted by the Chief Justice of the State. A petition for writ of certiorari was also filed, consideration of which was postponed. As the case is properly here on writ of error, the petition is dismissed.

In *Wisconsin, Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 287, decided in 1900, this Court sustained an

order of a state commission which, at the instance of shippers, had directed two railroads of the State engaged in interstate and intrastate commerce to provide a physical connection between their lines. The state commission had found that the connection was required for intrastate commerce; and this Court concluded that the connection ordered could not prejudice interstate commerce. Since then the authority of the Interstate Commerce Commission has been greatly enlarged and the power of the States over interstate carriers correspondingly restricted. Prominent among the enlarged powers of the federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confers upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

The Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, provided, by what is now paragraph 3 of § 3, that carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines;" but it did not confer upon the Commission authority to permit and to require the construction of the physical connection needed to effectuate such interchange. Paragraph 9 of § 1, introduced by Act of June 8, 1910, c. 309, § 7, 36 Stat. 539, 548, required a carrier engaged in interstate commerce to construct a switch connection "upon application of any lateral, branch line" and empowered the Commission to enforce the duty; but that provision was held applicable only to a line already constituting a lateral branch road. *United States v. Baltimore & Ohio Southwestern R. R. Co.*, 226 U. S. 14. The Act of August 24, 1912, c. 390, § 11, 37

Stat. 560, 568, amending § 6 of the Act to Regulate Commerce, empowered the Commission to require railroads to establish physical connection between their lines and the docks of water carriers; but the provision did not extend to connections between two rail lines. It was not until Transportation Act, 1920, c. 91, 41 Stat. 456, conferred upon the Commission additional authority, that it acquired full power over connections between interstate carriers. By paragraphs 18-20 added to § 1, it vested in the Commission power to authorize constructions or extensions of lines, although the railroad is located wholly within one State; and by paragraph 21 authorized the Commission to require the carrier "to extend its line or lines." By paragraph 4 of § 3 it empowered the Commission to require one such carrier to permit another to use its terminal facilities "including main-line track or tracks for a reasonable distance outside of such terminal."

The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of § 1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." It is clear that the connection here in question is not a track of this character. Compare *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The proposed junction is between the main lines of the two railroads. The point of junction is on the main line of the Alabama & Vicksburg, near its entrance into the City of Jackson. In support of the objection that a junction there would be dangerous, it was shown that the connection would be located between two tres-

ties, near a highway crossing, on a curve, on a fill, and within the flood area of Pearl River. The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction.

It is true that in this case the state court found that the place selected for the junction was a proper one. But the power to make the determination whether state action will obstruct interstate commerce inheres in the United States as an incident of its power to regulate such commerce. Compare *Colorado v. United States*, ante, p. 153. In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment. The Commission's power under paragraph 3 of § 3 to require the establishment of connections between the main lines of carriers was asserted by it in *Pittsburg & West Virginia Ry. Co. v. Lake Erie, Alliance & Wheeling R. R.*, 81 I. C. C. 333, a case decided after the withdrawal by the Jackson & Eastern of its application to the Commission for leave to make the junction at Curran's Crossing, and in *Breckenridge Chamber of Commerce v. Wichita Falls, Ranger & Fort Worth R. R. Co.*, 109 I. C. C. 81. That its jurisdiction is exclusive was held in *People v. Public Service Commission*, 233 N. Y. 113,

119-121. Compare *Lake Erie, Alliance & Wheeling R. R. Co. v. Public Utilities Commission*, 109 Ohio St. 103.

Writ of certiorari denied.

Decree reversed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY v. ALVIN R. DURHAM COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 257. Argued April 20, 1926.—Decided May 24, 1926.

1. The Uniform Bill of Lading Act of August 29, 1916, c. 415, § 23, presents no obstacle to garnishment of a carrier after the order bill of lading has been surrendered; neither does that Act confer a right of garnishment. P. 256.
 2. The fact that, by § 5 of the Uniform Bill of Lading, as construed by this Court in *Michigan Central R. Co. v. Mark Owen & Co.*, 256 U. S. 427, a carrier may remain liable *qua* carrier to the consignee of an interstate carload shipment after surrender of the bill of lading and payment of charges and while the car is on a train track and turned over to the consignee for the purpose of unloading, and partly unloaded by him, is not determinative of the carrier's liability as garnishee in a suit by a stranger seeking to collect a debt from the consignee. P. 255.
 3. The carrier's liability to garnishment in such circumstances depends on the state law. P. 257.
- 229 Mich. 468, reversed.

CERTIORARI to a judgment of the Supreme Court of Michigan holding the Railway Company liable as garnishee in a suit by Alvin R. Durham Company to collect a debt from one Fred S. Larson, as principal defendant. See also 224 Mich. 477.

Mr. R. N. Van Doren, with whom *Mr. Samuel H. Cady* was on the brief, for petitioner.

Under Michigan law the right to hold a garnishee liable depends upon the state of the claim, as one garnishable or not, at the time of the service of the process in garnishment. As a condition precedent, the garnishee

must have in his hands or under its custody or control property belonging to the defendant. This possession, custody or control must exist at the time of the service of the process in garnishment.

Prior to the decision in the *Mark Owen Case*, 256 U. S. 427, the courts uniformly held that facts similar to those of this case constituted delivery. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 38 S. C. 365; *Rothchild v. Northern Pac. R. R.*, 68 Wash. 527. See also *Kenny Co. v. Atlanta & W. P. R. Co.*, 122 Ga. 365; *Arkadelphia Mill Co. v. Smoker Mdse. Co.*, 100 Ark. 37; *Vaughn v. New York, N. H. & H. R. R.*, 27 R. I. 235; *Paddock v. Toledo & O. C. R. Co.*, 21 Ohio C. C. 626; *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.*, 102 Ia. 262; *South & N. A. R. Co. v. Wood*, 66 Ala. 167; *Southern R. Co. v. Barclay*, 1 Ala. App. 348.

The bill of lading does not change the law as to the facts which constitute delivery. It simply extends the liability of the carrier as to the goods "not removed" from the car. Delivery of the goods in the sense of the surrender of possession, the surrender of the carriers' lien, the surrender of custody or control, is not inconsistent with such liability. The sole question considered by the court in the *Mark Owen Case* was one arising out of the contract relations of the parties and involving the liability of the carrier to the consignee upon and by reason of such contract. The effect of the decision was to place upon the carrier the duty of policing and protecting cars in process of unloading, and for failure to do so a liability was created. In order to hold the carrier liable it was not necessary to hold what the language of the opinion, taken literally, seems to indicate. The purport of the language will properly be restricted in its scope to the query then under consideration, to-wit: the liability of the carrier before the removal of merchandise from a car.

Mr. Joseph L. Hooper, with whom Messrs. Julius J. Patek, Myron H. Walker, and Solomon W. Patek were on the brief, for respondent Durham Company.

The bill of lading, and the rules and regulations subject to which it is issued and accepted, constitute the contract between the parties, the carrier, the shipper, and the consignee, and necessarily limit and govern their rights in the shipment and the rights of those claiming under them; and it is well settled that the liability of the garnishee in respect of property in his hands is governed and must be determined by such contract and can neither be enlarged, restricted, modified, nor impaired as to the garnisheeing creditor and his rights. It is, therefore, the contention of the respondent that the rights of the parties in this case, fixed as they are by the contract of shipment, are settled; and this case is governed by the recent decision of this Court in *Michigan Central R. R. Co. v. Mark Owen & Co.*, 256 U. S. 427.

The Railway Company had plenary control over the car and the apples remaining in it, at the time the summons was served. As to such property "there was no delivery," "but only a right of access given to it in order that it might be removed." This "right of access" thus "given" was a mere license revocable at any time by the Railway Company, certainly for cause, such as service of process in garnishment. In the meantime the apples remained and were in the "custody and control" of the Railway Company, and as carrier. The relative rights and liabilities of the Railway Company as carrier, and of the consignee, under the bill of lading, in the goods still in the car during the forty-eight hour period, do not depend upon the fact of the payment of the freight bill, but upon the fact of "delivery" or "no delivery," of the shipment still in the car, and the consequent "custody and control" by the carrier of the shipment "not removed." See *Erie R. R. Co. v. Shuart*, 250 U. S. 465; *Southern Ry. Co. v. Prescott*, 240 U. S. 632.

Congress in the Uniform Bill of Lading Act, August 29, 1916, 39 Stat. 542, § 23, recognized that the surrender of the order bill of lading is not of itself a delivery of the goods or of possession so as to preclude garnishment of the carrier for the goods, for it expressly provides that goods in the possession of the carrier, in case of an order bill of lading, cannot be attached by garnishment of the carrier, "unless the bill be first surrendered to the carrier," and, further, that "the carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered or impounded by the Court."

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

By an interstate shipment made under the uniform order bill of lading the Chicago & Northwestern Railway received in 1921 at its yards in Ironton, Michigan, a box-car containing apples consigned to the shipper's order, "Notify F. M. Larson." The car was placed on the "team track," which is one of the public delivery tracks used for unloading freight received in car-load shipments and is not connected in any manner with a railway freight warehouse. The next morning, at 8.20 o'clock, Larson surrendered the bill of lading duly indorsed, paid the freight charges, gave to the Railway his receipt for the apples, and commenced unloading the car. On the same day the Alvin R. Durham Company sued out a writ of garnishment against the Railway which was served at 9.45 a. m. At that time about one-quarter of the apples had already been taken from the car by Larson. In spite of the service of the writ of garnishment, the Railway did not prevent the further unloading. This was not completed until four days later. Meanwhile the car was locked every night by Larson. During this period of un-

loading, the car was shifted several times by the Railway for its own convenience in the use of the team tracks.

The trial court directed a verdict for the garnishee on the ground that the Railway did not have the custody, control or possession of the shipment. The Supreme Court of Michigan reversed that judgment and held the carrier liable on the ground that "under the interpretation of § 5 of the uniform bill of lading as appears in *Michigan Central R. Co. v. [Mark] Owen [& Co.]*, 256 U. S. 427, . . . the railway did have the custody, control and possession of the interstate shipment." 229 Mich. 468. See also 224 Mich. 477; 265 U. S. 580. This Court granted a writ of certiorari. 268 U. S. 684. The sole question for decision is whether the Railway is liable as garnishee.

The facts in the two cases are similar, but the legal questions presented for decision are wholly different. In the *Mark Owen Case* it was sought to enforce under the federal law an alleged liability in contract of an interstate carrier to the consignee. Whether the railroad was liable depended upon the construction to be given the contract for an interstate shipment contained in the uniform bill of lading. Compare *Southern Railway Co. v. Prescott*, 240 U. S. 632. The question was whether, in the absence of negligence, the railroad was liable to the consignee for grapes stolen from the car while on the team track after the unloading had begun, but before the expiration of 48 hours after giving notice of arrival.¹ The

¹ Section 1 of the uniform bill of lading provides: "The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. . . ."

Section 5: "Property not removed by the party entitled to receive it within forty-eight hours . . . after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only. . . ."

railroad contended that, under § 5 of the bill of lading, there was no liability, because the surrender of the car to the consignee, followed by breaking the seals and commencement of unloading, constituted a delivery; and that, in any event, its responsibility for the unloaded part of the contents had become that of warehouseman. This Court held that, since the theft occurred within the 48-hour period, there had not been, under the contract of the parties as expressed in § 5 of the bill of lading, such a delivery as would terminate the carrier's liability as insurer or reduce the liability to that of the warehouseman's exercise of reasonable care.

In the case at bar it is sought to hold the railroad liable as garnishee to a stranger. It is not sought to enforce a liability arising under a federal law. As the order bill of lading had been surrendered, the Uniform Bill of Lading Act presented no obstacle to garnishment. Act of August 29, 1916, c. 415, § 23, 39 Stat. 538, 542. But that Act obviously confers no right to garnishment. Nor is there anything in the bill of lading which conceivably could be construed as either conferring or denying the right of garnishment. The plaintiff does not seek to enforce, as a derivative right, a claim of the consignee against the carrier under the bill of lading. It seeks to reach tangible property confessedly belonging to the principal defendant and to which the carrier confessedly makes no claim either of title or possession. Section 5 of the bill of lading clearly does not authorize a carrier, who had surrendered to the consignee control of the shipment upon surrender of the bill of lading, payment of charges and signing of the usual receipt, any right to recapture control of the unloaded part of the shipment in the event that garnishee proceedings are commenced within 48 hours after such surrender.

The liabilities consequent upon the character of the custody and control exercised by carrier or consignee arise

from and are dependent upon the state statutes conferring the right of garnishment, and as such are unaffected by the provisions of the bill of lading. Thus the question whether, under the circumstances, the apples remaining in the car were subject to garnishment, is not one of uniform carrier liability, but, primarily, of procedure, and as such governed by varying views of local policy, legislation and practice. Thus, a garnishee may be under no liability, because the property could have been reached by direct levy.² He may be under no liability because of the nature of the claim sought to be enforced,³ or because of the character of the plaintiff,⁴ of the principal defendant,⁵ of the garnishee,⁶ or of the property sought

² *Madden v. Union Pacific R. R. Co.*, 89 Kan. 282; *Wood v. Edgar*, 13 Mo. 451; *Gleason v. South Milwaukee Bank*, 89 Wis. 534. Compare *Hooper v. Day*, 19 Me. 56; *Balkham v. Lowe*, 20 Me. 369.

³ *Nesbitt v. Ware*, 30 Ala. 68; *Cunningham v. Baker*, 104 Ala. 160; *Holcomb v. Winchester*, 52 Conn. 447; *Clark v. Brewer*, 6 Gray (Mass.) 320; *Martz v. Detroit Fire Ins. Co.*, 28 Mich. 201; *Thorp v. Preston*, 42 Mich. 511; *Weil v. Tyler*, 38 Mo. 545; *Selheimer v. Elder*, 98 Pa. St. 154.

⁴ *Davis v. Millen*, 111 Ga. 451; *Shivers v. Wilson*, 5 Harr. & J. (Md.) 130. Compare *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570.

⁵ *Edmondson v. De Kalb County*, 51 Ala. 103; *Danley v. State Bank*, 15 Ark. 16; *Lovejoy v. Albee*, 33 Me. 414.

⁶ *Buchanan v. Alexander*, 4 How. 20; *Fischer v. Daudistal*, 9 Fed. 145; *Pringle v. Guild*, 118 Fed. 655; *Moscow Hardware Co. v. Colson*, 158 Fed. 199; *Allen-West Commission Co. v. Grumbles*, 161 Fed. 461; *In re Argonaut Shoe Co.*, 187 Fed. 784; *Glass v. Woodman*, 223 Fed. 621; *Forbes v. Thompson*, 2 Penn. (Del.) 530; *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351; *Millison v. Fisk*, 43 Ill. 112; *Bivens v. Harper*, 59 Ill. 21; *Wallace v. Lawyer*, 54 Ind. 501; *Allen v. Wright*, 134 Mass. 347, 136 Mass. 193; *School District v. Gage*, 39 Mich. 484; *White v. Ledyard*, 48 Mich. 264; *Hudson v. Saginaw Circuit Judge*, 114 Mich. 116; *McDougal v. Hennepin County*, 4 Minn. 184; *Clarksdale Compress Co. v. Caldwell County*, 80 Miss. 343; *Ross v. Allen*, 10 N. H. 96; *Burnham v. City of Fond du Lac*, 15 Wis. 193. Compare *Dunkley v. City of Marquette*, 157 Mich. 339.

to be reached.⁷ And, although no objection may exist upon any of these grounds, the garnishee may be held immune from liability, because the highest court of the State had declared that to allow garnishment, under the circumstances, would be against public policy; as where a carrier having possession, custody and control of property is held not chargeable by garnishment because the goods were in process of transportation.⁸

Whether under the law of Michigan the Railway was liable as garnishee, we have no occasion to enquire. There is nothing in the uniform bill of lading which would prevent the state court from holding that, although the freight car was in the carrier's possession, it was not liable as garnishee of the contents, because the apples were in the consignee's possession although not unloaded. A person breaking open and taking the contents of a chest in his custody has been held guilty of larceny. *Union Trust Co. v. Wilson*, 198 U. S. 530, 537. The state court, however, reversed the judgment of the trial court because it assumed that the liability of the garnishee was fixed by the federal law, and that, under the rule declared in the *Mark Owen Case*, the railroad was liable. As this was error, the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. *Ebert v. Poston*, 266 U. S. 548. Compare *Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109.

Reversed.

⁷ Compare *Smith v. Gilbert*, 71 Conn. 149; *Stowe v. Phinney*, 78 Me. 244; *Massachusetts National Bank v. Bullock*, 120 Mass. 88; *Rozelle v. Rhodes*, 116 Pa. St. 129.

⁸ *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104; *Bates v. Chicago, Milwaukee & St. P. Ry. Co.*, 60 Wis. 296. Compare *Adams v. Scott*, 104 Mass. 164; *Rosenbush v. Bernheimer*, 211 Mass. 146; *Clifford v. Brockton Transp. Co.*, 214 Mass. 466; *Landa v. Holck & Co.*, 129 Mo. 663.

Counsel for Parties.

TURNER, DENNIS & LOWRY LUMBER COMPANY
v. CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI.

No. 271. Argued April 26, 27, 1926.—Decided May 24, 1926.

1. A suit by a shipper to recover money exacted by a carrier under an interstate tariff alleged to be unauthorized by the Interstate Commerce Act, or unconstitutional, is within the jurisdiction of the District Court, irrespective of the amount involved, as a suit arising under a law regulating commerce. Jud. Code § 24, par. eighth. P. 261.
 2. Preliminary resort to the Interstate Commerce Commission is not essential to a suit to recover alleged wrongful demurrage charges, no administrative question being presented. P. 262.
 3. An additional demurrage charge, miscalled a penalty, of ten dollars per car, per day, imposed by tariff on cars of lumber held at initial destination beyond a specified time, for reconignment, and found reasonable, on evidence, by the Interstate Commerce Commission, does not exceed the Commission's statutory authority nor the power of Congress to delegate authority to the Commission. P. 262.
 4. Neither is such charge violative of due process, because without notice other than that conveyed by the tariff, or violative of equal protection of the laws, because applicable only to cars loaded with lumber. P. 263.
- 2 Fed. (2d) 292, affirmed.

ERROR to a judgment of the District Court for the Railway Company in an action by the Lumber Company to recover a sum collected under a demurrage tariff.

Messrs. Rees Turpin and Edward A. Haid for plaintiff in error.

Messrs. O. W. Dynes and J. N. Davis for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Turner, Dennis & Lowry Lumber Company brought this action against the Chicago, Milwaukee & St. Paul Railway Company in the federal court for western Missouri to recover \$40 alleged to have been illegally exacted in December, 1921. That sum was collected by the carrier, in accordance with a demurrage tariff duly filed, as a so-called penalty at the rate of \$10 a day for the detention of a car containing lumber shipped interstate over the defendant's railroad to the plaintiff at Aberdeen, South Dakota, and there held at its request for reconsignment. The claim that the charge was illegally exacted rests upon the contentions that imposition of a penalty exceeds the statutory authority conferred upon the Commission; that if the Interstate Commerce Act be construed as conferring such authority, the provision is void, because Congress is without power to authorize the Commission to impose it, since prescribing a penalty is a legislative function which cannot be delegated; and that, even if authority to impose a penalty was validly conferred, this particular provision is void, because, by imposing the penalty without notice, there is a denial of due process of law; and that, being imposed only on shippers of lumber, there is a denial of equal protection of the laws.

The tariff in question provides:

“To prevent undue detention of equipment under present emergency, the following additional penalties for detention of equipment will apply:

“On cars loaded with lumber held for reconsignment a storage charge of \$10 per car will be assessed for each day or fractional part of a day that a car is held for reconsignment after 48 hours after the hour at which free time begins to run under the demurrage rules.

“ These charges will be assessed regardless of whether cars are held on railroad hold tracks or transfer tracks, including consignee’s or other private sidings, and will be in addition to any existing demurrage and storage charges.”

The general nature of charges under the Uniform Demurrage Code was considered in *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, and *Pennsylvania R. R. Co. v. Kitanning Iron & Steel Co.*, 253 U. S. 319. The origin and purpose of the penalty charge here in question were discussed in *Edward Hines, etc., Trustees v. United States*, 263 U. S. 143. The nature and scope of the reconsignment privilege are stated in *Reconsignment Case*, 47 I. C. C. 590; *Reconsignment Case No. 3*, 53 I. C. C. 455; *Stetson, Cutler & Co. v. New York, New Haven & Hartford R. R. Co.*, 91 I. C. C. 3. This penalty charge was attacked as unreasonable and unjustly discriminatory in *American Wholesale Lumber Association v. Director General*, 66 I. C. C. 393, and there held by the Interstate Commerce Commission to be neither unreasonable nor otherwise unlawful.¹

By stipulation in writing a jury was waived; the case was submitted on agreed facts; these were adopted by the court as a special finding of facts; and judgment was entered for the defendant on November 8, 1924, 2 Fed. (2d) 291. The District Court had jurisdiction under Paragraph Eight of § 24 of the Judicial Code, despite the small amount, because the suit arises under a law regulating commerce. *Louisville & Nashville R. R. Co. v.*

¹ During the period of federal control this tariff was filed with the Interstate Commerce Commission, as provided by law, to be effective October 20, 1919. After the termination of federal control the defendant and other railroads continued to maintain the provision in their published tariffs until March 13, 1922, when it was cancelled in pursuance of the decision and order of the Commission in *American Wholesale Lumber Co. v. Director General*, 66 I. C. C. 393.

Rice, 247 U. S. 201. Preliminary resort to the Interstate Commerce Commission was unnecessary, because no administrative question is presented. *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285. The case is here on direct writ of error under § 238 of the Judicial Code, prior to its recent amendment, because of the constitutional questions involved.

The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States v. New River Co.*, 265 U. S. 533; *Avent v. United States*, 266 U. S. 127; *United States v. P. Koenig Coal Co.*, 270 U. S. 512. One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.

All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. *Pennsylvania R. R. Co. v. Kitanning Iron & Steel Co.*, 253 U. S. 319, 323; *Edward Hines, etc., Trustees v. United States*, 263 U. S. 143, 145. The charge here in question, although called a penalty, is in essence an additional demurrage charge, increasing at a step rate. Such additional charges increasing with the length of the pe-

riod of detention were introduced in respect to some cars by the National Car Demurrage Rules. See Rule 7.—Demurrage Charges, sections A and B. They were widely applied while the railroads were under federal control. See General Orders of the Director General Nos. 3, 7, and 7a. Bulletin No. 4, Revised (1919), pp. 146, 151; Supplement to Bulletin, Revised (1920), p. 44. The power to impose such charges, if reasonable, is clear. Those here in question have been found by the Commission to be reasonable. It is not claimed that there was no evidence to support the finding. Compare *Louisiana & Pine Bluff Ry. Co. v. United States*, 257 U. S. 114.

The further contentions are that there was a denial of due process of law because the so-called penalty was imposed without notice; and that there was a denial of equal protection of the laws, because the charge was applicable only to cars loaded with lumber. The demurrage charge is, however, a tariff provision and not a penal law, and thus the tariff duly filed charges the shipper with the requisite notice. And neither the Constitution nor the rule of reason requires that either freight or demurrage charges or the reconsignment privilege shall be the same for all commodities. We find no reason to disturb the basis of the Commission's classification.

Affirmed.

UNITED STATES *v.* WYCKOFF PIPE & CREOSOTING COMPANY, INC.

APPEAL FROM THE COURT OF CLAIMS.

No. 282. Argued April 29, 1926.—Decided May 24, 1926.

1. Where a contractor with the Government completed the job under the contract, reserving the right to claim damages due to long delays by the Government in performing its part, the measure of such damages was not the difference between the contract price

and the higher market value of the work at time of performance, but the loss actually sustained by the contractor as the result of the delay. P. 266.

2. In computing such damages, *held* that the contractor could not be allowed the difference between the cost of supplies bought and held for the work under the contract, and the higher market price they had acquired by the time when they were used in it, in the absence of evidence that this was the measure of the loss. P. 267. 59 Ct. Cls. 980, reversed.

APPEAL from a judgment of the Court of Claims allowing damages for delay in performance of the claimant's contract due to the fault of the United States.

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

Mr. Harvey D. Jacob for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Wyckoff Pipe & Creosoting Co., Inc., contracted with the United States, in December, 1917, to lay creosoted wood block floors in Navy Yard buildings at Norfolk, Virginia, furnishing all necessary labor and materials. On a part of the job the contractor was to begin the work immediately after delivery of a copy of the contract. This part was to be completed within 30 days thereafter. On other parts, work was to be deferred until such time as the Government was ready to proceed. These parts were to be finished within 43 days from the dates on which they were begun. The flooring was to be set in a concrete base which was to be laid promptly by the Government. The contractor prepared itself immediately to perform the contract. Among other things, it purchased the lumber and creosote oil needed for the job. Long delays by the Government in furnishing the con-

crete bases prevented performance by the contractor. Thus more than two years elapsed before the work was completed. The contractor was without fault.

The Government's delays confessedly caused the contractor some loss. For the loss so suffered the Government was confessedly liable. It made payment at the fixed contract rate of \$2.26 per square yard—and paid an additional amount, also provided by the contract, equal to 50 per cent. of the estimated increase in the labor cost. It paid nothing otherwise on account of the damages caused by its delay. To recover compensation for the loss suffered, this suit on the contract was brought in the Court of Claims in January, 1923. That court assessed the damages at \$10,122.99; and for that amount it entered judgment, without an opinion, on June 2, 1924. 59 Ct. Cl. 980. The case is here on appeal under § 242 of the Judicial Code. The only question presented is whether there was error in the measure of damages adopted.

The findings of fact recite that the contractor, in reserving its right to claim damages for extras by reason of the long unanticipated delay, had enumerated as items of the proposed claim extra labor on account of the advance in the scale of wages, extra expense by reason of renewal premiums on surety company bonds, additional freight rates on sand and other material, additional cost of sand, additional cost of creosote oil, storage, insurance, and carrying charges "on a large stock of lumber purchased for the account of your contract and carried in our yard for a space of between one and two years." The findings also recite that the record does not disclose by items the amount of extra expense incurred by the contractor by reason of the lengthy delay in the performance of the work. The court made no finding or estimate of the loss so incurred. It found merely that the increase in the prevailing market price of lumber from the time

that used was bought by the contractor until it was actually employed on the job was \$6,021.23; that the increase in the prevailing market price of the creosote oil required from the time it was purchased for the job until it actually was so used amounted to \$712.59; that the reasonable value of the contract work per square yard at the time it was actually performed was, for a part \$2.68, for a part \$2.98, and for the rest \$3.28; and that the reasonable value of the whole work at the time it was done by the contractor, based upon prices then paid by the Government on other work then done at the Navy Yard, was \$9,936.54 in excess of the amount which the contractor had received. It was for this sum of \$9,936.54, plus an item of \$186.45 about which there is no dispute, that the Court of Claims entered its judgment of \$10,122.99

The Government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay, *United States v. Smith*, 94 U. S. 214; *United States v. Mueller*, 113 U. S. 153; *Ripley v. United States*, 223 U. S. 695; that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to

make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the Government's delay. After completing performance it brought this suit declaring on the original contract.

The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the Government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job.

It is argued that the Court of Claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable, compare *United States v. Smith*, 94

U. S. 214, 219; and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error.

The judgment must be reversed. As there are no findings from which the amount of the loss can be determined, the case is remanded for further proceedings.

Reversed.

WESTERN PAPER MAKERS' CHEMICAL COMPANY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 312. Argued May 4, 5, 1926.—Decided May 24, 1926.

1. The determination by the Interstate Commerce Commission of the question whether a rate is reasonable or discriminatory is conclusive if supported by substantial evidence, in the absence of any irregularity in the proceeding or error in applying the rules of law. P. 271.
 2. The Commission is not hampered by mechanical rules governing the weight or effect of evidence. The mere admission of matter which under the rules of evidence applicable to judicial proceeding would be incompetent does not invalidate its order. P. 271.
 3. The Commission has power to require the abandonment of through routes which, under a revision of through rates on a commodity, would violate the long-and-short-haul clause of § 4 of the Interstate Commerce Act. P. 272.
- 7 Fed. (2d) 164, affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit to enjoin or modify orders of the Interstate Commerce Commission establishing through rates on rosin. See 7 Fed. (2d) 164.

Mr. Harry C. Howard for appellants.

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

Mr. P. J. Farrell, with whom *Mr. E. M. Reidy* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit against the United States and the Interstate Commerce Commission was brought in the federal court for western Michigan to enjoin in part, and to modify, certain orders of the Commission, which established through rates on rosin from Atlantic and Gulf ports to Kalamazoo and Grand Rapids, Michigan. The proceedings before the Commission originated in tariffs filed during 1923 by carriers operating in Southeast and Mississippi Valley territory. By these tariffs a comprehensive revision of rates on naval stores, including rosin, from all such points of production was proposed. Shippers, including these plaintiffs, protested. The proposed rates were suspended; and extensive hearings in which the plaintiffs participated were held. An order was entered requiring cancellation of the filed tariffs. A new schedule of rates, including those complained of by plaintiffs, was finally authorized. *Naval Stores from Southern Producing Points to Various Destinations*, 87 I. C. C. 740; 89 I. C. C. 634. Upon specific exceptions filed by the plaintiffs to the Kalamazoo and Grand Rap-

ids rates as proposed in the report of the Examiner, the Commission found that these rates were neither unreasonable nor unjustly discriminatory. *Western Paper Makers' Chemical Co. v. Director General*, 91 I. C. C. 223. The new rates to those cities are higher than the rates previously in effect. The Kalamazoo rates from Gulf ports are higher than those to Chicago; the Grand Rapids rates from Gulf ports are higher than those to Milwaukee.

The case was heard in the District Court before three judges upon application for an interlocutory injunction. The plaintiffs claimed that the order was void in part, because the evidence introduced before the Commission did not justify the increased rates from Atlantic and Gulf ports to Kalamazoo and Grand Rapids; because the establishment of rates from Gulf ports to these cities higher than those enjoyed by competing manufacturers at Chicago and Milwaukee was unjust discrimination against Kalamazoo and Grand Rapids; and because the new rates involved a violation of the long-and-short-haul clause of § 4 of the Interstate Commerce Act. The court found against the plaintiffs on each of their contentions and denied the injunction. 7 Fed. (2d) 164. Upon submission of the case for final hearing a decree dismissing the bill was entered on January 3, 1925. A direct appeal to this Court was taken under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220. The record included all the evidence introduced before the Commission. Pursuant to an order of this Court, made on a motion of the plaintiffs for diminution of the record, counsel agreed upon a short statement of the whole evidence sufficient to enable this Court to consider whether there was any evidence to support the findings of the Commission.

The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions.

It was urged that these are inconsistent with conclusions reached by it in similar cases; that the findings are inconsistent with some views expressed in its reports in this proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562; *New England Divisions Case*, 261 U. S. 184, 204. No such irregularity or error is shown. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence. The mere admission of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. There was ample evidence to support the finding that the joint through rates regarded as entireties were reasonable and justified. Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or through rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates. To consider the weight of the evidence is beyond our province.

Among the objections urged here was this: The rate from New Orleans to Chicago was fixed at 37 cents; that to Kalamazoo at 39. The rate from New Orleans to Milwaukee was fixed at 39 cents; that to Grand Rapids at 40. One of the many routes from the southern ports to Chicago theretofore open, was via Cincinnati and Kala-

mazoo; one of those to Milwaukee was via Cincinnati and Grand Rapids. These routes had been rarely used. If retained, they would have violated the long-and-short-haul clause of § 4 of the Interstate Commerce Act unless relief therefrom was granted by the Commission. See *United States v. Merchants, etc., Association*, 242 U. S. 178. That relief it refused; and, to remove this obstacle to the higher Kalamazoo and Grand Rapids rates, it directed that these routes should be abandoned. The plaintiffs insist that the Commission could not lawfully close an existing route in order to avoid a fourth-section violation. The authority exercised was clearly within the broad discretion vested in the Commission. Compare *Louisiana & Pine Bluff Ry. Co. v. United States*, 257 U. S. 114.

Affirmed.

SUTHERLAND, ALIEN PROPERTY CUSTODIAN,
v. MAYER ET AL.

MAYER v. SUTHERLAND, ALIEN PROPERTY CUS-
TODIAN, ET AL.

REIS ET AL. v. MAYER ET AL.

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

Nos. 232, 233, 234. Argued April 14, 1926.—Decided May 24, 1926.

1. The declaration of war, April 6, 1917, immediately effected dissolution of partnerships then existing between citizens of this country and citizens of Germany. P. 286.
2. During the war all intercourse, correspondence and traffic between citizens of the two countries which might advantage the enemy, was absolutely forbidden. *Id.*
3. The purpose of this restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or comfort, direct or indirect, to the

opposing forces; and private rights and duties are affected only so far as they are incompatible with the rights of war. P. 287.

4. The rule that a liquidating partner must settle the partnership affairs within a reasonable time and, after payment of the partnership liabilities, divide the proceeds among the partners according to their interests, applies to a partnership between citizen and alien dissolved by war. P. 289.
5. As settlement is legally impossible until the close of the war, it is the right and duty of the respective partners to care for and preserve the assets of the partnership in their possession for their mutual benefit when the war is ended. *Id.*
6. A *post-bellum* accounting between such partners is controlled by equitable principles; and the American partner is not entitled, in virtue of his citizenship, to more favorable consideration in the court of equity than is accorded to his alien partner. P. 290.
7. Where the German assets of a German-American partnership, which was dissolved by the war, were cared for by the German partners during the period of non-intercourse, but lost much of their value owing solely to the great depreciation of the German currency, while the assets in possession of the American partner, by reason of the more fortunate state of American finances, had preserved their original monetary value, *held*, upon an accounting:
 - (1) That the failure of the German partners to liquidate the German assets, and their continued use of them in the business during the war, were not grounds for holding them as purchasers of the American's interest in such assets as of the date when war was declared, their conduct not having been hostile, nor inconsistent with an honest effort to administer the property to the best advantage of all concerned, and no loss having resulted from the continuance of the business. P. 290.
 - (2) That whether the accounting were taken upon the basis of what the German partners did with the assets after war was declared or of what they should have done, the loss was an ineluctable consequence of the war and must be borne by all the partners equally. *Clay v. Field*, 138 U. S. 464. P. 292.
 - (3) That the German partners should be charged with the American's share in the German assets at the exchange value of the German mark on July 14, 1919, the date of the War Trade Board regulation restoring the right of commercial intercourse between citizens of the two countries, when settlement of the partnership first became lawful, rather than at exchange value at the time of accounting. P. 295.

8. Where a partnership between citizens of two countries was dissolved, and settlement suspended, by war, interest may be allowed to one partner in lieu of unascertainable profits derived from the assets by the other during the period of non-intercourse. P. 296.
9. Taxes levied by the German Government on the share of an American partner in partnership assets in Germany and paid by German partners during the war, *held* chargeable to him in a settlement of the partnership. P. 297.
10. An authority from an American partner to his German partners to make payments to his relatives from partnership funds, was canceled by the outbreak of war between the two countries. *Id.*
1 Fed. (2d) 419, reversed.

APPEALS from a decree of the Circuit Court of Appeals which affirmed in part and reversed in part a decree of the District Court, in a suit brought by the Alien Property Custodian for an accounting of assets, part in the United States and part in Germany, which appertained to a partnership existing on the declaration of war.

Assistant Attorney General Letts, with whom *Solicitor General Mitchell* and *Messrs. Dean Hill Stanley* and *E. N. Cherrington*, Special Assistants to the Attorney General, were on the brief, for Sutherland, Alien Property Custodian.

The court erred in adopting the par of exchange as the basis for determining in dollars the credits to which Mayer was entitled in respect of the assets located in Germany instead of using the rate of exchange existing at the time of proving the account.

The declaration of war did not alter the ownership of the partnership property in the respective countries. The instant war was declared, all intercourse between Mayer and his partners became illegal and, even though the war dissolved the partnership, it became legally impossible to secure an accounting. *The Rapid*, 8 Cr. 155; *The Julia*, 8 Cr. 181; *United States v. Grossmayer*, 9 Wall. 72; *Habricht v. Alexander*, Fed. Cas. No. 5886; *Expositio v. Bowden*, 22 Eng. Rul. Cas. 399; *Robson v. Premier Co.*

Ltd., (1915) 2 Ch. 124. Section 3 of the Trading with the Enemy Act expressly prohibited such trading, thereby adopting and broadening the common law rule. Accounting remained legally impossible after the General Enemy Trade License of July 8, 1920, because that license expressly exempted from its operation any trade with respect to property reported, or which should have been reported, to the Alien Property Custodian. An accounting could not legally be had, therefore, until the state of war ended and Congress so declared, on July 2, 1921. But at that time, and until May 4, 1922, when the decree after mandate was entered in *Mayer v. Garvan*, 270 Fed. 229, (aff'd. 278 Fed. 27,) Mayer was urgently pressing before the District Court and before the Circuit Court of Appeals his claim to all the American assets under a void instrument.

It is well settled that mere dissolution, without an accounting, has no effect upon the title to partnership property. Dissolution by war does not free a party from his duty to act in good faith with respect to the rights of his partners. *Griswold v. Waddington*, 16 Johns. 438; *Douglas v. United States*, 14 Ct. Cls. 1; *Cramer v. United States*, 7 Ct. Cls. 302; *Stevenson & Sons, Ltd. v. Aktiengesellschaft, etc.*, (1918) A. C. 239. With respect to the equitable ownership of partnership property after dissolution and before accounting, there is therefore nothing peculiar to those cases where war produces the dissolution. The situation is governed by the familiar rules as to dissolution by death or by operation of law generally. *Freeman v. Freeman*, 136 Mass. 260; *Moore v. Huntington*, 17 Wall. 417; *Busch v. Clark*, 127 Mass. 111; *Case v. Abeel*, 1 Paige 393; *Evans v. Evans*, 9 Paige 178; *Wedderburn v. Wedderburn*, 22 Beav. 84.

The ownership of the partnership property was not, prior to the accounting, altered by the acts of the parties. There has been a gain regularly credited to Mayer's ac-

count in the partner's ledger. The only loss has been due to the depreciation in the German currency, which, of course, was not causally related to any act of the partners.

There is a striking analogy between this case and the *Clay Case*, 138 U. S. 464.

The conditions existing subsequent to April 6, 1917, and prior to the filing of the bill in this suit, rendered all losses to partnership assets, not due to the neglect or fault of any partner, a partnership loss. A partner's duty, after dissolution as before, is to observe absolute fairness and good faith toward his partners in dealing with partnership property. *Jones v. Dexter*, 130 Mass. 380; *Whitney v. Dewey*, 158 Fed. 385; *Betts v. June*, 51 N. Y. 274; *Beam v. Macomber*, 33 Mich. 127; *Lees v. LaForrest*, 14 Beav. 250; *Johnson's Appeal*, 115 Pa. 129. But he is under no liability to indemnify the firm from loss caused by an honest error in judgment. *Charlton v. Sloan*, 76 Iowa 288; *Knipe v. Livingston*, 209 Pa. 49; *Fordyce v. Shriver*, 115 Ill. 530.

The District Court and the Circuit Court of Appeals adopted the arbitrary "par of exchange" in translating into dollars what they respectively found to be due to Mayer in marks. It is submitted that there is no justification for the adoption of such a rule. Both the District Court and the Circuit Court of Appeals based their decision upon the authority of certain old cases which were characterized as "respectable authorities," principally *Adams v. Cordis*, 8 Pick. 260, and *Martin v. Franklin*, 4 Johns. 125. Long prior to the outbreak of war between the United States and Germany, the use of the par of exchange under circumstances such as the present had been largely abandoned by the courts and the prevailing rate of exchange generally adopted. *Grant v. Healey*, Fed. Cas. No. 5696; *Murphy v. Camac*, Fed. Cas. No. 9948; *Scott v. Hornsby*, 1 Call 35. See also *Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37; *Simonoff v. Bank*, 279

Ill. 248; *Katcher v. American Express Co.*, 94 N. J. L. 165; S. S. "*Celia*" v. S. S. "*Volturno*" (1921), L. R. 2 App. Cas. 544; *Di Ferdinando v. Simon, Smits & Co.* (1920), 3 K. B. D. 409; *Guinness v. Hicks*, 269 U. S. 71.

The court erred in crediting Mayer with the expenses incurred by him in connection with the suit of *Mayer v. Garvan*, 270 Fed. 229, aff'd. 278 Fed. 27. See *Grant v. Fletcher*, 283 Fed. 243.

A partner is not entitled to interest on capital which he contributes to the firm unless the partners have agreed that he shall have interest. *Hill v. King*, 8 L. T. N. S. 220; *Cooke v. Benbow*, 68 Eng. Ch. 1; *Ewing v. Ewing*, L. R. 8 A. C. 822; *Hart v. Hart*, 117 Wis. 639; *Smith v. Smith*, 18 R. I. 722. And even where such an agreement exists, interest is not recoverable after dissolution of the firm unless there is a special stipulation to that effect. *Bradley v. Brigham*, 137 Mass. 545; *Johnson v. Harts-horne*, 52 N. Y. 173. It is the policy of courts in this country to require strict proof of such an agreement. *In re James*, 146 N. Y. 78; *Jones v. Jones*, 36 N. C. 332; *Daniels v. McCormick*, 87 Wis. 255. Interest is not allowed upon partnership accounts generally until after a balance has been struck on a settlement between the partners. *Miller v. Lord*, 11 Pick. 11; *Dexter v. Arnold*, 3 Mason 289; *Boddam v. Ryly*, 1 Bro. Ch. 239; *King v. Hamilton*, 16 Ill. 190; *Bayly v. Becnel*, 30 La. Ann. 75; *Smith v. Knight*, 88 Ia. 257.

Mayer is not entitled to interest as against the plaintiff. The United States is not liable for interest in the absence of express statutory provision therefor. *United States ex rel. Angarica v. Bayard*, 127 U. S. 251; *Gordon v. United States*, 7 Wall. 188; *United States v. Verdier*, 164 U. S. 213.

Mr. Edward F. McClennen for Richard Mayer.

The courts below erred in allowing nothing to Mayer for interest or loss of use of the property from the time

of its wrongful seizure in 1918 to the time of its return in 1922. The Alien Property Custodian wrongfully seized from the liquidating partner, Mayer, in 1918, property of the value of \$916,939.66. Mayer was entitled at that time to have and retain from it as his own, \$745,083.93. He demanded it back in 1918. He was wrongfully deprived of the use of that amount for four years. The final decree in *Mayer v. Garvan*, 278 Fed. 27, has established this as *res adjudicata*, between the Alien Property Custodian and Mayer.

As the claim is against this private fund and not against the United States or its officer as such, the rule of sovereign immunity from liability for interest has no bearing. *Miller v. Robertson*, 266 U. S. 243.

The Alien Property Law ought not to impose this loss on a loyal American citizen not required for the protection of the public interests, and going to benefit only the German partners who have had the actual use of the German share during all the time. *Stevenson & Sons, Ltd. v. Aktien-Gesellschaft*, 1918 A. C. 239; *Hicks v. Guinness*, 269 U. S. 71; *Clay v. Field*, 138 U. S. 464; *Hutchins v. Page*, 204 Mass. 284. This is not a claim for interest on balances properly in the hands of a liquidating partner.

The principle that, inasmuch as the enemy cannot lawfully pay the debt during the war, he is not liable for interest, does not apply to damages by way of interest on money or property withheld after demand which should have been complied with. *Hicks v. Guinness*, 269 U. S. 71; *Miller v. Robertson*, 266 U. S. 243; *Miller v. Humphrey*, 7 Fed. (2d) 330.

The Court of Appeals rightly held that Mayer was not obliged to account to the Alien Property Custodian for sums paid after April 6, 1917, by his former German partners, for German taxes on Mayer, individually. It is clear that one person cannot make another his debtor by paying, voluntarily, a tax on the latter without the

latter's request or consent. Even legitimate debts of a partner paid by the other partners without an agreement that they shall be a part of the partnership accounting, are not to be taken into account in determining the partner's share in the partnership assets.

Mayer was not obliged to account to the Custodian for sums paid without his continued authority, after April 6, 1917, by his former German partners to his relatives.

The Germans should be treated as purchasers April 6, 1917. It seems not to be disputed that they did not liquidate. They continued to use the German assets in a going business after the dissolution. The *Garvan* decree was based on the adjudged fact that the German partners had taken over the German assets as their own. That is *res adjudicata*. *Oklahoma v. Texas*, 256 U. S. 70; *Myers v. International Trust Co.*, 263 U. S. 64; *United States v. Moser*, 266 U. S. 236. Mayer did not and could not, before July 2, 1921, legally consent or contract with his enemy former partners that they might conduct a going business in Germany for his account.

The American assets had been liquidated in 1917. If the American assets had not been liquidated by Mayer's taking them to himself, and so becoming liable as a purchaser of them before the Alien Property Custodian took possession, they have not been liquidated yet, and he is not required to pay over any surplus until he has liquidated them and has satisfied his lien. The continuation of the German business for six years after April 6, 1917, rendered the Germans liable for the value of the German assets on April 6, 1917, irrespective of their intentions as to Mayer. When a partnership is dissolved, each of the partners has the right to have the partners in possession of the assets liquidate them immediately, and the consequent right, if liquidation does not take place within a reasonable time, to charge the partners in default with

the value of the assets. *Clay v. Field*, 138 U. S. 464; *Hutchins v. Page*, 204 Mass. 284; *Moore v. Rawson*, 185 Mass. 264. The value should be determined on the date of dissolution, April 6, 1917, *Parker v. Broadbent*, 134 Pa. St. 322; Lindley on Partnerships, 8th ed., p. 601. The representative of a deceased partner has the positive right to have the assets sold by the surviving partner, *Freeman v. Freeman*, 136 Mass. 260. If this right is ignored by the partner in possession, he is to be held liable for the value of the assets at the date of dissolution. *Stevenson & Sons, Ltd. v. Aktien-Gesellschaft*, 1918 A. C. 239.

The courts below rightly defined in English the German word mark used in a United States court. This case involves no question of foreign exchange, or of the date at which foreign exchange shall be reckoned. Upon the outbreak of war, there was no longer any rate of exchange. The internal value of the German mark in Germany on April 6, 1917, does not appear. The assets in Germany had to be valued. They were not marks. They were lands, buildings, plants, machinery, furniture, fixtures, tools, utensils, merchandise, receivables, bank balances in Switzerland, and cash. It was necessary to state the value of these. This value might have been stated in the English language, in the French language, in the Italian language, or in any other language. In fact, it was stated in a United States Court in the word marks. This made it necessary to define the word used, when used in that court. The word was in the dictionaries of the United States; "the monetary unit of the German Empire equivalent to 23.8 United States cents." There is no evidence that the dictionary definition, or that by the Director of the Mint, is erroneous. The finding of the courts below, that in the United States the German word "mark" is to be translated as 23.82 cents, was warranted by the evidence and not contrary to any evidence in the case.

This is not a case to ascertain the amount of damages for a breach or to obtain a judgment in dollars on a contract to make payment in marks. *Hicks v. Guinness*, 269 U. S. 71; *Birge-Forbes Co. v. Heye*, 251 U. S. 317.

Mr. John W. Davis, with whom *Mr. John Caldwell Myers* was on the brief, for Edwin Reis et al.

Dissolution does not create a debtor and creditor relationship among the partners. Story on Partnership (7th ed.), §§ 221, 325; *Crawshay v. Collins*, 15 Ves. 226; *Freeman v. Freeman*, 136 Mass. 260; Parsons on Partnership (4th ed.), § 286, p. 376; *Richardson v. Bank of England*, 4 Myl. & C. 165; *Arnold v. Arnold*, 90 N. Y. 580; *Lamalere v. Caze*, Fed. Cas. No. 8003; *Goldsboro v. McWilliams*, Fed. Cas. No. 5518; *Gommersall v. Gommersall*, 96 Mass. 60; *The Eumaeus*, 51 L. J. 7 (Adm. Ct.); 29 Harv. L. Rev. 795; *Anderson v. Allen*, 9 S. & R. 241; *Milliken v. Slote*, 1 Nev. 585; *Powell v. Railway Co.*, 36 Fed. 726.

No principle of partnership law is better settled than that interest does not run on a partner's distributive share until after a balance is struck on an accounting. The act of dissolution does not operate as a distribution or allocation of partnership assets. Some agent or agency—normally the surviving partners themselves or one designated by them as liquidating partner—must administer the assets and liabilities. *Moore v. Huntington*, 17 Wall. 417. And until this is done and an accounting had between the partners, and a balance struck on that accounting, the partnership property remains partnership property and may not become the individual property of any of the partners merely by conversion. Story on Partnership, § 351; *Cramer v. United States*, 7 Ct. Cls. 302; *Grant v. Fletcher*, 283 Fed. 243; *Zimmerman v. Harding*, 227 U. S. 489. During such period of administration the partnership entity—the estate in process of administra-

tion—may be committed to the tender mercies of a court of bankruptcy. *In re Coe*, 157 Fed. 308; *In re Stein & Co.*, 127 Fed. 547.

The assets and liabilities of the partnership must be ascertained as of April 6, 1917, solely for the purpose of limiting Mayer's liability in a continuing business, but not to effect distribution or division of the partnership assets as of that date. There is no liability for failure to liquidate where there is no loss. And where the loss is not attributable to the fault or neglect of the partners who fail to liquidate but continue the business after dissolution, the loss must be borne by all the partners alike. *Clay v. Field*, 138 U. S. 464. Though intercourse between the enemy partners be prohibited on the outbreak of the war, and the partnership dissolved, the effect is no greater than that which occurs where a partnership is dissolved by mutual agreement of the partners. See *Buchanan v. Curry*, 19 Johns. 137; *Douglas v. United States*, 14 Ct. Cls. 1; *Cramer v. United States*, 7 Ct. Cls., 302; *Stevenson & Sons, Ltd. v. Aktiengesellschaft*, (1918) A. C. 239; *Clay v. Field*, 138 U. S. 464; *Griswold v. Waddington*, 16 Johns. 438; *United States v. Grossmayer*, 9 Wall. 72; *Insurance Co. v. Davis*, 95 U. S. 425.

No accounting and determination of the distributive shares of the partners could be had until the trial.

The account of the German partners shows that they have accounted for everything they received in the currency in which they received it. The loss which has been sustained by the partnership arises exclusively from the depreciation of that currency. *Jackson v. Chase*, 98 Mass. 286; *McNair v. Ragland*, 16 N. C. 520. The court erred in translating Mayer's distributive share computed in marks into dollars at the par of exchange (23.82 cents) for the purpose of rendering a decree in dollars. The par of exchange is an ideal, and whenever a currency becomes depreciated by either the issuance of debased me-

tallic coinage or paper money not representing gold or silver in the treasury, the nominal or ideal par of exchange ceases to represent the true relation between the currencies. In order to find equivalents, we must then resort to the real par. See *Hargrave v. Creighton*, Fed. Cas. No. 6064; *Robinson v. Hall*, 28 How. Prac. 342; *United States v. American Gold Coin*, 24 Fed. Cas. 780; *Martin v. Franklin*, 4 Johns. 124; *Adams v. Cordis*, 8 Pick. 260.

The World War has probably called to the attention of the public generally, as emphatically as possible, the principles of Gresham's law, and has developed a number of decisions as to the rule to be applied in translating foreign currency into United States dollars. See *Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37; *Simonoff v. Bank*, 279 Ill. 248; *Katcher v. American Express Co.*, 94 N. J. L. 165; *S. S. "Celia" v. S. S. "Volturno"* (1921) L. R. 2 App. Cas. 544; *Di Ferdinando v. Simon, Smits & Co.* (1920), 3 K. B. D. 409; *Guinness v. Hicks*, 269 U. S. 71; *Birge Forbes Co. v. Heye*, 251 U. S. 317. Wherever the court has before it evidence as to the proper rate of exchange it has applied that rate, whether the conversion be of marks, *Miller v. Humphrey*, 7 Fed. (2d) 330, or francs, *The Hurona*, 268 Fed. 910, *Page v. Levenson*, 281 Fed. 910, *Dante v. Minnigio*, 298 Fed. 845, or florins, *Wichita Mill v. Naamlooze*, 3 Fed. (2d) 931, or of pounds sterling, *The Verdi*, 268 Fed. 908. See *Cramer v. Arthur*, 102 U. S. 612; *Grant v. Maxwell*, Fed. Cas. No. 5699.

The court erred in holding and ruling that the sum set aside by the German defendants for reserves should not be included among the liabilities, to the payment of which the defendant Mayer's share should contribute.

The court erred in failing to hold that the claims of Ely, Leiser, Sanft, and Heinstein for percentages of profits of the firm constitute a liability of the firm, and in failing to make provision in the decree for the pay-

ment of these liabilities, and in disallowing the sum paid by the German partners for taxes and the sum paid by them to Mayer's relatives, at his request.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These are several appeals from a decree of the court below affirming in part and reversing in part a decree of the federal district court for the District of Massachusetts. The suit was brought by the Alien Property Custodian against Richard Mayer, a naturalized citizen of the United States, two corporations, organized under Massachusetts law, Karl B. Strauss, a naturalized subject of Great Britain, and Edwin Reis and Anny Reis, in her own right as widow and as trustee for two minor children of Ludwig Reis, deceased, citizens and inhabitants of Germany, for an accounting in respect of the interest of Mayer and the German citizens in certain assets in the United States in Mayer's possession and assets in Germany in the possession of the Germans, alleged to belong to a partnership consisting of Mayer, Edwin Reis, Karl B. Strauss and Ludwig Reis.

The partnership was formed sometime prior to the declaration of war against Germany on April 6, 1917, and was existing at that time. Mayer contributed to the partnership his American business, worth slightly over 206,000 marks—less than \$50,000. The German partners contributed about 2,655,000 marks. By the partnership agreement, after payment of 4½ per cent. on the capital contributed and stipulated salaries, Mayer was to receive 20 per cent. of the profits, to be credited to his capital account. The partnership agreement was made in Germany, and the principal seat of the partnership was at Friedrichsfeld, Germany, with branches at Manchester, England, and in Boston. At the time of the declaration

of war, the partnership assets in Mayer's possession had grown to a little over \$910,000, and his share in the European assets amounted to 2,414,056.12 marks. Of the amount in Mayer's possession, between \$500,000 and \$600,000 consisted of a balance remaining out of \$2,500,000 sent to him by the German partners for the purpose of buying cotton waste.

After the declaration of war, the American assets were seized by the Alien Property Custodian; but in a suit brought against that officer they were ordered redelivered to Mayer upon the ground that he had a lien upon them for his share of the partnership capital and profits. *Mayer v. Garvan*, 270 Fed. 229, affirmed 278 Fed. 27. The value of the assets returned to Mayer was \$828,072.72, losses having occurred which are not material to the present consideration.

In that case the court held that under the partnership agreement Mayer was entitled upon distribution to have out of the assets of the partnership the amount of his capital investment together with 20% of the net profits earned by the partnership, and was liable for 20% of all losses. There was, however, no evidence of the actual value of the American property or of the German or English property, nor of the liabilities of the firm; and this suit for an accounting followed. It is not disputed that the custodian is entitled to the American assets after deducting therefrom the amount of Mayer's share in all the assets.

The German partners entered an appearance in the present suit and produced at the hearing all the account books. The property in Manchester had been seized by the English Government and sold, leaving debts on account of the English branch, amounting to £35,000, which were either paid or assumed by the German partners. The district court found that a few days prior to the declaration of war the value of the German mark in the

currency of the United States, according to the rate of exchange then quoted, was about 18 cents. Thereafter, no rate of exchange was quoted until July 17, 1919, at which time the exchange value of the German mark was $7\frac{7}{8}$ cents. Thereafter, its value steadily declined, until at the time of the Act of Congress declaring the state of war at an end on July 2, 1921, it was 1.35 cents; and when the hearing was begun in the present case its value was .0048 of a dollar. The district court determined that the German partners should account for Mayer's share of the German assets at their value on April 6, 1917, the American assets to be measured in terms of the American gold dollar, and the German assets correspondingly in terms of the German gold mark, which is the equivalent of 23.82 cents of the money of the United States; and upon this basis the decree was entered. The circuit court of appeals, in affirming the decree, adopted the same view. *Sub nom. Miller v. Mayer*, 1 Fed. (2d) 419. And this presents the principal question in the case and the only one requiring extended consideration.

Appellants in Nos. 232 and 234 unite in the contention that the declaration of war did not affect the title to the partnership property; that although the partnership was thereby dissolved the partners must suffer ratably from any depreciation in the value of the German assets after the dissolution and before the accounting; and that the accounting must be made upon the basis of the value of such assets at the time of the accounting, the value of the mark being taken at its then rate of exchange.

That the declaration of a state of war immediately effected a dissolution of the partnership is well settled and is not in dispute. It is likewise settled that during the war all intercourse, correspondence and traffic between citizens of this country and of Germany, which would or might be to the advantage of the enemy, were absolutely forbidden. *Conrad v. Waples*, 96 U. S. 279, 287; *Briggs*

v. *United States*, 143 U. S. 346, 353. The effect of War Trade Regulations No. 802, July 14, 1919, and No. 814, July 20, 1919, we shall consider further along.

The reasons for, and the limitations upon, the rule have been frequently stated. War between nations is war between their individual citizens. All intercourse inconsistent with a condition of hostility is interdicted, *The Rapid*, 8 Cr. 155, 162-163, for fear that it may give aid or comfort to, or add to the resources of, the enemy. Moreover, as said by this court in *United States v. Lane*, 8 Wall. 185, 195, "If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen." But war is abnormal and exceptional; and, while the supreme necessities which it imposes require that, in many respects, the rules which govern the relations of the respective citizens of the belligerent powers in time of peace must be modified or entirely put aside, there is no tendency in our day at least to extend them to results clearly beyond the need and the duration of the need. The purpose of the restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or comfort, direct or indirect, to the opposing forces. It is that purpose which gives birth to the rule and indicates its limits. The rule is simply "a belligerent's weapon of self-protection." *Daimler Co. v. Continental Tyre, etc., Co.*, [1916] 2 A. C. 307, 344. And it applies even where the trading is with a loyal citizen, if he be resident in the enemy's country, since the result of his action may be to furnish resources to the enemy. *Id.*, 319; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, 505. The whole tendency of modern law and practice is to soften the "ancient severities of war," and to recognize, increasingly,

that the normal interrelations of the citizens of the respective belligerents are not to be interfered with when such interference is unnecessary to the successful prosecution of the war. Private rights and duties are affected by war only so far as they are incompatible with the rights of war. See, generally, *Kershaw v. Kelsey*, 100 Mass. 561, 568-574, where the question is elaborately reviewed in an opinion by Mr. Justice Gray which has several times received the approval of this court; *Briggs v. United States*, *supra*, p. 353; *Williams v. Paine*, 169 U. S. 55, 72; *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323.

Thus, where a contract has been performed before the advent of war and nothing remains but the payment of money, the right to collect is not destroyed, but only the remedy suspended until the termination of the war. *Hanger v. Abbott*, 6 Wall. 532, 537; *Brown v. United States*, 8 Cranch 110, 123; *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 31; *Crutcher v. Hord and wife*, 67 Ky. 360, 366; *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 465. Agencies, created before the war, and not requiring intercourse across the enemy's frontier, such as for the collection of debts, preservation of property, and so forth, are not terminated by war. See, generally, *Ward v. Smith*, 7 Wall. 447, 452-453; *Quigley's Case*, 13 Ct. Cl. 367, 371; *Anderson v. Bank*, 1 Fed. Cases 838, No. 354; *Lamar v. Micou*, 112 U. S. 452, 464. And in the case of contracts made before the war for the delivery of goods, it is entirely lawful to make delivery during the war within the United States. The thing forbidden is placing property or money within the power of the enemy, "not in delivering it to an alien enemy, or his agent, *residing here*, under the control of our own government. . . . In such a case, the interests of commerce are perfectly compatible with the rights of war; and public policy does not forbid the transfer." *Buchanan v. Curry*, 19 Johns. 137, 141.

And so here, we have to deal not with a contract made during the war or requiring commercial or other inter-

course across military lines, but with an adjustment of rights, after the restoration of peace, under lawful articles of partnership entered into before, and existing at the outbreak of, the war. The advent of a state of war put an end to the partnership and postponed all remedies relating to the dissolution; but it did not petrify rights and duties resulting therefrom. Its effect only was to suspend the enforcement of the obligation of each of the partners in respect of the assets and past transactions of the partnership; and the essential inquiry now is: What was the obligation which resulted from the dissolution?

Upon the dissolution of a partnership, the general rule is that the liquidating partner or partners must settle up the partnership affairs within a reasonable time and, after payment of the partnership debts and liabilities, divide the proceeds among the partners according to their interests. *Clay v. Field*, 138 U. S. 464, 473. The rule is not different because the dissolution is the result of war. *Stevenson & Sons v. Aktiengesellschaft, etc.*, [1918] A. C. 239, 246. But in the case of such a dissolution, in the absence of legislation to the contrary, a settlement is legally impossible until the close of the war, because of the rule forbidding intercourse across the enemy's frontier and denying access by enemy citizens to our courts; although it is entirely compatible with the rule to recognize the right and duty of the enemy partners to care for and preserve the assets of the co-partnership in the possession of each for their mutual benefit when the war has ended. To say otherwise, because an enemy may realize a benefit after the war has come to an end, is utterly to misapply the principle upon which the non-intercourse rule is based and to confound the suspension of the remedy with the loss of the right. "The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." *Daimler Co. v. Conti-*

mental Tyre, etc. Co., supra, p. 347; *Stevenson & Sons v. Aktiengesellschaft, etc., supra*, pp. 249, 253, 254.

In the present case, the adjustment of the account as among the partners is a matter in which the government—the war and the exigencies of the war having passed—is no longer concerned, save as its rights and duties are represented by the Alien Property Custodian. Except for the latter consideration, we are dealing with a simple suit for an accounting among partners, to be determined by the application of equitable principles. *Stevenson & Sons v. Aktiengesellschaft, etc., supra*, p. 248. The effect upon these principles of the dissolution of the partnership by war is certainly no greater than if it had been dissolved by death or agreement. *Buchanan v. Curry, supra*, pp. 142–143. In either event the relation created by the dissolution in respect of the assets is a fiduciary relation, and adjustments of rights and liabilities of the partners *inter se* are to be made in accordance with the rules governing such relationships; and in a court of equity the American partner, *ipso facto*, has no such exceptional privilege as will permit him to secure more favorable consideration than that to be accorded to his alien partners.

The argument for Mayer is that the German partners should be treated as having purchased the German assets on April 6, 1917, and compelled to account for Mayer's interest therein upon that basis and as of that date. In support of that contention we are referred to the record in the original case of *Mayer v. Garvan, supra*, of which the district court in the present case took judicial notice. That record has not been before us; but we accept the statements contained in Mayer's brief in respect of its disclosures, since they do not seem to be challenged by the other parties. We are of opinion, however, that they fall short of establishing a situation for applying the theory of a purchase of the German assets by the German partners.

Undoubtedly, the German partners, instead of liquidating, continued to use the assets after the dissolution in a going business, commingling old assets with new. Also, they took in a new partner. The court of appeals said, and evidence is quoted from the Garvan record to the effect, that the assets were taken over by the German partners and thereafter treated as their own. The evidence before us in the present record is to the effect that the business in Germany was carried on during the war as it had been before; that Mayer's share of the profits was credited to him annually in the private ledger at Friedrichsfeld; and that a sum sufficient to pay out Mayer's capital interest, as shown by the books, was continuously carried on deposit in banks.

Precisely what are the facts in respect of this matter we need not stop to determine, because, in view of the conclusion we have reached, it is not material whether the German partners treated the business as their own or as that of the old partnership. The partnership was at an end; and their duty was to liquidate. They could not carry on the business in any form so as to bind Mayer. But Mayer must elect either to accept what was actually done, with the burdens and benefits, or to enforce against his German partners a liability based upon what they should have done. The decision below and Mayer's attitude apparently proceed upon the latter alternative, and in that view, in an ordinary case, he could justly be given no more than what he would have obtained if the liquidation had in fact been made within a reasonable time and the amount of his share promptly paid over to him. Precisely at this point, the contention in Mayer's behalf breaks down, for it ignores the circumstance, which differentiates this from the ordinary case, that, even if the assets had been promptly liquidated, nothing could have been paid to Mayer until after the removal or expiration of the non-intercourse bar. Until that time, the amount

coming to Mayer necessarily would have been held by the German partners in the form of German currency, or of securities or a bank account payable in such currency, and the loss, so far as Mayer is concerned, would have resulted none the less.

In this connection the fact may not be disregarded that the German partners dealt with a situation under the abnormal restraints and perplexities of war; and it is fair to interpret what they did in the light of that situation. So viewed, we are unable to conclude that their acts were hostile to Mayer's ultimate rights or inconsistent with an honest effort to do the best possible thing with the property until the close of the war, utilizing it, in the meantime, in a way which they conceived to be to the best advantage of all concerned. It is clear that no loss was sustained by the continuance of the business; but, on the contrary, there was an asset gain. The great loss, which finally resulted, and which was little short of being complete, was due entirely to the depreciation in the value of the German mark and not to any lack of care or good faith on their part. Moreover, with the exception of plant and machinery, relatively of small value, the German assets during the entire time were in the form of German paper currency or securities, bills receivable, etc., convertible only into German paper currency, since there was no gold in circulation and the paper currency was by German law legal tender.

In whatever aspect the case is viewed or upon whatever basis the liability of the German partners be made to rest, the loss, in the final analysis, was an ineluctable consequence of the war. Is it to be borne by them alone or to be shared equally by all the partners as a common misfortune beyond the power of any of them to turn aside? That question justly cannot be solved by a strict enforcement of the ordinary rule as in ordinary cases, for here we are dealing with extraordinary and anoma-

lous conditions, as a result of which money values were swept away by immense causes as much beyond the sway of the German partners as of Mayer. Blame for such a situation rests upon neither; and equality is equity.

This would appear more clearly if there were no American assets and the German assets were alone concerned. In that event, a decree compelling the German partners to account to Mayer upon the basis of the full value of these assets at the outbreak of the war in terms of gold, notwithstanding the destructive force of these unavoidable circumstances, would be so obviously harsh and inequitable as to shock the conscience of the chancellor. But the equities are not different because Mayer chances also to have in his possession partnership assets—the greater part of which, it may be said in passing, had been sent to him by the German partners for trade purposes—which, by reason of the more fortunate state of American finances, had preserved their original monetary value.

Upon the whole, we think the case is fairly ruled in principle by *Clay v. Field, supra*. In that case, the property of the partnership consisted of a plantation in Tennessee. Prior to the outbreak of the Civil War, one of the partners died. The surviving partner continued, after his partner's death, to retain possession of the plantation, together with the slaves upon it, and to operate the property in good faith. When the war came a year or two later, the plantation was in the theatre of conflict, and at the close of the war the slaves had become free. The court recognized the general rule, as we have already stated it, that it was the survivor's duty to settle up the partnership affairs within a reasonable time and pay over to the representatives of the deceased partner the amount due them. And the court proceeded to say (pp. 473-474) that "if he [the survivor] takes the responsibility of continuing the business of the firm, and using the property

of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm." Strictly applied, the court said, the rule would entitle the representatives to call for an account of the share of the deceased at the time of his death with lawful interest. But, in view of the anomalous circumstances and unexpected events, the court declined to enforce the rule, saying (p. 474): "In our view, equity, when called upon to settle the mutual rights of the parties, may very properly mitigate the hardships of the rule, especially when, as in this case, the loss has occurred by public war." It was recognized that the survivor "might have sold the slaves and other property on terms which, in the light of subsequent events, would have been greatly to the advantage of his brother's estate, yet it seems clear from the evidence that the reason he did not sell was that no opportunity offered of effecting a sale of the plantation at what he deemed an adequate price." Under all the circumstances, this court agreed with the trial court that it would be a very hard application of the general rule relating to a dissolution of partnership to compel the survivor or his estate to account for the value of the slaves, which, in a short time, were freed by operation of law and no longer articles of property. It was, therefore, held that the surviving partner was not accountable for the value of the slaves, but was accountable for the fair rental value of the property, including that of the slaves while they were slaves. See also, *Tate v. Norton*, 94 U. S. 746, 747-748.

Here the case for the German partners, if anything, is stronger; for, during the non-intercourse period, there never was a time when, so far as appears, Mayer's share

could have been converted into anything but German marks, or when it was legally possible to pay the amount to Mayer. As soon as the non-intercourse restriction ceased to be operative, however, such payment became lawful, and an obligation arose on the part of the German partners to make it, since Mayer's share, long prior to that time, had been identified and was separable from the body of the assets. It was, in effect, a trust fund, in respect of which the German partners then owed the duty of prompt settlement. The war was formally declared to be at an end by the Act of July 2, 1921; but the right of commercial intercourse and of communication between citizens of this country and Germany was restored by the War Trade Board regulation of July 14, 1919, as amended July 20, 1919. We, therefore, conclude that the German partners should be charged with the amount of Mayer's share of the German assets at the exchange value of the German mark on July 14, 1919. The evidence in the record shows that on July 17th, three days later, the exchange value was $7\frac{7}{8}$ cents, which seems near enough to the designated date. The depreciation of the German mark was so great that to compute its American monetary value on a nominal par basis would be to indulge in a pure fiction; and exchange values must be resorted to as the only available method of measurement. The conclusion that the exchange value of marks in American money is to be taken as of the time when commercial intercourse, and, therefore, settlement, first became lawful, rather than at the time of the accounting, finds support, by analogy, in many decisions. See, for example, *Hicks v. Guinness*, 269 U. S. 71, 80; *S. S. Celia v. S. S. Volturmo*, [1921] 2 A. C. 544; *In re British American Continental Bank*, [1922] 2 Ch. 575; *Société des Hotels v. Cumming*, [1921] 3 K. B. 459; *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K. B. 409; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714.

In fixing the date upon which exchange should be calculated, the inevitable delay which must result before a

judicial taking of the account must be given weight. If the liability be treated as having crystallized at the time indicated above, then a definite date is fixed for the ascertainment of exchange and the amount when found may be awarded without regard to the fluctuations in the possible date of accounting. *Lebeaupin v. Crispin, supra*, p. 723. In England the rule has been applied in a winding-up proceeding upon the ground that a date must necessarily be fixed on which liabilities are to be treated as definitely ascertained for the purpose of properly conducting the later winding-up of the company's affairs. *In re British American Continental Bank, supra*, p. 582. And the rule is the same whether the contract is to be performed in England or out of England, on the ground that there should not be varying rules in such cases. *Lebeaupin v. Crispin, supra*, p. 723.

The remaining questions in dispute require only brief consideration.

The district court held that it was impossible to calculate the profits which should be equitably assigned to Mayer's share in the German assets, and that, since there could be no payment to him during the period of non-intercourse, interest could not be allowed him upon such share,—applying the rule laid down in *Brown v. Hiatts*, 15 Wall. 177. But the question there arose in respect of a debt which became payable during the progress of the Civil War, and the court held that, since the debt could not be paid until the termination of the war, interest upon it could not be exacted. Here we are not dealing with the question of interest upon a debt, or really with interest at all except as a term of convenience; but with that of an allowance in lieu of unascertainable profits, to which the rule in the *Hiatts Case* has no application. *Stevenson & Sons v. Aktiengesellschaft, etc., supra*, p. 256. An award should have been made to Mayer calculated upon the basis of interest in lieu of profits.

The district court allowed the German partners a credit for 266,432.40 marks paid by them to the German Government during the war for taxes levied against Mayer's partnership interest in 1914, 1915 and 1916. It appears that, if the tax had not been paid, Mayer's share would have been liable to seizure by the tax collector. The circuit court of appeals reversed the ruling of the district court and disallowed the item. The obligation was one which apparently arose before the war, and, in the view we have taken of the relation of the German partners to Mayer's interest in the assets, we think the payment was properly made to protect the fund and that the district court was right in allowing credit for it.

Payments made during the war to relatives of Mayer do not rest upon like considerations; and we agree with the action of the circuit court of appeals in disallowing them. These payments were based upon directions, said to be of a continuing character, given before the war; but which were brought to an end by the advent of war. This results not on the ground that the payments were contrary to public policy, but upon the ground that the outbreak of hostilities produced such a fundamental alteration in the relations of the parties that we cannot assume a continuance of authority to make such payments in the absence of evidence of Mayer's assent thereto. *Insurance Co. v. Davis*, 95 U. S. 425, 429; *Williams v. Paine, supra*, p. 73.

In respect of other items, either allowed Mayer or disallowed the German partners, we see no reason to differ with the conclusions of the circuit court of appeals.

Decree reversed.

HENKELS *v.* SUTHERLAND, ALIEN PROPERTY
CUSTODIAN, ET AL.

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

No. 318. Argued May 5, 6, 1926.—Decided May 24, 1926.

In a suit by an American citizen under the Trading with the Enemy Act to recover the proceeds of property mistakenly seized and sold as enemy property, which were deposited with the Treasurer of the United States and by him invested in interest-bearing securities of the United States, the plaintiff is entitled to an accounting for the interest derived from such investment, as well as the principal. P. 300.

4 Fed. (2d) 988, reversed.

APPEAL from a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (298 Fed. 947) dismissing the bill in a suit under the Trading with the Enemy Act, in which the plaintiff, Henkels, sought an accounting for interest.

Mr. Herbert R. Limburg, with whom *Messrs. Henry L. Sherman* and *Harry F. Mela* were on the brief, for appellant.

Mr. Dean Hill Stanley, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Letts* were on the brief, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit in equity, under § 9(a) of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 419, as amended by c. 6, 41 Stat. 35 and c. 241, 41 Stat. 977, brought by Henkels, a citizen of the United States, in the federal district court for the Southern District of New York, to

recover the proceeds of the sale of 2,298 shares of common stock of International Textile, Inc., a Connecticut corporation, theretofore seized by the Alien Property Custodian upon the claim that it was the property of an alien enemy. A decree was rendered in Henkels' favor, adjudging him to be the sole owner of the stock; and the Treasurer of the United States was directed to account for, and pay over to Henkels, the proceeds of the sale "together with the income or interest, if any, earned thereon." There was realized from the sale of the stock, made on March 26, 1919, after deducting expenses, a balance of \$1,505,052.55. This amount the Treasurer paid to Henkels. Subsequently, Henkels applied to the district court to name a master to take and state the account of interest or income earned upon the fund prior to its payment. The application was denied and a final decree of dismissal entered upon the ground that the principal sum had been paid to Henkels, who had executed a release and satisfaction in full which the court refused to set aside on the claim of duress. 298 Fed. 947. Upon appeal, the circuit court of appeals, without passing upon this ground, held that the United States was not liable for income resulting from an investment of the funds in its own securities. 4 Fed. (2d) 988.

The proceeds arising from the sale of the stock were deposited with the Treasurer in conformity with law; and by that officer they were commingled with the proceeds of other sales of alien property and invested in interest-bearing securities of the United States. The Government admits Henkels' right to recover income earned on the corporate shares prior to their sale, but denies his right to recover for interest actually paid on Government securities in which the proceeds had been invested. This presents the only question for our determination, the Government having expressly waived the point upon which the district court decided the case.

No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case. *Central Trust Co. v. Garvan*, 254 U. S. 554, 566; *Stoehr v. Wallace*, 255 U. S. 239, 245.

By Executive Order No. 2813 of February 26, 1918, made pursuant to law, moneys deposited with the Treasurer by the Custodian are to be held by the Secretary of the Treasury "for account of the Alien Property Custodian," and may be invested and reinvested from time to time in bonds or United States certificates of indebtedness. All moneys so deposited, together with interest or income received from the investment thereof, are made subject to withdrawal by the Secretary of the Treasury for the purpose of making payments pursuant to the provisions of the Trading with the Enemy Act, which would include, of course, payments under § 9(a).

Section 9(a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right or title in the property seized. If, in the meantime, the seized property has been sold, the same remedy, by § 7(c), as amended, c. 201, 40 Stat. 1020, becomes available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." No distinction in this respect is made between the property and its proceeds. It cannot be doubted that, if the seized property had been securities of the United States and these, thereafter, had been held in their original form, maturing coupons for interest would have belonged to the American claimant equally with the body of the bonds. In principle, there can be no difference between such a case and the one here, where claimant's property had been converted into securities of the United States. Such securities constitute the statutory "net proceeds," and, by the clear import of the

statute, claimant's rights in respect of such proceeds are not inferior to his rights in respect of the original property. And no distinction fairly can be made between the accumulated interest upon securities constituting the proceeds, in the one case, and like securities constituting the property, in the other.

The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are to be held, for the account of the Alien Property Custodian.

With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit, *White v. Mechanics' Securities Corporation*, 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen. Whether the Government shall pay interest upon its obligations depends upon Congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

The Government contends that *Angarica v. Bayard*, 127 U. S. 251, is to the contrary, and the court below so held. In that case, the suit was for interest or income realized upon the amount of an award in favor of Angarica paid by the Spanish Government to the United States. This court, in denying the right of recovery, applied the general rule of immunity from interest, saying (pp. 259-260) that the claim "is not different in char-

acter from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money." Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment.

Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, after deducting proper charges and expenses and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. Compare *The Distilled Spirits*, 11 Wall. 356, 368-369; *Intermingled Cotton Cases*, 92 U. S. 651, 652-653; *Duel v. Hollins*, 241 U. S. 523.

Decree reversed.

Opinion of the Court.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL. v. OKLAHOMA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 205. Submitted March 5, 1926.—Decided May 24, 1926.

1. A contract between a city and a railroad company the enforcement of which would hamper the State's power reasonably to regulate the construction and use of a crossing of the railway by a city street, would be void. P. 307.
 2. A contract between a city and a railroad company, whereby the company (owning the fee) granted the city the right of way for a street under its railroad, and the city agreed to pay the cost of construction, and which contained other stipulations made for the sake of doing away with unauthorized crossings and arranging for further street extensions, but none involving any surrender by the city of police power or eminent domain, *held* valid. P. 308.
 3. An order of a state commission ignoring such a contract and requiring the company to construct the crossing and share the expense with the city, receiving from the city compensation for the right of way, impaired the obligation of the contract and deprived the company of property without due process of law. P. 306.
- 107 Okla. 23, reversed.

ERROR to a judgment of the Supreme Court of Oklahoma denying a petition by the Railway Company to set aside an order of the Oklahoma Corporation Commission, made on petition of the City of McAlester, and requiring the Company to provide a street crossing.

Messrs. Joseph M. Bryson, Charles S. Burg, Maurice D. Green, and Howard L. Smith for plaintiffs in error.

Messrs. William J. Horton, E. S. Ratliff, and Jackman A. Gill for defendants in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The railroad of plaintiff in error runs through the city of McAlester, Oklahoma. At Comanche Avenue the main

line is on a fill, and at least one industrial or sidetrack is on a lower level. In September, 1921, the city applied to the state Corporation Commission for an order requiring the railway company to provide at that place a pass under its tracks and a highway across its right of way. The commission ordered that the company prepare a plan and an estimate of quantities and cost for a reinforced concrete subway, having two openings of specified dimensions; that the plan show the location of industrial tracks, and that these tracks conform to the street grade; that the plan and estimate be filed with the mayor of the city and the Corporation Commission; and that if the company and the city failed to agree on an apportionment of cost of the underpass, the commission would hear evidence on that subject. The company was ordered to have the underpass constructed and open for traffic within 90 days after arrangement by the city to pay its portion of the cost. The company filed its petition in the supreme court to have the order set aside on the grounds, among others, that it is repugnant to the due process clause of the Fourteenth Amendment, and impairs the obligation of a contract in violation of § 10 of Article I of the Constitution of the United States. The court affirmed the order (107 Okla. 23), and the case is here on writ of error. § 237, Judicial Code.

The line was built about 1873 on land granted by Congress to the company—then known as the Union Pacific Railroad Company, southern branch—for the construction of its railroad. Act of July 26, 1866, § 8, c. 270, 14 Stat. 289, 291. The city of South McAlester and the townsite of McAlester were laid out subsequently, pursuant to the Act of Congress of June 28, 1898, § 14, c. 517, 30 Stat. 495, 499. In platting these townsites, streets were laid out to the boundary line on each side of the land constituting the company's right of way. November 8, 1901, the city passed Ordinance No. 74. At

that time there were a number of unauthorized crossings in use by the public; but the city had not acquired by purchase or condemnation the right of way for the extension of any street across the railroad. The ordinance was accepted by the company and is in form a contract. It provided for the immediate extension of certain platted streets across the right of way, tracks and station grounds of the company in lieu of the unauthorized crossings then in use. Some of the new crossings were to be constructed by the company at its own expense, and the cost of others was to be borne equally by the parties. Terms and conditions for the construction of other crossings were set forth in the ordinance. It was declared that thereafter the city would open no other street across the right of way and tracks of the company except upon payment of amounts specified in the ordinance as stipulated damages for a right of way across the railroad, any determination in condemnation proceedings instituted by the city, whether more or less than the agreed sum, to the contrary notwithstanding. It was stated that nothing contained in the ordinance should constitute a waiver of the company's right to contest the opening of additional streets. But there is no provision purporting to limit power or authority of the city to establish or regulate street crossings over, under or upon the tracks and other property of the company. And it was specifically agreed that, if at any time the city should desire to extend and open Comanche Avenue across the company's right of way and station grounds, the crossing should be constructed under the tracks located upon the fill and at grade across tracks laid at the street level, according to plans and specifications approved by the company and at the sole cost and expense of the city. The company, for this and other considerations mentioned in the ordinance, agreed to waive all claims for damages caused by the opening and establishing of this crossing.

Pursuant to the Act of Congress of March 29, 1906, c. 1351, 34 Stat. 91, the city of McAlester was created by the consolidation of the city of South McAlester and the town of McAlester. In performance of the agreements contained in the ordinance, the city of McAlester in 1909, and again in 1912, assumed and paid portions of the cost of construction of some of the crossings covered by the ordinance. And ever since the consolidation it has been recognized and treated as the successor of the city of South McAlester and as a party to the contract. The present city is bound to the same extent as was its predecessor that passed the ordinance.

The court held that the state laws gave the commission full jurisdiction over all highways where they cross railways; that the commission had authority to order the crossing in question and to assess the cost of it against the city and the railway company, but not more than 50 per cent. against the city; that the company was the owner in fee of its right of way lands; that they could not be appropriated or damaged for public use without just compensation, and that the commission could not enforce obedience to its order to construct the grade crossing until the question of damage to the fee had been determined either by amicable settlement or by condemnation proceedings.

The order, as interpreted and affirmed, directly contravenes the provisions of the ordinance in respect of the Comanche Avenue crossing. It sets at naught the undertaking of the city to bear the cost of construction and the agreement of the company to give the city the right of way for the street crossing and to waive all claims for damages. The effect is to require the company forthwith to prepare the plan and estimate, and to direct the company—upon the determination of its just compensation and the consummation of arrangements by the city to pay the portion of the cost, if any, that may be imposed upon

it—to proceed to construct the underpass and to have it open for traffic within the time specified. If a contract exists between the parties in respect of this crossing, it is manifest that it would be impaired by the enforcement of the commission's order.

But defendants in error contend that the ordinance is void because it attempts to surrender police power; and therefore that there is no such contract.

It is elementary that for the safety and convenience of the public, the State, either directly or through its municipalities, may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. *Northern Pacific Railway v. Duluth*, 208 U. S. 583, 597; *Chi., Mil. & St. P. Ry. v. Minneapolis*, 232 U. S. 430, 438; *Mo. Pac. Ry. v. Omaha*, 235 U. S. 121, 127; *Erie R. R. Co. v. Public Utilities Comm'rs*, 254 U. S. 394, 409, 412. And such costs are not included in the just compensation which the railroad companies are entitled to receive. *Cincinnati, I. & W. Ry. v. Connersville*, 218 U. S. 336, 343; *Chi., Mil. & St. P. Ry. v. Minneapolis*, *supra*, 440. If the enforcement of its provisions operates to hamper the State's power reasonably to regulate the construction and use of the Comanche Avenue crossing, then undoubtedly the ordinance is void. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 76; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558; *Denver & R. G. R. R. Co. v. Denver*, 250 U. S. 241, 244.

The precise question is whether the agreement of the city to bear the cost of construction is inconsistent with the proper exertion of the police power.

When the ordinance was passed, it was the purpose of the parties to get rid of unauthorized crossings then in use and to arrange for the extension of platted streets across the tracks and station grounds. It was necessary for the city to obtain rights of way for that purpose; and it was empowered to acquire them by contract, purchase or condemnation. §§ 11, 14, c. 517, 30 Stat. 498, 499; Mansfield's Digest of the Statutes of Arkansas (1884), §§ 749, 760, 907-912. It could not take them without making just compensation to the owner. The company owned its right of way lands and station grounds in fee. *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114. It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossings. *Chicago, Burlington, &c., R. R. Co. v. Chicago*, 166 U. S. 226, 251; *Cincinnati, I. & W. Ry. v. Connersville*, *supra*.

The ordinance did not purport to limit the number of crossings that might be opened. Retention by the company of the right to resort to litigation to determine whether the opening of additional streets across the railroad is reasonably necessary does not at all impinge upon police power. Quite independently of the ordinance, the opening and regulation of such crossings is subject to judicial scrutiny, and action that is arbitrary or capricious will be held invalid. *Denver & R. G. R. R. Co. v. Denver*, *supra*, 244. Indeed, the reservation contemplates the exertion of the police power and plainly implies that the parties did not intend to restrict the authority of the city to open crossings.

The agreement of the city to pay the amounts stipulated for the opening of certain crossings does not involve or contemplate any surrender of the power of eminent domain. It was authorized to contract, purchase or condemn as it saw fit. The opinion of the state court rightly approves amicable settlement of the compensa-

tion to be given the owner. The parties were not bound to resort to litigation. It was competent for them in advance to settle the form and amount of compensation. The company's agreement to grant a right of way for the crossing was a valid consideration for the city's undertaking to bear the cost of construction.

This case is not like *Northern Pacific Railroad v. Duluth, supra*, cited by defendants in error. There the city had the right of way for the street, and a grade crossing existed for many years. The elimination of that crossing became necessary. The company refused to comply with the city's demands in that respect. Then a contract was made. The city agreed to build a bridge to carry the street over the railroad tracks and the company agreed to contribute \$50,000 to its cost. The city undertook to maintain the bridge over the tracks for 15 years and to maintain the approaches perpetually. The city built the bridge at a cost of \$23,000 in addition to the amount paid by the company. Years later, when repairs were needed, the company refused to make them. This court following the decision of the Minnesota supreme court (98 Minn. 429) held that the contract was without consideration, against public policy and void. The Northern Pacific Company gave up nothing. The city already had the right of way. The company might have been required to build the bridge. The contract relieved it of a part of the cost, and attempted for all time to suspend the proper exertion of the police power in respect of maintenance. The ordinance now before us is very different from the situation and contract considered in that case.

There is nothing in the ordinance that involves any attempt to interfere with or hinder the proper exertion of police power. Evidently it was the intention of the parties to make a permanent settlement in respect of the crossings covered by the ordinance. The city was em-

Syllabus.

powered to open the Comanche Avenue crossing at any time without condemnation or other proceedings. Neither party could terminate the contract without the consent of the other. *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed. 849, 862. The city's agreement to bear the cost of construction of the Comanche Avenue crossing does not infringe the police power. The enforcement of the commission's order would deprive plaintiff in error of its property without due process of law and would impair the obligation of the contract in violation of the Constitution of the United States.

Judgment reversed.

UNITED STATES *v.* PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY ET AL.

PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY ET AL. *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 864, 865. Argued March 11, 1926.—Decided May 24, 1926.

1. Under § 1 of the Federal Control Act, and § 6 of the standard form of contracts made pursuant thereto between the Director General of railways and railroads taken over by the Government, whereby the Director General was either to pay out of the revenues derived from railway operations "during the period of federal control," or save the company harmless from, all taxes lawfully assessed under federal or other governmental authority "for any part of said period," except "war taxes" assessed against the company under the Revenue Act of 1917 or any Act in addition thereto or amendment thereof, the obligation of the Director General to bear the normal income taxes of a railroad corporation was limited to those "assessed for the period of federal control," and did not extend to income taxes under the Revenue Act of 1921, assessed for the year 1921, on income received by the company in that year (after termination of federal control) from the Director General in compensation for the use of its properties during federal control. P. 312.

2. The divisions of income taxes prescribed by Revenue Act of 1918, § 230(b), between the Director General of Railroads and railroad companies did not apply to income taxes imposed by Revenue Act of 1921, and the latter prescribed no such divisions. *Id.*
61 Ct. Cls. 11, reversed.

CROSS APPEALS from a judgment of the Court of Claims in a suit to recover money collected from the plaintiff railway companies as income tax.

Solicitor General Mitchell, with whom *Mr. A. A. McLaughlin* was on the brief, for the United States.

Mr. Harvey D. Jacob, with whom *Mr. Frank M. Swacker* was on the brief, for the Pittsburgh & West Virginia Railway Company et al.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The United States appeals from a judgment in favor of plaintiffs for \$21,295.62, being two per cent. tax on their consolidated income for 1921. Plaintiffs have taken a cross appeal, and insist that the court erred in failing to add their expenses and attorneys' fees.

The Pittsburgh Company owned all the capital stock of the West Side Company. Their railroads were taken over by the President and were operated under federal control from January 1, 1918, to March 1, 1920. They failed to make any agreement with the Railroad Administration as to just compensation to be paid them for the use of their properties until final settlement was made July 1, 1921. At that time there was paid to plaintiffs \$1,570,000 in addition to \$250,000 which had been paid on account in January, 1920. And the Director General assumed, in respect of the payment of taxes, the obligations which are specified in § 6 of the standard form contract authorized by the Federal Control Act, March 21, 1918, § 1, c. 25, 40 Stat. 451.

Plaintiffs made returns and paid the full amount of federal taxes for 1918 and 1919 respectively. These included nothing received as compensation for the use of their properties. The Director General reimbursed them to the extent of the normal taxes. Plaintiffs made their return and paid their taxes for 1920. Their income in that year included the \$250,000 paid on account. As federal control ended March 1, the Director General declined to allow more than one-sixth of the tax. The plaintiffs' taxable net income for 1921 was \$1,064,781.39. This, because of deductions allowed, was less than the payment at final settlement. In 1923, upon plaintiffs' insistence, the Bureau of Internal Revenue held that the compensation received in 1921 for the use of their properties during federal control was income for that year, and that none of it was attributable to the period of federal control. Subsequently, plaintiffs called on the Railroad Administration for payment of \$21,295.62, two per cent. of their income.

The question for decision is whether plaintiffs' income tax for 1921 was "assessed for the period of Federal control" within the meaning of the Federal Control Act and the authorized standard contract.

Section 1 of the Federal Control Act required that every such agreement should provide that federal taxes under the Revenue Act of 1917, or Acts in addition thereto or in amendment thereof, commonly called war taxes, "assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period" should be paid by the carrier out of its own funds or should be charged against or deducted from the just compensation; that other taxes assessed "for the period of Federal control or any part thereof," should be paid out of revenues derived from operations while under federal control.

The authorized standard form of contract, § 6 (a), provided that all war taxes assessed against the company

under the Revenue Act of 1917 or any Act in addition thereto or in amendment thereof should be paid by the company. And paragraph (c) provided that the Director General should either pay out of revenues derived from railway operations "during the period of Federal control" or save the company harmless from all taxes lawfully assessed under federal or other governmental authority "for any part of said period" except the taxes and assessments for which provision was made in paragraph (a).

The tax of two per cent. imposed by § 10 of the Revenue Act of 1916 was known as the normal tax. The additional tax of four per cent. imposed by § 4 of the Revenue Act of 1917 was a war tax. Section 230 (a) of the Revenue Act of 1918 provided that, in lieu of the two per cent. normal tax and the four per cent. war tax, there should be paid for the calendar year 1918 a tax of 12 per cent. of net incomes and for each year thereafter 10 per cent. Section 230 (b) provided that, for the purpose of the Federal Control Act, five-sixths of the 12 per cent. tax and four-fifths of the 10 per cent. tax should be "treated as levied by an Act in amendment of Title I of the Revenue Act of 1917." Thus, it was plainly indicated that the tax to be borne by the Director General was the two per cent. The amount in controversy is two per cent. of the income tax for 1921. It was assessed under the Revenue Act of that year which provided that, in lieu of taxes imposed by the Act of 1918, there should be paid 10 per cent. of net incomes for 1921 and 12½ per cent. for each year thereafter. The divisions between the Director General and the corporation, prescribed by subdivision (b) of § 230 of the Act of 1918 applied only to taxes imposed by subdivision (a) of that section. No divisions were prescribed by the Act of 1921. Those made by the earlier Act were not intended to apply to taxes imposed by the Act of 1921, and neither of them would produce the two per cent. normal tax if applied to 12½ per cent., the rate for each year after 1921.

The provisions of § 6 of the standard form of contract, the Federal Control Act and the Revenue Acts are to be read together. When this is done, it is clear that the obligation of the Director General to bear the normal income taxes of the corporations did not go beyond those assessed for the period of federal control. That obligation was not held down to the normal tax on amounts received as compensation for the use of their properties, but extended to the normal tax assessed for that period on all incomes taxed without regard to source. But it cannot be held to extend to taxes on incomes for 1921 without excluding from consideration the provisions of the Federal Control Act and standard agreement clearly limiting the obligation to taxes assessed for the period of federal control. The meaning of these provisions is plain. There is no room for construction. The period in which the assessments were made governed. The sources of taxable incomes were not regarded. It would be contrary to the plain language of the statute and contract to hold the United States liable for any part of the taxes for 1921. Plaintiffs were not entitled to recover.

Their cross appeal depends upon a provision contained in § 6 of the standard contract binding the Director General to pay or save the company harmless from expense of suits respecting the classes of taxes payable by the Director General under the agreement. As the tax was not so payable, plaintiffs take nothing by their cross appeal.

Judgment reversed.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of this case.

Opinion of the Court.

CULVER v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 816. Submitted April 12, 1926.—Decided May 24, 1926.

After issuance by the President of Army Regulation 1269¹/₂, an officer of flying status assigned to the War College, as a student, by order of the Secretary of War, was required by that regulation to participate regularly and frequently in aerial flights, and was therefore entitled to extra pay under § 13a of the Army Reorganization Act; but prior to the date of that regulation it was otherwise, since the officer, even though he took regular flights, was not required to do so, being relieved from the Air Service regulation in that regard by the order of the Secretary assigning him to the War College.

60 Ct. Cls. 825, reversed.

CERTIORARI to a judgment of the Court of Claims dismissing a petition for extra pay.

Messrs. George A. King, William B. King, and George R. Shields for petitioner.

Solicitor General Mitchell for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff brought this action to recover increase of pay from August 15, 1921 to June 30, 1922, under the Army Reorganization Act of June 4, 1920, § 13a, c. 227, 41 Stat. 759, 768. The Court of Claims made findings of fact, held him not entitled to recover and dismissed the petition.

That section provided that officers and enlisted men of the Army should receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights. Plaintiff was a Lieutenant Colonel in the Air Service, and was rated as an airplane pilot. For some time prior to August 15,

1921, he was assigned to duty which required him to participate regularly and frequently in aerial flights, and up to that date he received the increase of pay allowed for that service. August 9, 1921, the Secretary of War issued a special order that plaintiff be relieved "from his present assignment and duties" and that, on August 15, 1921, he report to the commandant, General Staff War College, for duty as a student officer. Plaintiff complied, and remained on duty as a student officer from that date to June 30, 1922. While there he performed a number of flights in each month, 131 in all.

Paragraph 1575 of the Army Regulations charges the Chief of Air Service, under direction of the Secretary of War, with command of the Air Service, both staff and line, and with its management, including the regulation of the duties of officers and others who may be employed under his direction, excepting such persons as may be specifically detached by the order of the Secretary of War. December 2, 1920, a circular letter was issued by the Chief of Air Service to the commanding officers of all air stations. It was there stated that he considered that any officer holding a flying rating was on duty which required his participation in regular and frequent flights no matter what the nature of that duty might be. December 31, 1921, after the controversy culminating in this suit arose, the President issued a regulation (Paragraph 1269 $\frac{1}{2}$, Army Regulations) requiring all officers of the Air Service who are rated as pilots of airplanes or airships and on a duty status to participate regularly in aerial flights as pilots whenever flying facilities are available.

The United States concedes that, after the taking effect of that regulation, plaintiff was on a duty status requiring him to participate regularly and frequently in flights, and that he was entitled to have the increase of pay given by the Act of June 4, 1920.

It remains to be considered whether he was entitled to the increase of pay from August 15 to December 31, 1921. The findings sufficiently show that he actually took frequent and regular flights during that period; but there is no finding that he was required to do so. Paragraph 1575 of the Army Regulations expressly excepts from the command of the Chief of the Air Service such persons as may be specifically detached by order of the Secretary of War. The plaintiff was so detached by the order of August 9, 1921. It follows that the circular letter of December 2, 1920, did not apply to him while on duty as a student officer at the General Staff War College. During that time he was not subject to the orders or regulations of the Chief of the Air Service; and undoubtedly that was the reason the President made the regulation of December 31, 1921.

The facts found are not sufficient to show that plaintiff was on duty requiring him to participate in the flights which he actually took prior to that regulation. It does not appear that he would have been subject to military discipline if he had not taken the flights. In the absence of such finding he is not entitled to recover increase of pay for that period. But the regulation of December 31, 1921, did require him to take such flights, and—as conceded by the United States—he is entitled to recover such increase for the period between that date and June 30, 1922.

Judgment reversed.

REPORTER'S NOTE.—In the foregoing case the Solicitor General conceded that there was substantial reason for the view that the judgment below was erroneous, and did not oppose the issuance of the certiorari.

HAY *v.* MAY DEPARTMENT STORES COMPANY
ET AL.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI.

No. 292. Submitted April 29, 1926.—Decided May 24, 1926.

1. A motion to remand upon the ground that the suit is not removable from the state court raises a question of the jurisdiction of the District Court, reviewable under Jud. Code, § 238, where the motion was denied and the suit dismissed upon plaintiff's failure to comply with a rule for security for costs. P. 321.
2. An action brought in a state court against two defendants jointly, in which the plaintiff states a case of joint liability arising out of the concurrent negligence of the defendants, does not present a separable controversy authorizing the removal of the cause to a federal court, even though the plaintiff might have sued the defendants separately; the allegations of the complaint being decisive as to the nature of the controversy in the absence of a showing that one of the defendants was fraudulently joined for the purpose of preventing the removal. P. 321.

Reversed.

ERROR to a judgment of the District Court dismissing a suit for personal injuries, for failure of the plaintiff to give security for costs, after his motion to remand it to the state court where it originated had been overruled.

Messrs. James J. O'Donohoe, Mark D. Eagleton, and Harry S. Rooks for plaintiff in error.

Messrs. Robert A. Holland, Jr., and Jacob M. Lashly for defendant in error, The May Department Stores Company.

Where a suit for personal injuries is filed in a state court against two defendants, and each is charged with committing separate and distinct acts of negligence, some of which affect only the non-resident defendant and others of which affect only the resident defendant, no joint cause of action is stated against the two, and a separable con-

trovcrsy is presented which entitles the non-resident defendant to removal. *Cayce v. Southern Ry. Co.*, 195 Fed. 786; *Nichols v. C. & O. Ry. Co.*, 195 Fed. 913; *Shaver v. Pacific Coast Milk Co.*, 185 Fed. 316; *Bainbridge Gro. Co. v. A. C. L. R. R. Co.*, 182 Fed. 276; *Adderson v. Southern Ry. Co.*, 177 Fed. 571; *Evansberg v. Insurance Stove Co.*, 168 Fed. 1001; *Ferguson v. C. M. & St. P. Ry. Co.*, 63 Fed. 177; *Grimm v. Globe Printing Co.*, 232 S. W. 676.

It appears from the averments of the petition that the sole proximate cause of the alleged injuries was an alleged act of negligence on the part of one of said defendants. That being so, no joint cause of action is stated against the two defendants and, therefore, a separable controversy is presented which entitles the non-resident defendant to the removal of the case. *Smith v. Johnson*, 219 Mass. 142; *Graeff v. Phil. R. R. Co.*, 161 Pa. 230; *Cole v. German Society*, 124 Fed. 113; *Parkington v. Abraham*, 183 N. Y. 553; *Teis v. Smuggler Mining Co.*, 158 Fed. 260.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case presents a question as to the jurisdiction of the District Court arising under the provision of § 28 of the Judicial Code that: When there is pending in a state court any civil suit of which the district courts of the United States are given original jurisdiction, in which "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

The suit was brought by Hay, a citizen of Missouri, in the Circuit Court of St. Louis, against the Stores Company, a New York corporation, and McCormick, a citizen of Missouri, to recover damages for personal injuries.

The petition alleged that the plaintiff and McCormick were employed by the Stores Company in its place of business in Missouri, in moving loaded trucks along a tunnel or passageway on its premises; that the company negligently permitted this passageway to become strewn with débris, and negligently required its employees to push heavily loaded trucks along the passageway, unassisted, rapidly, and at short and unsafe intervals; that McCormick, who was not a reasonably safe co-employee, habitually pushed his truck at an unsafe speed, in dangerous proximity to the preceding truck, and without exercising reasonable care to avoid a collision; that, although the company knew or by the exercise of ordinary care could have known of these dangerous and negligent habits, it negligently caused and permitted him to continue to perform his duties in this negligent and unsafe manner; that on the day of the accident, while the plaintiff was engaged in pushing a loaded truck along the passageway, it was suddenly stopped by débris obstructing the passageway, and he was struck by a loaded truck which McCormick was negligently pushing, close behind him, at a rapid rate of speed, and which "the defendants" negligently failed to stop or divert so as to avoid the collision; and "that the negligence of both defendants as aforesaid concurred and jointly coöperated to cause, and did directly and proximately cause, the aforesaid collision," from which the plaintiff sustained serious and permanent injuries, to his damage in the sum of \$15,000.

The Stores Company in due time presented to the Circuit Court its petition for the removal of the cause to the District Court. The sole ground alleged for the removal was that the plaintiff's petition showed "upon its face" that there was "a separable controversy" in the cause between the plaintiff and the Stores Company, citizens of different States, in that, under its allegations,

whatever the previous negligence of the Stores Company, the negligent failure of McCormick to stop or divert his truck so as to avoid the collision, was "the sole proximate cause" of the collision and of the plaintiff's injuries, and that "hence" no joint cause of action was stated against the defendants. The Circuit Court on this petition ordered the removal.

After the record had been filed in the District Court the plaintiff filed a motion to remand the cause to the Circuit Court, on the ground that it appeared upon the face of the record that the petition for removal was insufficient and the District Court had not acquired jurisdiction of the cause. This motion was overruled; to which the plaintiff excepted. Thereafter, on motion of the Stores Company, the court ordered the plaintiff to furnish security for costs within a specified time; and upon his failure to comply with this rule, the suit was dismissed, at his costs.

To obtain a review of the ruling on the jurisdictional question presented by the motion to remand, the plaintiff applied for a direct writ of error from this court. This was allowed by the District Judge in February, 1925, under § 238 of the Judicial Code; and in that connection he duly certified for decision the single question whether, upon the record, the District Court acquired jurisdiction of the cause by the removal based upon a separable controversy. This question is now properly before us for review. *Wilson v. Republic Iron Co.*, 257 U. S. 92, 96.

It is well settled by the decisions of this court, that an action brought in a state court against two defendants jointly, in which the plaintiff states a case of joint liability arising out of the concurrent negligence of the defendants, does not present a separable controversy authorizing the removal of the cause to a federal court, even though the plaintiff might have sued the defendants separately; the allegations of the complaint being decisive as to the nature of the controversy in the absence of a showing that one

of the defendants was fraudulently joined for the purpose of preventing the removal. *Louisville & Nashville Railroad v. Wangelin*, 132 U. S. 599, 601; *Powers v. Chesapeake & Ohio Railway*, 169 U. S. 92, 97; *Alabama Southern Railway v. Thompson*, 200 U. S. 206, 214; *Chicago, R. I. & Pac. Railway v. Dowell*, 229 U. S. 102, 111; *McAllister v. Chesapeake & Ohio Railway*, 243 U. S. 302, 310; *Chicago & Alton Railroad v. McWhirt*, 243 U. S. 422, 425.

This rule was applied in the *Dowell Case*, *supra*, 112, where a railroad laborer, who had been run down by an engine, brought suit against the railroad company and the engineer jointly, alleging in his petition that the defective character of the engine, the unfitness and incompetency of the engineer, and his negligence and carelessness in needlessly running the engine over the plaintiff, "concurrently and jointly contributed" to the injuries. So, in the present case, the plaintiffs' petition alleged in substance that the negligence of the Stores Company in permitting the passageway to become obstructed, in requiring the employees to operate their trucks in an unsafe manner, and, specifically, in permitting McCormick, an unsafe co-employee, to handle his truck in a negligent and dangerous manner, directly concurred and jointly coöperated with McCormick's negligence in causing the plaintiff's injuries. It is clear that this petition stated on its face a case of joint liability arising from concurrent acts of negligence on the part of the defendants, coöperating to cause the injuries, and that it presented no separable controversy with the Stores Company within the established rule applicable in such cases.

The petition of the Stores Company, therefore, showed no ground for the removal to the District Court, and no jurisdiction was acquired under it.

The judgment is reversed, and the cause remanded to the District Court with direction to remand it to the Circuit Court of St. Louis.

Reversed and remanded.

Statement of the Case.

CORRIGAN ET AL. *v.* BUCKLEY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 104. Argued January 8, 1926.—Decided May 24, 1926.

1. This Court has no jurisdiction of an appeal from the Court of Appeals of the District of Columbia founded on alleged constitutional questions so unsubstantial as to be plainly without color of merit and frivolous. P. 329.
 2. The Fifth Amendment is a limitation upon the powers of the General Government and is not directed against individuals. P. 330.
 3. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. *Id.*
 4. The prohibitions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals. Individual invasion of individual rights is not the subject-matter of the Amendment. *Id.*
 5. Not by any of these Amendments, nor by §§ 1977–1979 Rev. Stats., are private lot owners prohibited from entering into twenty-one year mutual covenants not to sell to any person of negro blood or race. P. 331.
 6. The contention that such an indenture is void as against public policy does not involve the construction or application of the Constitution or draw in question the construction of the above sections of the Revised Statutes; and therefore affords no basis for an appeal to this Court under § 250, Judicial Code, from a decree of the Court of Appeals of the District of Columbia. P. 330.
 7. A contention, to constitute ground for appeal, should be raised by the petition for appeal and assignment of errors. P. 331.
 8. Mere error of a court in a judgment entered after full hearing does not constitute a denial of due process of law. *Id.*
- Appeal from 55 App. D. C. 30; 299 Fed. 899; dismissed.

APPEAL from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District in favor of Buckley in a suit to enjoin the defendant Corrigan from selling a lot

in Washington to the defendant Curtis, in violation of an indenture entered into by Buckley, Corrigan and other land owners whereby they mutually covenanted and bound themselves, their heirs and assigns, for twenty-one years, not to sell to any person of negro race or blood.

Messrs. Louis Marshall and Moorfield Storey, with whom *Messrs. James A. Cobb, Henry E. Davis, William H. Lewis, James P. Schick, Arthur B. Spingarn, and Herbert K. Stockton* were on the brief, for appellants.

The decrees of the courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law. *Buchanan v. Warley*, 245 U. S. 60; *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, 100 U. S. 313; *United States v. Harris*, 106 U. S. 629; *Scott v. McNeal*, 154 U. S. 34; *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. 276; *Hovey v. Elliott*, 167 U. S. 409.

For the reasons considered in *Buchanan v. Warley*, 245 U. S. 60, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative branch to authorize. This Court has repeatedly included the judicial department within the inhibitions against the violation of

the constitutional guaranties which we have invoked. The immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the appellants have been deprived of their liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereign power. In rendering these decrees, the courts which have pronounced them have functioned as the law-making power. See *Gondolfo v. Hartman*, 49 Fed. 181; *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.

On the applicability of constitutional amendments to the District of Columbia, see *Siddons v. Edmondston*, 42 App. D. C. 459; *Downes v. Bidwell*, 182 U. S. 244; *Evans v. United States*, 31 App. D. C. 544; *Stoutenburgh v. Frazier*, 16 App. D. C. 229; *Curry v. District of Columbia*, 14 App. D. C. 423; *Wight v. Davidson*, 181 U. S. 371; *Moses v. United States*, 16 App. D. C. 428; *Callan v. Wilson*, 127 U. S. 540; *Lappin v. District of Columbia*, 22 App. D. C. 68; *Smoot v. Heyl*, 227 U. S. 518; *Block v. Hirsh*, 256 U. S. 135; *Adkins v. Children's Hospital*, 261 U. S. 525; *District of Columbia v. Brooke*, 214 U. S. 138; *Geofroy v. Riggs*, 133 U. S. 258; *Talbot v. Silver Bow County*, 139 U. S. 444.

The covenant, the enforcement of which has been decreed by the courts below, is contrary to public policy. The public policy of this country is to be ascertained from its Constitution, statutes and decisions, and the underlying spirit illustrated by them. The covenant is not only one which restricts the use and occupancy by negroes of the various premises covered by its terms, but it also prevents the sale, conveyance, lease or gift of any such premises by any of the owners or their heirs and assigns to negroes or to any person or persons of the negro race

or blood, perpetually, or at least for a period of twenty-one years. It is in its essential nature a contract in restraint of alienation and is, therefore, contrary to public policy. *De Peyster v. Michael*, 6 N. Y. 497; *Potter v. Couch*, 141 U. S. 296; *Manierre v. Welling*, 32 R. I. 104; *Mandlebaum v. McDonell*, 29 Mich. 79; *In re Rosher*, L. R. 26 Ch. Div. 801; *In re Macleay*, L. R. 20 Eq. 186; *Smith v. Clark*, 10 Md. 186; *McCullough v. Gilmore*, 11 Pa. 370; *Bennett v. Chapin*, 77 Mich. 527; *Attwater v. Attwater*, 18 Beav. 330; *Billing v. Welch*, Irish Rep., 6 C. L. 88; *Schermerhorn v. Negus*, 1 Denio 148; *Johnson v. Preston*, 226 Ill. 447; *Anderson v. Carey*, 36 Ohio St. 506; *Barnard v. Bailey*, 2 Harr. (Del.) 56; *Williams v. Jones*, 2 Swan (Tenn.) 620; *Brothers v. McCurdy*, 36 Pa. 407. See also *Re Rosher*, L. R. 26 Ch. Div. 801, and *Re Dugdale*, L. R. 38 Ch. Div. 176, in both of which cases *In re Macleay*, L. R. 20 Eq. 186, was disapproved. 4 Kent's Commentaries 131.

Independently of our public policy as deduced from the Constitution, statutes, and decisions, with respect to the segregation of colored persons and the fact that the covenant sued upon is in restraint of alienation, we contend that such a contract as that now under consideration militates against the public welfare. The covenant is not ancillary to the main purpose of a valid contract and therefore is an unlawful restraint. *Test Oil Co. v. La Tourrette*, 19 Okla. 214; 3 Williston on Contracts, § 1642; *Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373. It is a subject of serious consideration as to whether such a covenant, entered into, as in this case, by twenty-four different individuals, would not constitute a common law conspiracy. *Callan v. Wilson*, 127 U. S. 540; *Granada Lumber Co. v. Mississippi*, 217 U. S. 440; *Lumber Assn. v. United States*, 234 U. S. 600.

Cases relied upon in the court below to sustain the enforcement of this covenant are not only unsound but

also distinguishable. *Los Angeles Investment Co. v. Gary*, 181 Cal. 680; *Queensboro Land Co. v. Cazeaux*, 136 La. 724; *Koehler v. Rowland*, 275 Mo. 573; *Parmalee v. Morris*, 218 Mich. 625.

Mr. James S. Easby-Smith, with whom *Messrs. David A. Pine* and *Francis W. Hill, Jr.*, were on the brief, for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is a suit in equity brought by John J. Buckley in the Supreme Court of the District of Columbia against Irene H. Corrigan and Helen Curtis, to enjoin the conveyance of certain real estate from one to the other of the defendants.

The case made by the bill is this: The parties are citizens of the United States, residing in the District. The plaintiff and the defendant Corrigan are white persons, and the defendant Curtis is a person of the negro race. In 1921, thirty white persons, including the plaintiff and the defendant Corrigan, owning twenty-five parcels of land, improved by dwelling houses, situated on S Street, between 18th and New Hampshire Avenue, in the City of Washington, executed an indenture, duly recorded, in which they recited that for their mutual benefit and the best interests of the neighborhood comprising these properties, they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns for twenty-one years from and after its date.

In 1922, the defendants entered into a contract by which the defendant Corrigan, although knowing the defendant Curtis to be a person of the negro race, agreed to

sell her a certain lot, with dwelling house, included within the terms of the indenture, and the defendant Curtis, although knowing of the existence and terms of the indenture, agreed to purchase it. The defendant Curtis demanded that this contract of sale be carried out, and, despite the protest of other parties to the indenture, the defendant Corrigan had stated that she would convey the lot to the defendant Curtis.

The bill alleged that this would cause irreparable injury to the plaintiff and the other parties to the indenture, and that the plaintiff, having no adequate remedy at law, was entitled to have the covenant of the defendant Corrigan specifically enforced in equity by an injunction preventing the defendants from carrying the contract of sale into effect; and prayed, in substance, that the defendant Corrigan be enjoined during twenty-one years from the date of the indenture, from conveying the lot to the defendant Curtis, and that the defendant Curtis be enjoined from taking title to the lot during such period, and from using or occupying it.

The defendant Corrigan moved to dismiss the bill on the grounds that the "indenture or covenant made the basis of said bill" is (1) "void in that the same is contrary to and in violation of the Constitution of the United States," and (2) "is void in that the same is contrary to public policy." And the defendant Curtis moved to dismiss the bill on the ground that it appears therein that the indenture or covenant "is void, in that it attempts to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction [and denies them] the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth

Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments.”

Both of these motions to dismiss were overruled, with leave to answer. 52 Wash. L. Rep. 402. And the defendants having elected to stand on their motions, a final decree was entered enjoining them as prayed in the bill. This was affirmed, on appeal, by the Court of Appeals of the District. 299 Fed. 899. The defendants then prayed an appeal to this Court on the ground that such review was authorized under the provisions of § 250 of the Judicial Code—as it then stood, before the amendment made by the Jurisdictional Act of 1925—in that the case was one “involving the construction or application of the Constitution of the United States” (par. 3), and “in which the construction of” certain laws of the United States, namely §§ 1977, 1978, 1979 of the Revised Statutes, were “drawn in question” by them (par. 6). This appeal was allowed, in June, 1924.

The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this Court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. *Sugarman v. United States*, 249 U. S. 182, 184; *Zucht v. King*, 260 U. S. 174, 176. And under well settled rules, jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color of merit and frivolous. *Wilson v. North Carolina*, 169 U. S. 586, 595; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335; *Binderup v. Pathe Exchange*, 263 U. S. 291, 305; *Moore v. New York Cotton Exchange*, 270 U. S. 593.

Under the pleadings in the present case the only constitutional question involved was that arising under the

assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is "void" in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. This contention is entirely lacking in substance or color of merit. The Fifth Amendment "is a limitation only upon the powers of the General Government," *Talton v. Mayes*, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. *Hodges v. United States*, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment "have reference to state action exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U. S. 313, 318; *United States v. Harris*, 106 U. S. 629, 639. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U. S. 3, 11. It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being "against public policy," does not involve a constitutional question within the meaning of the Code provision.

The claim that the defendants drew in question the "construction" of §§ 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the

assertion in the motion interposed by the defendant Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments. Assuming that this contention drew in question the "construction" of these statutes, as distinguished from their "application," it is obvious, upon their face, that while they provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect.

We therefore conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal.

And, while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary

and contrary to law as to be acts of mere spoliation. See *Delmar Jockey Club v. Missouri*, *supra*, 335. Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law. *Central Land Co. v. Laidley*, 159 U. S. 103, 112; *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328, 329.

It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of § 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

Hence, without a consideration of these questions, the appeal must be, and is

Dismissed for want of jurisdiction.

UNITED STATES *v.* ZERBEY ET AL.

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

No. 790. Argued March 3, 1926.—Decided May 24, 1926.

A surety bond, required by the Commissioner of Internal Revenue under § 6, Tit. II of the Prohibition Act, in connection with a permit issued to the obligor to sell wines and distilled spirits for other than beverage purposes, and conditioned "that if the said

principal shall fully and faithfully comply with all the requirements of the laws of the United States now or hereafter enacted and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, then this obligation to be void; otherwise to remain in full force and virtue," is not a bond for a penalty forfeitable in its entire amount upon a breach of condition, but is a bond for indemnity securing the payment of the internal revenue taxes, interest, penalties, and liabilities accruing to the United States by reason of the breach. P. 337.

RESPONSE to questions certified by the Circuit Court of Appeals upon a review of a judgment of the District Court which dismissed an action brought by the United States on the bond of a permittee under the Prohibition Act and his surety to recover the full penal sum of the bond because of alleged breaches of condition.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. John J. Byrne* were on the brief, for the United States.

The bond sued upon, as evidenced by its plain recitals, as well as by the statute which authorized it, the regulations under which it was prescribed, and the administrative construction of its purpose and effect, is a bond required by the Government of the principal named therein, not to secure the United States against any supposed pecuniary damage it might sustain from a breach, but to insure the observance by the principal of the law and regulations in pursuance of which the bond was given. National Prohibition Act, § 6, Tit. II; Treasury Decision 2940, Art. 15(b), (f); Regulations 60 (ed. Feb. 1, 1920), § 20(a), (c); Treasury Decision 2559, p. 12; Treasury Decision 2788, p. 23; 32 Op. At. Gen. 365. Upon a breach of the condition of such a bond the full penal sum is recoverable as a penalty or forfeiture against which neither a court of equity nor a court of law will relieve, first, because it is imposed by law, and second,

because no adequate compensation can be adjudged for the affront to the sovereignty and the injury to the public welfare resulting from the breach. *Clark v. Barnard*, 108 U. S. 436; *United States v. Dieckerhoff*, 202 U. S. 302; *United States v. Montell*, 26 Fed. Cas. 15798; *The Oteri*, 67 Fed. 146; *Illinois Surety Co. v. United States*, 229 Fed. 527; *United States v. Rubin*, 233 Fed. 125; *United States v. Engelberg*, 2 Fed. (2d) 720; *Lyman v. Perlmutter*, 166 N. Y. 410; *Lightner v. Commonwealth*, 31 Pa. 341; *Paducah v. Jones*, 126 Ky. 809; Sedgwick on Damages (9th ed.), vol. 1, § 416a; Sutherland on Damages (3d ed.), vol. 1, § 279; *Klein v. Insurance Co.*, 104 U. S. 88; *Peirce v. New York Dock Co.*, 265 Fed. 148; *Gates v. Parmly*, 93 Wis. 294; *Grigg v. Landis*, 21 N. J. Eq. 494; *Thompson v. Whipple*, 5 R. I. 144; *Hagar v. Buck*, 44 Vt. 285; Pomeroy Eq. Jur., vol. 1, § 381; Story Eq. Jur. (14th ed.), § 1726; Sedgwick on Damages (8th ed.), vol. 1, § 391.

If the breach is of a covenant within the authority of the statute, the bond will be held to be a valid statutory bond to that extent and the excess rejected as surplusage. If the covenant breached is not within the statutory authority, the bond, having been entered into by competent parties and not being prohibited by law or opposed to public policy, will be held to be a valid and binding obligation at common law. Moreover, the obligor, having enjoyed the benefits for which the bond was given, is estopped to deny its validity. *Speake v. United States*, 9 Cr. 27; *United States v. Tingey*, 5 Pet. 114; *United States v. Bradley*, 10 Pet. 343; *United States v. Linn*, 15 Pet. 290; *United States v. Hodson*, 10 Wall, 395; *Jessup v. United States*, 106 U. S. 147; *Moses v. United States*, 166 U. S. 571; *United States v. Dieckerhoff*, 202 U. S. 302. While penalties and forfeitures are not favored in the law, and the court will seek diligently for a ground upon which to hold that they have not been incurred,

nevertheless, if actually incurred, they will be enforced in a court of law. *New York L. Ins. Co. v. Statham*, 93 U. S. 24; *Insurance Co. v. Norton*, 96 U. S. 234; *Klein v. Insurance Co.*, 104 U. S. 88; *Thompson v. Insurance Co.*, 104 U. S. 252; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335.

Mr. John W. Davis, with whom *Messrs. Ralph W. Rymer* and *James M. Nicely* were on the brief, for National Surety Company.

Form 738 is not a forfeiture bond. The condition in the bond must be construed by a consideration of its terms and of all the circumstances attending its execution. *Sun Printing Assn. v. Moore*, 183 U. S. 642; *Clark v. Barnard*, 108 U. S. 436; *United States v. Montell*, 26 Fed. Cas. 1293; *United States v. Dieckerhoff*, 202 U. S. 302; *United States v. Alcorn*, 145 Fed. 995; *United States v. Cutajar*, 59 Fed. 1001; *The S. Oteri*, 67 Fed. 146; *Illinois Surety Co. v. United States*, 229 Fed. 527; *United States v. U. S. F. & G. Co.*, 1 Fed. (2d) 335. The language of the condition is not that of a forfeiture bond.

The purpose of the Commissioner and Treasury Department was to obtain indemnity only. The purpose of Congress in requiring a bond from permittees was indemnity only.

Revised Statutes, § 961, prevents the recovery of the full amount under this bond. *Sun Printing Assn. v. Moore*, 183 U. S. 642; *United States v. Dieckerhoff*, 202 U. S. 302; *United States v. Alcorn*, 145 Fed. 995; *United States v. Abeel*, 174 Fed. 12; *In re Appel*, 163 Fed. 1002.

If form 738 is held to be a forfeiture bond on its face, it represents an excess of power on the part of the Commissioner which prevents its enforcement. *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470; *Williamson v. United States*, 207 U. S. 425; *United States v. Grimaud*, 220 U. S. 506; *Lipke v. Lederer*, 259 U. S.

557; *Regal Drug Co. v. Wardell*, 260 U. S. 386; *United States v. 1412 Barrels*, Fed. Cas. No. 15960; *Ex Parte Lange*, 18 Wall. 163; *Dukich v. Blair*, 3 Fed. (2d) 302.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case comes before us on a certificate from the Circuit Court of Appeals. Jud. Code, § 239.

It appears from the certificate that Zerbey, on January 23, 1920, applied to the Commissioner of Internal Revenue, under the provisions of the National Prohibition Act,¹ for a permit to sell distilled spirits and wines for other than beverage purposes, and filed with his application a bond in the sum of \$100,000, with the National Surety Company as surety. This bond was on Form 738, previously prescribed by the regulations, and recited, in accordance therewith, that "the condition of this obligation is such that if the said principal shall fully and faithfully comply with all the requirements of the laws of the United States now or hereafter enacted and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, then this obligation to be void; otherwise to remain in full force and virtue." On January 26, the Commissioner issued to Zerbey a permit "under the conditions that the provisions of the national prohibition act, and regulations issued thereunder will be strictly observed."

Thereafter, the United States brought an action against Zerbey and the Surety Company in a Federal District Court, in which it was alleged that Zerbey had violated the condition of the bond in (a) failing and neglecting to keep records of his sales of distilled spirits, as required by the Prohibition Act and regulations, (b) selling and

¹ 41 Stat. 305, c. 85.

disposing of distilled spirits for beverage purposes, (c) diverting distilled spirits to other than beverage purposes, and (d) having in his possession whiskey which had been withdrawn, for nonbeverage purposes only, from a bonded warehouse, of which he kept no record as required by the Prohibition Act and regulations; and that the full penal sum of the bond had been forfeited and was due by the defendants to the United States by reason of these breaches of the condition of the bond. It was not alleged that any damage or loss had been sustained by the United States as the result of these breaches. The defendants filed statutory demurrers, which were sustained by the District Court on the ground that the United States could not recover the full penal sum of the bond, but only such loss or damage as it had sustained in consequence of the breaches of the bond; and the suit was dismissed. And the case having been taken to the Circuit Court of Appeals by writ of error, it has certified that, for the proper decision of the case, it desires the instruction of this Court as to the following questions of law: "(1) Is a bond conditioned upon compliance with the law of the United States and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, given the United States by one to whom a permit to sell intoxicating liquors for other than beverage purposes has been issued under the provisions of § 6 of Title II of the national prohibition act and regulations promulgated thereunder, forfeitable upon breach of the condition in the full amount of its penal sum? (2) Is recovery upon breach of the condition of such a bond given by one holding such a permit limited to actual damages sustained by the United States?"

These questions, shortly stated, are, in effect: Whether a permit bond on Form 738 is a forfeiture bond entitling the United States to recover the full amount named on a

breach of its condition, or a bond of indemnity for the actual damages sustained by the United States from such breach.

Section 6, Title II, of the National Prohibition Act provides, with certain exceptions not here material, that: "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, . . . The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title."

By § 29 it is further provided that any person violating the provisions of any permit or of this title, shall be punished by either fine or imprisonment, or both; and, by § 35, that a tax shall be assessed against any person responsible for an illegal sale in double the amount provided by the internal revenue law, with an additional penalty.

By regulations issued by the Commissioner in October and November, 1919,² every applicant for a permit for the sale or use of distilled spirits or wines for other than beverage purposes, was required to furnish either a bond with corporate or personal sureties, on Form 738, in a penal sum of from \$1,000 to \$100,000, computed, at specified rates, on the quantity of spirits and wine which he then had on hand or would receive in the next quarterly period; or his personal bond for the same amount, secured by the deposit of Government bonds as collateral security.

Form 738 prescribed for a surety bond—which was used by Zerbey—was conditioned, as previously stated, that the principal "shall fully and faithfully comply with

² T. D. 2940; T. D. 2946.

all the requirements of the laws of the United States now or hereafter enacted, and regulations issued pursuant thereto respecting the sale or use of distilled spirits and wines for other than beverage purposes." The corresponding Form 738A prescribed for a collateral bond, recited the pledge of Government bonds "as security for any obligation arising hereunder," and contained, after the general condition in Form 738, a specific provision that "the said principal expressly agrees that the said bonds so deposited may be sold . . . and the proceeds applied to the payment of any internal-revenue taxes, interest, and penalties which may be due, and in satisfaction of any liabilities incurred hereunder, and the expenses of such sale, if any; and the residue, if any, paid to the said principal."

Thereafter, by Regulations No. 60,³ which, although dated January 16, 1920, were not, it appears, published and put into effect until February 1—after the issuance of the permit to Zerbey—an applicant for a permit to sell or use distilled spirits or wines was required to file either a surety bond on a new Form 1408 or a collateral bond on a new Form 1409; provided that if the holder of such a permit had already given a bond on Form 738 or Form 738A in a sufficient penal sum, a new bond should not be required until he was called upon to make an application for a new permit.

The Form 1408 thus prescribed for a surety bond,⁴ recites that "the condition of this obligation is such that if . . . the said principal shall not violate the terms of such permit . . . or . . . any of the provisions of the National Prohibition Act and regulations promulgated thereunder as now or hereafter provided, and all other laws of the United States now or hereafter enacted respecting distilled spirits, fermented liquors, wines, or

³ T. D. 2985.

⁴ Regulations 60, ed. of Feb. 1, 1920, appendix.

other intoxicating liquors, and will pay all taxes, assessments, fines, and penalties incurred or imposed upon him by law, then this obligation to be void, otherwise to remain in full force and effect." And Form 1409 prescribed for a collateral bond likewise provides that upon the sale of the Government's bonds pledged as security, the proceeds, shall "be applied to the payment of any internal-revenue taxes, interest, fines and penalties which may be due, and in satisfaction of any liabilities incurred hereunder and the expenses of such sale, if any; and the residue, if any, paid to said principal."

The case now presented is not that of a bond executed to the Government in a specified penal sum prescribed by statute and intended as a fixed penalty imposed for a breach of a statutory duty, which is forfeited in its full amount by a breach of the condition irrespective of the actual damage thereby caused the Government. *Clark v. Barnard*, 108 U. S. 436, 461; *United States v. Dieckerhoff*, 202 U. S. 302, 309; *United States v. Montell* (Taney, 47), 26 Fed. Cas. 1293, 1296. Whether Congress did or could authorize the Commissioner in fixing the form of bond to prescribe a penalty, we need not consider; for here it is plain that he did not intend that the penal sum of a surety bond on Form 738 should be a penalty or liquidated damages—in this case of \$100,000—the full amount of which the United States might recover for any breach of condition, however slight, as, for example, a failure to make a record of any sale as required by the regulations; but, on the contrary, intended that such penal sum should be the maximum amount of the obligation incurred by reason of a breach of the bond. Form 738 is unquestionably to be read in connection with Form 738A. These were prescribed by the same regulations as alternative forms of the bond which the applicant might at his election furnish. They had precisely the same object, and were intended to secure the same obligation;

the one by personal sureties, the other by the deposit of collateral. Plainly it was not intended that the obligation should be greater in the one case than in the other, merely because the applicant chose to furnish personal instead of collateral security. The effect of Form 738A is that the applicant's obligation shall be discharged by the payment of any internal revenue taxes, interest, penalties and liabilities accruing to the United States by reason of a breach of the condition; and it cannot be doubted that this was intended, in like manner, to be the measure of the obligation incurred under a surety bond on the corresponding Form 738.

This view is emphasized by the consideration of the new Forms 1408 and 1409 prescribed by Regulations 60. It is clear that Form 1408 is not one for a penalty or forfeiture, but is one for indemnity merely in respect, broadly speaking, of the liabilities enumerated in Form 738A. *United States v. Chouteau*, 102 U. S. 603, 608. And the fact that these new regulations provided that a permit holder who had previously given a surety bond on Form 738 should not be required to give a new bond on Form 1408 until called upon to make application for a new permit, is strongly persuasive evidence that the Commissioner regarded Form 738 as of substantially the same character as Form 1408, that is, as a bond for indemnity securing the payment of the liabilities enumerated in Form 738A.

Our answer to the certified questions is that: A permit bond on Form 738 is not a bond for a penalty forfeitable in its entire amount upon a breach of condition, but is a bond for indemnity securing the payment of the internal revenue taxes, interest, penalties, and liabilities accruing to the United States by reason of the breach.

LEDERER, FORMER COLLECTOR, *v.* McGARVEY,
EXECUTRIX.

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

No. 120. Argued March 3, 1926.—Decided May 24, 1926.

When, upon the hearing of a certificate from the Circuit Court of Appeals, the plaintiff in error concedes that answers to the questions certified can avail nothing, owing to his incapacity to litigate the claim to which they relate, the certificate (the other party not opposing) will be dismissed. P. 343.

Certificate dismissed.

QUESTIONS certified by the Circuit Court of Appeals upon a writ of error to a judgment of the District Court, 4 Fed. (2d) 418, which allowed recovery from the Collector of taxes assessed for violations of the liquor regulations and overruled a counterclaim set up by the Collector for the full penal amount of the plaintiff's surety bond. See also case preceding.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. John J. Byrne* were on the brief, for Lederer, Collector.

Mr. Levi Cooke, with whom *Messrs. Frederick W. Breiting* and *George R. Beneman* were on the brief, for McGarvey, Executrix.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Circuit Court of Appeals has certified to us in this case the same questions that were submitted in *United States v. Zerbey*, *ante*, p. 332, in reference to permit bonds covering the sale and use of distilled spirits and wines for other than beverage purposes.

It appears from the certificate that on March 20, 1920, after Regulations 60 had been promulgated, prescribing a surety bond on Form 1408, a permit was issued to O'Kane on a surety bond in the penal sum of \$2,000, executed on Form 738. While this permit was in force O'Kane violated the National Prohibition Act and the regulations by selling whiskey to a pharmacy having no permit to purchase it, and failing to keep a record of the sales as required by the regulations. He was assessed with a differential tax of \$1,098.72. He paid this, under protest, to Lederer, the Collector of Internal Revenue, and thereafter brought suit against Lederer in a Federal District Court to recover the amount paid. Lederer, while conceding this claim, interposed a counterclaim for \$2,000 on the surety bond, the full amount of which, he insisted, had become due to the United States by reason of the breach of condition. The District Court, holding that "the amount named in the bond represents a limit, and not a measure of liability," denied the counterclaim, and gave O'Kane judgment for the amount of the tax paid. 4 Fed. (2d) 418. And the case having been taken to the Circuit Court of Appeals on a writ of error, it has certified to us, in effect, the questions whether a surety bond executed on Form 738—after Form 1408 had been prescribed—is a forfeiture bond entitling the United States to recover the full amount named on a breach of its condition, or an indemnity bond merely.

In the brief filed in this Court in behalf of Lederer, it is now said that the decision in *Sage v. United States*, 250 U. S. 33, "makes it plain that, in defending an action for the recovery of taxes alleged to have been illegally collected, a collector of internal revenue is not acting for and in behalf of the United States, but is seeking to prevent the entry of a personal judgment against himself"; and that it "would apparently follow that the collector is without right in such a case to set up as a counterclaim

an alleged indebtedness of the plaintiff to the United States." And it is suggested that, "as the judgment of the District Court must be affirmed by the Circuit Court of Appeals without regard to the points presented in the certified questions," an answer to these questions, which would avail nothing, is not required. *United States v. Buzzo*, 18 Wall. 125, 129; *United States v. Britton*, 108 U. S. 199, 207.

In view of the concession now made by Lederer, this suggestion is not opposed by the counsel for O'Kane's executrix. Accordingly, without answering the question certified, the

Certificate is dismissed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
v. MILLS, ADMINISTRATRIX.

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

No. 264. Argued April 22, 23, 1926.—Decided May 24, 1926.

1. An employer, by voluntarily furnishing a guard for employees as a protection against strikers, does not become bound to furnish more to make the protection adequate. P. 346.
 2. Assuming that the railroad in this case was under a duty to furnish protection to plaintiff's intestate, (an employee who was shot by strikers,) *held*, on the facts, that there was no evidence of negligence in failure to furnish more than one guard, and that the jury should not have been allowed to conjecture what would have happened if another guard had been present.
- 3 Fed. (2d) 882, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the plaintiff, Mills, in an action against the Railway under the Federal Employers' Liability Act, removed from a state court.

Mr. W. R. C. Cocke, with whom *Messrs. E. T. Miller* and *Forney Johnston* were on the brief, for petitioner.

Mr. G. R. Harsh for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent's intestate was employed in interstate and intrastate commerce by the petitioner, as a car inspector in its yards in Birmingham, Alabama. During the railroad shopmen's strike, on the night of August 3, 1922, decedent, while returning from work to his home, on a street car, was shot to death by strikers who fired upon him, a fellow workman, and a deputy sheriff employed by petitioner to guard decedent and his companion. Respondent brought suit in the Circuit Court of Jefferson County, Alabama, to recover for intestate's death, under the Federal Employer's Liability Act, c. 149, 35 Stat. 65. The cause was removed to the District Court for northern Alabama on the ground of diversity of citizenship. Judgment for the plaintiff, the respondent here, was affirmed by the Circuit Court of Appeals for the Fifth Circuit. 3 Fed. (2d) 882. This court granted certiorari, 267 U. S. 589.

The trial judge withdrew from the jury the question whether the guard was negligent in the performance of his duty, but left it to them to say whether upon the evidence, defendant was employed in interstate commerce at the time and place of the shooting; whether there was a duty of due care on the part of the defendant to protect decedent from violence by strikers while going from his place of employment to his home; and whether the failure of respondent to send more than a single guard to protect decedent was negligence causing his death. The instructions so given, and the refusal to direct a verdict for the defendant, are assigned as error.

Petitioner argues that the evidence did not warrant the submission of any of these questions to the jury; and

contends, among other objections, that there is no evidence of a breach of any duty owing by petitioner to respondent. The question of law thus raised goes directly to the right to recover under the Act upon which the action was based. See *St. Louis & Iron M. Ry. v. McWhirter*, 229 U. S. 265, 277.

It is not contended that any duty growing out of the relationship of employer and employee required the employer to guard the employee against violence by strikers. Compare *Davis v. Green*, 260 U. S. 349, 351; *Manwell v. Durst*, 178 Cal. 572; *Roebuck v. Railway Co.*, 99 Kan. 544; *Louis v. Taylor Coal Co.*, 112 Ky. 485; *Rourke's Case*, 237 Mass. 360; *Matter of Lampert v. Siemons*, 235 N. Y. 311. Nor is there any evidence of such an undertaking in the contract of employment. Hence the duty, if it existed, must be predicated upon the voluntary assumption of it by petitioner.

Taken in the aspect most favorable to respondent, the evidence shows that decedent was first employed on the Monday preceding his death, which occurred on Thursday. The strike had been in progress for some time, and six or seven employees were on strike in the yard where decedent was employed. The number of strikers elsewhere does not appear. Seven guards were employed by petitioner in the yard where decedent worked, and from fifty to seventy-five were employed elsewhere in the city. There was some evidence that, during decedent's employment, guards had been provided for employees while at work during the day, and to accompany decedent and some others to and from their homes. There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnish more protection to the decedent or its other workmen than it actually did furnish.

The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence.

There is a similar absence of evidence of negligent failure by petitioners to fulfill this supposed duty of protection. The burden of proving negligence rested on the respondent. *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658. But whether a supply of guards sufficient to meet the emergency was obtainable; what demands were made upon them, and whether there were other guards available for the particular journey when the decedent was killed, are questions on which the record is silent.

Nor is there evidence from which the jury might infer that petitioner's failure to provide an additional guard or guards, was the proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companions had seated themselves in the car. Without warning they fired a volley into the car, and fled. Decedent and his guard were armed, but had no opportunity to defend themselves. On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present. See *Chicago, M. & St. P. Ry. Co. v. Coogan*, *post*, p. 472; *Patton v. Texas & Pacific Ry.*, *supra*; *Reading Co. v. Boyer*, 6 Fed. (2d) 185; *Midland Valley R. R. v. Fulgham*, 181 Fed. 91; *Laidlaw v. Sage*, 158 N. Y. 73.

The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict.

We need not inquire whether decedent was employed in interstate commerce at the time of his death, or whether the rule laid down in *Erie R. R. v. Winfield*, 244 U. S. 170, can be extended, as the court below held, so as to support the judgment of the District Court.

Judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BLAIR, COMMISSIONER, *v.* UNITED STATES EX
REL. BIRKENSTOCK ET AL., EXECUTORS, ETC.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 713. Argued May 4, 1926.—Decided May 24, 1926.

Under § 1019 of the Revenue Act of 1924, which provides: "Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, . . . interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax . . . was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken . . ."—*held*:

1. Interest runs to the date on which the Commissioner of Internal Revenue signs the authorization to the Disbursing Clerk of the Treasury, directing him to pay the refund. *Girard Trust Co. v. United States*, 270 U. S. 163. P. 348.

2. Where an excessive income tax is paid in instalments, interest does not begin running upon payments in excess of instalments due until the payments exceed the total tax due. Revenue Act, 1918, §§ 250(a) (b), 252. P. 351.

3. The provision of § 1019 that "in case of a credit" interest is to be allowed "to the due date of the amount against which the credit is taken," relates to a credit properly allowed of a

“tax erroneously or illegally assessed or collected,” and has no application to excess payments of quarterly instalments which the Government was entitled to treat as an advance payment of later instalments, under the provisions of § 250. P. 353.

55 App. D. C. 376, reversed.

CERTIORARI to a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment granting the writ of mandamus to compel the Commissioner of Internal Revenue to compute and allow interest on income tax refunds.

Mr. T. H. Lewis, with whom *Solicitor General Mitchell* and *Messrs. Newton K. Fox* and *Ralph E. Smith* were on the brief, for petitioner.

Mr. James Craig Peacock, with whom *Mr. John W. Townsend* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

In 1920, Margaret Murphy, testatrix of respondents, paid without protest, to the Collector of Internal Revenue at Philadelphia, the sum of \$88,956.92 as income tax for the year 1919. On May 18, 1923, a claim was filed with the Commissioner of Internal Revenue, for a refund of \$35,054.85 as an overpayment of her taxes for 1919. On May 19, 1924, the Commissioner signed a “schedule of overassessment and allowance of abatement, credit and refund,” in the amount claimed, and gave certain instructions to the Collector with respect to it. On a statement from the Collector that the amount claimed was subject to refund, the Commissioner, on August 12, 1924, signed an authorization to the Disbursing Clerk of the Treasury to pay to respondents the refund demanded, with interest computed from November 18, 1923 (six months after the filing of the claim for refund, as provided by § 1324 of the Revenue Act of 1921, which he deemed applicable)

to May 19, 1924, the date on which the Commissioner signed the schedule of overassessment.

Respondents protested the amount of interest allowed, and demanded that it be computed on the excess of each quarterly payment from the date when it was made, in 1920, to August 12, 1924, the date upon which the Commissioner signed the authorization to the Disbursing Clerk. Upon the refusal of the Commissioner to allow this claim, respondents petitioned the Supreme Court of the District of Columbia for a writ of mandamus to compel him to compute and allow the interest demanded. The Commissioner, the petitioner here, filed an answer to which the respondents demurred. The Supreme Court of the District sustained the demurrer and granted the writ; and upon appeal, the Court of Appeals sustained the judgment, modifying it in only one particular, not important to the decision in this case. This court granted certiorari. 269 U. S. 545.

The Government having expressly waived the point made below that mandamus will not lie, only two questions are presented for consideration here. One is the date from which, the other is the date to which, interest allowed on the refund should be computed. Since the certiorari was allowed, the second question has been decided by this court in *Girard Trust Company v. United States*, 270 U. S. 163. In that case we held that the date of allowance of the refund, and therefore the date to which interest should be computed under § 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 346, is the date on which the Commissioner signed the authorization to the Disbursing Clerk of the Treasury, directing him to pay the refund. The court below therefore correctly held that interest should be computed to that date, which was August 12, 1924, and that as this date was subsequent to the enactment of § 1019 of the Revenue Act of 1924, the allowance of interest must be in accordance with that

section, and not § 1324 of the Act of 1921, which had been repealed. Hence we are not concerned with the ruling of the Commissioner, applying the 1921 Act, that interest ran only from six months after filing of the claim for refund, because it was based on his erroneous conclusion as to the date when the refund was "allowed."

The question remaining for decision is, from what date interest on the refund is to be computed, under § 1019 of the Act of 1924, which provides:

"Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, . . . interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax . . . was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken. . . ."

The respondents contend that as each of the quarterly instalments paid by the taxpayer was in excess of one-fourth of the proper amount of the tax for the year, interest allowed on the refund should have been computed, as the court below held, on the excess of each quarterly payment, from the date on which it was paid. But the Government argues that such an excess quarterly payment is not a "tax erroneously or illegally assessed or collected," within the meaning of § 1019, if, when it is made, any part of the proper tax for the year has not been paid; that such overpayment becomes a "tax erroneously or illegally assessed or collected," only when the amount paid, added to the previous quarterly payments, exceeds the whole tax due for the year. In support of this position, it relies on §§ 250 and 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, in force when the tax was paid. Section 250 (a) provides (p. 1082):

"That . . . the tax shall be paid in four install-

ments, each consisting of one-fourth of the total amount of the tax. . . .

“The tax may at the option of the taxpayer, be paid in a single payment instead of in installments . . .”

Subdivision (b) of § 250 provides (p. 1083):

“As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.”

Section 252 provides (p. 1085):

“That if, upon examination of any return of income made pursuant to this Act . . . it appears that an amount of income . . . tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer . . .”

By § 250(a) the payment of the whole tax in a single payment is expressly made optional with the taxpayer, and any payment in excess of the correct amount of a quarterly instalment is by § 250(b) to be treated as a payment on account of the whole tax. It is clear that a taxpayer who, anticipating the required quarterly installments, pays the entire tax in one payment, is not entitled to interest or a discount, on the anticipated instalments, as upon a “tax erroneously or illegally assessed or collected” under § 1019 of the Act of 1924.

We think that, under any reasonable interpretation of § 1019, the payment of a lesser amount which is in excess of the required quarterly instalments must stand on the same footing. Under §§ 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly instalment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an instalment is treated as a payment on account of the tax which is assessed for that year, and is not a "tax erroneously or illegally assessed or collected," within the meaning of the refund provisions of § 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest. Payments in excess of the total amount of the tax, then and subsequently made, are subject to refund or credit under the provisions of § 1019, and interest must be allowed on them at the rate of 6 per cent., from the date of payment.

The provision of § 1019 that "in case of a credit" interest is to be allowed "to the due date of the amount against which the credit is taken," relates to a credit properly allowed of a "tax erroneously or illegally assessed or collected," and has no application to excess payments of quarterly instalments which the Government was entitled to treat as an advance payment of later instalments, under the provisions of § 250.

The judgment below was erroneous, insofar as it allowed interest on payments made prior to September 27, 1920, on which date the total amount of the instalments paid first exceeded the total amount of tax due, by the sum of \$12,815.62. Interest should have been allowed on that amount from that date, and on the full amount of the fourth instalment from December 13, 1920, when it was paid.

Judgment reversed, with costs to the respondents.

UNITED STATES *v.* KATZ ET AL.
THE SAME *v.* FEUERSTEIN ET AL.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 726, 727. Argued March 11, 1926.—Decided May 24, 1926.

1. Section 10 of the Prohibition Act, in providing that no person shall manufacture, purchase for sale or transport any liquor without making a record of the transaction in detail, applies to persons authorized by other sections of the act to deal in non-beverage liquor under government permit; it was not intended to add to the crime of unauthorized dealing a second offense whenever the person so dealing should fail to make a record of his own wrong doing. P. 356.
 2. General terms descriptive of a class of persons made subject to a criminal statute may and should be limited, where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation. P. 362.
- 5 Fed. (2d) 527, affirmed.

ERROR to judgments of the District Court quashing indictments.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Mahlon D. Kiefer* were on the brief, for the United States.

Mr. William T. Connor, with whom *Messrs. John R. K. Scott* and *Benjamin M. Golder* were on the brief, for the defendants in error.

MR. JUSTICE STONE delivered the opinion of the Court.

The two defendants in error in each of these cases were indicted in the Eastern District of Pennsylvania for a conspiracy to sell intoxicating liquors without making a permanent record of the sale, in violation of § 10, Title II

of the National Prohibition Act, of October 28, 1919, c. 85, 41 Stat. 305, 310.

The indictment in No. 726 charged that the defendant Katz conspired with the defendant Senn to sell for the Stewart Distilling Company, to Senn, a quantity of whisky, without making a record of the sale. A similar offense was charged against the defendants named in the indictment in No. 727.

Demurrers and motions to quash were interposed to both indictments, on the ground that they failed to charge any crime. In support of this contention it was argued that § 10, which requires a permanent record to be made of sales of intoxicating liquors, applies only to persons authorized by the National Prohibition Act to sell alcoholic liquor; and that the indictment failed to allege that either of the defendants charged with making the sales, or the Stewart Distilling Co., held a permit, or was otherwise authorized to sell. The indictments were quashed by the district court. 5 Fed. (2d) 527. The cases come here on writ of error to the district court, under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States v. N. Y. C. & H. R. R.* 146 Fed. 298; *United States v. Dietrich*, 126 Fed. 664; *Vannata v. United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring

the agreement of two persons for its completion. See *Chadwick v. United States*, 141 Fed. 225.

Hence the Government takes the position that the seller of intoxicating liquor is required by the statute to keep a permanent record of his sales, whether lawful or unlawful, and that failure to do so is itself a crime; from which it would follow that a conspiracy to effect a sale without such a record is an indictable offense. No question is made but that persons authorized to deal in alcoholic liquors under the Prohibition Act are required to make permanent records of their transactions. But the Government, to support a charge of conspiracy applicable to buyer and seller, relies on the literal application of § 10:

“No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided.”

Section 34 provides:

“All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for.”

To uphold the contention of the Government, therefore, the language of § 10 must be taken to apply not

only to those who hold Government permits authorizing them to deal in intoxicating liquors under a familiar system of regulation, to whom it admittedly is applicable, but to every criminal violator of the National Prohibition Act, even though making only a single, isolated sale. It must be taken also to extend the provisions of § 34, clearly applicable to such permittees, in such a way as to present the incongruity of a system of records to be kept by criminal violators of the Act who are not permittees, in a form which the Commissioner may prescribe, which may be introduced in evidence on the certification of the person "with whom kept," and verified copies of which are to be furnished on demand, presumably by the criminal keeping the record.

We are not now concerned with any question of legislative power to establish such a system but only with the question whether it was the intention of Congress to do so.

All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. See *Hawaii v. Mankichi*, 190 U. S. 197, 212, and cases there cited. In ascertaining that purpose, we may examine the title of the Act (*United States v. Fisher*, 2 Cr. 358, 386; *United States v. Palmer*, 3 Wheat. 610, 631; *Holy Trinity Church v. United States*, 143 U. S. 457, 462), the source in previous legislation of the particular provision in question (*United States v. Saunders*, 22 Wall. 492; *Viterbo v. Friedlander*, 120 U. S. 707; *United States v. Morrow*, 266 U. S. 531, 535), and the legislative scheme or plan by which the general purpose of the Act is to be carried out. See *Platt v. Union Pacific R. R.*, 99 U. S. 48, 63-64; *Bernier v. Bernier*, 147 U. S. 242, 246.

One purpose of the National Prohibition Act was to suppress the entire traffic in intoxicating liquor as a bev-

erage. *Grogan v. Walker & Sons*, 259 U. S. 80, 89. But the Eighteenth Amendment did not prohibit the use of intoxicating liquor for other than beverage purposes, and an important purpose of the Act, as its title¹ and contents show, was to regulate the manufacture, transportation and use of intoxicating liquor for other than beverage purposes.

Section 3, Title II, which prohibits the manufacture, sale and possession of intoxicating liquor, expressly provides that "liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor. . . ." To make the prohibitions of the Act effective, and to provide for the production and use of liquor for nonbeverage purposes, it became necessary for the Government to regulate and supervise those uses of intoxicating liquor which were not prohibited. Congress had before it the provisions of the Revenue Law (Comp. Stat. 1916, §§ 5981 to 6161) governing distillers, rectifiers, and brewers, requiring detailed records of all transactions, and laying down other regulations designed to promote the effective collection of liquor taxes; it also had before it the regulatory system devised by the Internal Revenue Bureau for carrying into effect the prohibitory legislation contained in the Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, and subsequent war legislation. See 21 T. D. 7, No. 2788.

The business affected by this legislation was lawful business, subject to governmental regulation; records of

¹"An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

transactions were required to be kept, as a condition of receiving governmental permission to operate, and such records were a convenient and necessary means for protecting the interests of the Government with respect to its revenues. When Congress came to enact the National Prohibition Act, a similar method of permit or license and a similar system of records afforded a convenient means for the regulation and control of those dealing with alcoholic liquors for the nonbeverage purposes as authorized by the statute.

The reports of the Committees of the Senate and House having the bill in charge, as well as the statute as adopted, indicate clearly that the purpose of Congress was to take over an established and well known system of granting permits and requiring reports and records, for the purpose of regulating and controlling such portion of the liquor traffic as had not been prohibited by the Eighteenth Amendment and the National Prohibition Act.² The

² Report No. 151 of the Senate Judiciary Committee, Aug. 18, 1919, to accompany H. R. 6810, which became the National Prohibition Act, contains the following statement, on p. 20:

"The provision requiring those who sell or manufacture liquor for nonbeverage purposes to secure a permit is a continuation of the system now enforced by the Federal authorities. It is the most effective means to insure obedience to the law and prevents the diversion of liquor for illegal purposes. It is a slight burden on the law-abiding citizens who are dealing in liquor for legal purposes."

Report No. 91, Part 1, of the House Judiciary Committee, June 30, 1919, to accompany H. R. 6810, contains the following statement, on p. 2:

"Title 2, to enforce prohibition under the eighteenth amendment to the Constitution, contains substantially the same features as title 1 and in addition a system of permits such as is now in force under regulations of the Revenue Department, Treasury Decision 2788, and in the various prohibition codes. These permits are designed to prevent diversion of liquor from legal to illegitimate uses. This system greatly lessens prosecution by making it difficult for persons to obtain liquor except for legitimate purposes. In addition to the permit system, which is also provided for in title 3 (the industrial-

report of the Senate Committee is also persuasive that the provisions of § 34, already quoted, relating to "all records and reports kept or filed under the provisions of this Act," refer to records and reports required of permittees.³ Nowhere in the reports of the Committees does it appear that any such novel legislation was being proposed as is here contended for by the Government. On the contrary, it is stated in the report of the House Judiciary Committee, p. 7, that "Title 2 for the enforcement of the eighteenth amendment has in it no new or experimental features. Every provision in it has precedents in State or Federal legislation." The Government does not suggest that there is in fact any precedent in

alcohol section) the act carries a number of the more essential penal provisions of the ordinary prohibition codes, such as those against advertising liquor."

³ The Senate report, pages 7-8, contains the following statement with reference to the provisions of the present § 34 of the National Prohibition Act:

"The requirement of section 35 [now 34]—that the commissioner file all the reports, statements, and information required by Title II as a part of the files of his office, in a permanent record, alphabetically arranged, with an indorsement showing the date when filed, etc., and to furnish certified copies of such reports, statements, and information to any person requesting the same—is deemed by the committee an unnecessary requirement, and one which will result in cumbering the office of the commissioner with reports, information, and data which would serve no useful purpose; that for all practical purposes it will be sufficient if all records and reports kept on file under the provisions of the act shall be subject to inspection by the commissioner or any of his agents or by any public prosecutor or any person designated by him, and that copies of such records and reports, duly certified, may be introduced in evidence with like effect as the originals thereof. The committee has amended section 35 [now 34] accordingly. Section 10, it will be observed, authorizes the commissioner to prescribe the form of the permanent record to be made by the manufacturer, purchaser, seller, or transporter of any liquor, and requires that such permanent record be at all times open to inspection by the commissioner or his agents."

legislation, state or national, for the interpretation which it urges here.

Of the thirty-nine sections in Title II of the Act, which deals with national prohibition, more than half, including the seven sections which precede § 10, contain provisions authorizing or regulating the manufacture, sale, transportation or use of intoxicating liquor for nonbeverage purposes.⁴ These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition

⁴The following examples may be noted:

§ 4 exempts from the operation of the Act, denatured alcohol, medicinal and toilet preparations, etc. It authorizes the manufacture of these articles and the purchase and possession of alcoholic liquors for that purpose under government permit, and requires the manufacturer to "keep the records, and make the reports specified in this Act and as directed by the commissioner."

§ 5 provides for the revocation of permits if the product manufactured does not comply with the requirements of § 4.

§ 6 prohibits the sale, purchase, transportation or prescription of liquor without a permit from the Commissioner, issued as prescribed in the section, except the purchase and use for medicinal purposes and for the treatment of alcoholism. This section also exempts sacramental wines from the provisions of the Act, except as to the requirements of § 6 for permits (save for purchase) and to the requirements of § 10 for the keeping of records.

§ 7 authorizes physicians to prescribe liquor under government permit and requires a record of such prescriptions.

§ 9 authorizes proceedings for the revocation of permits for the violation of the Act, and § 27 provides that seized liquor may, under order of the court, be ordered sold to persons holding permits to purchase.

§ 11 requires manufacturers and wholesale or retail druggists to keep, as part of the records required of them, a copy of all permits to purchase on which sales are made, and prohibits them from selling except to persons having permits to purchase.

§ 12 requires manufacturers of liquor for sale to attach to every package a label describing its contents.

§ 13 makes it the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and § 14 requires the packages carried to be labeled in a specified way.

of alcoholic liquor not prohibited by the Eighteenth Amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use or possess intoxicating liquors under the Eighteenth Amendment and the provision of § 3 of the Act, already quoted.

No section of the Act requiring records to be made of dealings in alcoholic liquors relates to any but dealings authorized or permitted under the statute, unless it be § 10. The question is thus presented, whether the requirement of § 10 that "no person shall . . . sell . . . liquor without making at the time a permanent record thereof" is a regulatory measure applicable to persons authorized to deal in nonbeverage liquors, or whether it was intended to add to the crime of manufacturing, selling or transporting, a second offense, whenever the person committing the crime should fail to make a record of his own wrongdoing. When the statute is read as a whole, and the implications of the latter interpretation are taken into account, we think that it is not a reasonable or a fairly admissible interpretation.

General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation. *United States v. Jin Fuey Moy*, 241 U. S. 394; *Holy Trinity Church v. United States*, *supra*; *United States v. Kirby*, 7 Wall. 482; *United States v. Palmer*, *supra*. Cf. *Oklahoma v. Texas*, 258 U. S. 574, 599-600.

In *United States v. Palmer*, the defendants, not citizens of the United States, were indicted for a robbery committed on a foreign vessel on the high seas, under a statute which provided that "if any person or persons shall com-

mit upon the high seas . . . out of the jurisdiction of any particular state, murder or robbery . . . ", such offender should be guilty of piracy and punishable with death. Chief Justice Marshall pointed out that Congress, under its constitutional power to define and punish piracy, had authority to make a statute applicable to the defendants; but, applying the principle of statutory construction to which we have referred, he held that the words "any person or persons," although broad enough to comprehend every human being, could not, in view of the exceptional consequences of a literal application, and the intent of the legislature, as derived from the title of the Act and a reading of the whole statute, be construed to apply to persons, not citizens, who committed offenses on foreign vessels on the high seas.

In *United States v. Jin Fuey Moy, supra*, the defendant was indicted for a conspiracy "to have in . . . possession" of another person, not registered, a quantity of opium, in violation of the Opium Registration Act of 1914, which declared it unlawful for "any person" who had not registered and paid the prescribed tax, to have in his possession or control any of the drug in question. This court held that the words "any person not registered" could not be taken to apply to any person in the United States, but must be read in harmony with the purpose of the Act, to refer to persons required by law to register.

We think the reasoning of these cases applicable here, and that the words "no person" in § 10 refer to persons authorized under other provisions of the Act to carry on traffic in alcoholic liquors. It is not without significance that the Commissioner has never made any regulation with respect to records of bootlegging transactions and that the published regulations contain no suggestion that § 10 has any application except to persons who hold permits, or are otherwise authorized by law to traffic in intoxi-

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cating liquor. See *National Lead Co. v. United States*, 252 U. S. 140, 145.

Affirmed.

MR. JUSTICE BRANDEIS dissents.

 APPLEBY ET AL. v. CITY OF NEW YORK ET AL.

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

No. 15. Argued October 7, 1925; reargued March 1, 2, 1926.—
Decided June 1, 1926.

1. Upon review of a decision of a state court enforcing a state law over the objection that it impairs the obligation of a prior contract, this court must decide whether there was a contract, what was its proper construction and effect, and whether its obligation was impaired. P. 379.
2. And although the construction and effect of the contract involved depend on questions of state law, this court must determine those questions, independently of the conclusion of the state court. *Id.*
3. Whether grants by a city of land under navigable waters, to private persons, free from subsequent regulatory control over the water and the land, were within the power of the city and the legislature, is a state question, to be determined by the law of the State, as it was when the deeds were executed. P. 380.
4. Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States. P. 381.
5. Deeds made by the City of New York, in 1852-53, with approval of the legislature, conveying lots below tidewater in the Hudson River, extending out from the original high water mark to a line then established as the exterior line and *ripa* of the city, with the right to fill in, and with all the advantages and emoluments of wharfage on that line at the ends of the lots, were within the power of the legislature and city, being made on valuable consideration and for the public purpose of harbor development; and they conveyed both the *jus publicum* and the *jus privatum*, to be regained by the State and city only through condemnation proceedings. Pp. 381, 384, 388, 399.

6. Delay of the grantees in filling in such lots did not preserve in the city the power to regulate navigation over the parts unfilled next the river,—the grants being in fee simple absolute with no covenant by the grantees to fill in, or other breach of duty in that regard. P. 399.
7. Subsequently to these grants, the State, by Acts of 1857 and 1871, established a bulkhead line inshore from the exterior line bounding the lots, forbade solid filling, but permitted piers, beyond the bulkhead line, and limited the water spaces permissible between piers to 100 feet. The same bulkhead line was adopted later by the Secretary of War. The city built piers out from that line at the ends of streets crossing or adjacent to the granted premises, leased accommodations on the piers, constructed a platform or dumping board overhanging one of the waterlots, and dredged and appropriated the submerged lots, both inside and outside of the bulkhead line, with the result that the lots were converted into slips for accommodation of the city's tenants, in use constantly by vessels moored and fastened alongside the piers, discharging cargo. *Held*:

(1) That these acts by the city were in trespass upon the rights of the lot-owners, and that the state laws of 1857 and 1871, as applied by the state court to uphold the city's conduct, were an unconstitutional impairment of the contracts with the lot-owners. P. 398.

(2) That the order of the Secretary of War, fixing the bulkhead line but allowing pier extensions beyond it, did not revert the city with proprietary or regulatory rights over the lots outshore from the bulkhead line or the parts still unfilled within that line, inconsistent with the rights of the lot-owners to fill in to that line and to erect piers beyond it, in accordance with the federal regulation. P. 400.

(3) That owners were entitled to an injunction against the above-described trespasses of the city. P. 402.

235 N. Y. 351; 199 App. Div. 539; reversed.

This is a writ of error to review the judgment of the Supreme Court of New York as affirmed by the Court of Appeals. *Appleby v. City of New York*, 199 App. Div. 539; 235 N. Y. 351. The plaintiffs are executors of Charles E. Appleby, and hold deeds in fee simple from the City of New York, made in 1853 and 1852, one to their testator Appleby, and one to Latou, who later con-

veyed to Appleby. The land conveyed consists of two water lots in the City of New York on the east side of North River. This suit was brought in 1914 to restrain the defendant, the City of New York, and its co-defendants, lessees of the city's piers, from dredging the land under water conveyed by the deeds, and from using the water over the lots of the plaintiffs as slips and mooring places for vessels alongside those piers.

The Appellate Division and the Court of Appeals denied relief. This is a writ of error under § 237 of the Judicial Code, sued out on the ground that by its judgment the Supreme Court of New York has upheld and enforced statutes of the State enacted in 1857 and 1871 in such a way as to impair the obligation of the plaintiffs' deeds, in violation of section 10, Article I, of the Federal Constitution.

The City of New York was established before the Revolution by a charter of Governor Dongan in 1686, and by a subsequent charter of Governor Montgomery of 1730, under both of which it acquired title to the tideway, i. e., the strip between high and low water, surrounding the island of Manhattan. These grants were confirmed by the Constitution of 1777 of the State of New York. By the Act of 1807, Laws of 1807, p. 125, c. 115, the State granted to the city a strip of land under water along the westerly side of the Island, which extended from low water mark westerly into the Hudson River, a distance of 400 feet.

In 1837, the Legislature passed a law, Laws of 1837, c. 182, making 13th Avenue as laid out by the city surveyor the permanent exterior street along the easterly shore of the North or Hudson River in the district where these lots are. It extended the streets already laid out to 13th Avenue, and further provided that it should be construed to grant to the city forever the said lands under water easterly of 13th Avenue.

In pursuance of this law, ordinances were passed by the Sinking Fund Trustees of New York providing that the lands under water belonging to the city under its several charters might be sold and conveyed by such city to parties desiring to purchase the same, giving priority to the owners of the adjacent uplands. The ordinances were recognized and approved by the State Legislature in c. 225 of the Laws of 1845, and the city then made the deeds here to be considered.

The grant to Appleby was made on August 1, 1853, for the consideration of \$6,367.37; that to Latou on December 24, 1852, for \$4,937.50. The one covered land under water between 39th and 40th Streets and high water mark and 13th Avenue, the other land between 40th and 41st Streets and high water mark and 13th Avenue. The wording and covenants of the deeds were alike, *mutatis mutandis*. It will be enough to describe the Appleby deed. That granted

“All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North river or harbor of New York and bounded described and containing as follows—that is to say:—

“Beginning at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running thence Westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the Westerly line or side of Thirteenth Avenue, said Westerly line or side of the Thirteenth Avenue, being the permanent exterior line of said City, as established by law, thence Northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence Easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven

inches to the line of original high-water mark, and thence in a Southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described designated and shown on a map hereto annexed dated New York, June 1853, made by John J. Serrel, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture.

“The premises conveyed being colored pink on said map, be the same dimensions more or less.

“Saving and reserving from and out of the hereby granted premises, so much thereof, as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues Thirty-ninth and Fortieth Streets for the uses and purposes of Public Streets. . . .

“To have and to hold the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever.”

The pink map of lot referred to in the deed faces this page.

Appleby in the deed covenanted with the city that, within three months after the city required it, he would build four bulkheads and wharves, and fill in and pave such parts of 12th and 13th Avenues and 39th and 40th Streets as lay within the premises described, and keep them in repair, with the provision that in default the city might make them at the cost of Appleby, or sell and dispose of the premises or any part at public auction to supply the deficiency, and grant the land and the wharfage to other persons. Appleby further covenanted to pay all taxes on the lot and not to build the wharves, bulkheads, avenues or streets until permission was given by the city.

The city covenanted that Appleby and his heirs and assigns should receive “all manner of wharfage, crantage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said city, lying

1851, WEST NEBODA
NORTH OR HUDSONS RIVER

...to be a part of this ...
 ...to be a part of this ...

"The premises ...
 ...to be a part of this ...

"To have and to hold ...
 ...to be a part of this ...

Appley in the ...
 ...to be a part of this ...

The city ...
 ...to be a part of this ...

on the westerly side of the hereby granted premises fronting on the Hudson River, excepting therefrom wharfage from the westerly end of the bulkhead in front of the entire width of the northerly half part of 39th Street and the southerly half part of 40th Street, which were reserved to the City."

At the time of these deeds, there was no filling between the high water mark and 12th Avenue, but since that time and before 1871, the lots were filled by Appleby from high water mark to within 4 feet of the easterly side of 12th Avenue, a distance of approximately 500 feet.

In 1855, Laws of 1855, c. 121, for the avowed reason that grants had been made and piers built which obstructed the river navigation, provision was made for a harbor commission to prepare plans for harbor improvement, and as a result chapter 763, Laws of 1857, was passed to establish for the harbor bulkhead and pier lines. In its second section it provided:

"It shall not be lawful to fill in with earth, stone, or other solid material in the waters of said port, beyond the bulkhead line or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of this act, and piers which shall not exceed seventy feet in width respectively, with intervening water spaces of at least one hundred feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond, or outside of the said sea wall."

In the same year, by virtue of the act the Harbor Commission established a bulkhead line beyond which there could be no solid filling at 100 feet west of 12th Avenue.

The necessary effect of this legislation and action if made effective was to abolish 13th Avenue as a *ripa* or exterior line on the river, and to prevent the filling of plaintiffs' lots outshore from the bulkhead line and the making of docks on the lots and the enjoyment of wharfage at the ends thereof within 100 feet of the city's piers.

By the Laws of 1871, c. 574, which amended § 99 of the Act of April 5, 1870, relating to the government of the City of New York, it was provided that the Department of Docks should be established, that it should determine upon such plans as it deemed wise for the whole or any part of the water front, and submit them to the Commissioners of the Sinking Fund, who might adopt or reject any such plan. After the plan was adopted no wharf, pier, bulkhead, basin, dock, slip or any wharf, structure or superstructure should thereafter be laid out or constructed within the territory or district embraced in and specified upon such plan except in accordance with the plan. The Department was authorized in the Act of 1871 to acquire, in the name and for the benefit of the city, any and all wharf property in the city to which the city had no right or title and any rights and easements and any rights, terms, easements and privileges pertaining to any wharf property in the city and not owned by the city, by purchase or by condemnation. By the Act of 1871, the bulkhead line for solid filling was fixed at 150 feet west of 12th Avenue, instead of 100 feet as previously fixed.

In 1890, the Secretary of War fixed the same bulkhead line as that fixed by Dock Commissioner under the Act of 1871. Thereupon, in 1894, a condemnation proceeding was begun by the city against Appleby to appropriate both lots. It was delayed for 20 years, presumably for a lack of funds. In 1914, it was discontinued by the city. This action was commenced shortly thereafter.

During the pendency of the condemnation proceeding, the city constructed concrete and steel piers against plaintiffs' objection within the lines of west 39th Street, of 40th Street and 41st Street, beginning at or near 12th Avenue and extending westerly to and beyond 13th Avenue. It placed thereon iron or steel sheds and leased these to tenants, excluding the public from the piers. The piers have numerous doors and windows which open on

to the water over the Appleby lots, so that boats are constantly moored and fastened alongside of the piers and in the adjoining slips upon plaintiffs' premises and discharge their cargoes and freight into the sheds. The city also constructed an overhanging dumping board or platform extending northerly from the 39th Street pier for the use of its tenants over the same water. The city has from time to time dredged plaintiffs' premises between its piers without their consent to a depth of about 20 feet, and threatens to continue to do so. West of the bulkhead line the depth of water varied from 4 feet in 1884 to 20 feet now. East of the line the bottom was an average depth of 3 feet and was dredged to 16 or 20 feet as far east as 50 feet from the west side of 12th Avenue, or 100 feet inside the bulkhead line. The record contains reports in ten years, between 1895 and 1905, showing dredging of about 150,000 cubic yards in the two slips or basins. From its piers, made more valuable by the use of these slips and mooring places, the city receives substantial rentals and income from its lessees and other occupants of the piers.

No request was ever made by the city that Appleby should fill the streets which he covenanted to fill on the city's call and not to fill until that. After the Act of 1871, the city built the piers, and the streets and avenues specified in the deeds, so far as they have been built. 13th Avenue being out shore from the bulkhead line fixed in 1857 and 1871 was never filled.

In January, 1917, the plaintiffs were required to pay as back taxes upon these lots the sum of \$74,426.01.

The prayer of the petition is that the city and its tenants and the other defendants be enjoined from using plaintiffs' lots as a slip or permanent mooring place and from dredging them.

The special term of the Supreme Court held that the deeds here in question conveyed a fee simple title to the

plaintiffs, carrying both the *jus publicum* and the *jus privatum*, and that their rights could not be affected by the Act of 1857 and the Act of 1871, or the orders of the Dock Commissioners under that Act, but that the establishment of the bulkhead line by the Secretary of War in 1890 made the waters of the Hudson River westerly of that line open and in use for purposes of commerce and navigation, and that no action to restrain or prevent the use of that water for loading or unloading at the city piers would lie, but that the city was without right to dredge any soil or part of the granted premises east of the bulkhead line, and should be enjoined from doing so. The special term refused damages for the dredging which had been done for failure to adduce proper evidence as to what the damages were, and allowed only a nominal recovery.

On appeal, the Appellate Division also held that the deeds carried to the plaintiffs the *jus publicum* and the *jus privatum* from the city and the State, and that the plaintiffs' rights under the deeds could not be affected by the Acts of 1857 and 1871, but closed its findings and conclusions as follows:

“ The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead line and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New

York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue.

“The plaintiffs are not entitled to an injunction restraining The City of New York from using or authorizing the use by others of the plaintiffs premises either within or without the Federal bulkhead line, for the purpose of mooring, docking and floating boats.”

The Court of Appeals in its opinion, affirming the decree of the Appellate Division, after referring to the laws of 1857 and 1871 as the basis of the contention of the city that the plaintiffs were not entitled to relief, said:

“When the secretary of war established the bulkhead line, the title of the state, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The city of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs.”

The Court said further that, if the plaintiffs' lots easterly of the bulkhead line had been actually filled in, they would no longer be lands under water and would be completely subject to the plaintiffs' control, but that so long as they remained unfilled and under water, they were sub-

ject to the sovereign power of the State and city to regulate the use of the water over them for purposes of navigation, and accordingly held that in respect to them the city had invaded no right of the plaintiffs. The opinion of the Court of Appeals indicates that previous decisions of the court contain dicta in respect of the *jus publicum* and *jus privatum* that can not be sustained.

Mr. Charles E. Hughes, with whom *Mr. Banton Moore* was on the briefs, for plaintiffs in error.

It was competent for the State of New York to establish the *ripa* about the City of New York and to make or provide for grants on valuable consideration of title in fee simple in pursuance of a plan for water front improvement. Such action was subject to the controlling authority of Congress in the regulation of interstate and foreign commerce, but aside from conflict with that paramount authority and as between the State and grantees, the grants made by the State or by the city under its authority are inviolable. *Hardin v. Jordan*, 140 U. S. 371; *Seattle v. Oregon & Wash. R. R. Co.*, 255 U. S. 56; *Towle v. Remsen*, 70 N. Y. 303; *Langdon v. Mayor*, 93 N. Y. 129; *Williams v. Mayor*, 105 N. Y. 419; *People v. Del. & Hud. Co.*, 213 N. Y. 194; *People v. Steeplechase Park Co.*, 218 N. Y. 459; *Mayor v. Law*, 125 N. Y. 380.

The grants in question conveyed title in fee simple to the premises described. The *jus publicum* was extinguished and the grants conveyed absolute title to the grantees according to the terms of the grants. *Towle v. Remsen*, 70 N. Y. 303; *Duryea v. Mayor*, 62 N. Y. 592; *Langdon v. Mayor*, 93 N. Y. 129; *Mayor v. Law*, 125 N. Y. 380; *Furman v. Mayor*, 10 N. Y. 567; *Williams v. Mayor*, 105 N. Y. 419; *Appleby v. New York*, 199 App. Div. 539; 235 N. Y. 351.

The action of the Secretary of War in defining bulkhead and pierhead lines merely limited the plaintiffs' rights accordingly. They still enjoyed the absolute right to fill in up to the bulkhead line so determined and to improve their premises beyond the bulkhead line in a manner consistent with the lines of the Secretary of War. The attempt of the State, and the city under its authority, to prevent the erection of piers over the plaintiffs' premises outside the bulkhead line and not in conflict with the Secretary of War's pierhead line was a violation of the plaintiffs' rights of property.

With respect to the requirement of permission by the city for the making of the plaintiffs' improvements, this Court will determine for itself the true construction of the grants. The true construction of the grants is that the plaintiffs are entitled to improve the granted premises in accordance with the terms of the grants at their pleasure and without the consent of the City of New York. At most, the city could insist upon a reasonable police supervision. *Appleby v. Delaney*, 235 N. Y. 364; *Duryea v. Mayor*, 62 N. Y. 592; *Mayor v. Law*, 125 N. Y. 380.

The adoption of the new plans of 1871 and 1916 by the Department of Docks with the approval of the Commissioners of the Sinking Fund, under the provisions of the Act of 1871, and the Greater New York Charter, was legislative action, within the meaning of the contract clause of the Federal Constitution. *New Orleans Water Works Co. v. Louisiana Ref. Co.*, 125 U. S. 18; *Williams v. Bruffy*, 96 U. S. 176; *Walla Walla City v. Walla Walla Water Works Co.*, 172 U. S. 1; *Mercantile Trust & Deposit Co. v. Columbus*, 203 U. S. 311; *Zucht v. King*, 260 U. S. 174.

Mr. William C. Cannon for Weehawken Stock Yard Company, submitted.

Mr. Charles J. Nehrbas, with whom Mr. George P. Nicholson was on the briefs, for City of New York.

The acts of the State do not amount either to a taking of property or the impairment of the obligation of a contract. The courts of New York have held that the title of the City of New York and of its grantees to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the water front. This has been the uniform course of adjudication upon this subject in the State of New York for many years. *Knickerbocker Ice Co. v. 42d St. R. R. Co.*, 176 N. Y. 408; *American Ice Co. v. New York*, 217 N. Y. 402; *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71.

In *Langdon v. Mayor*, 93 N. Y. 129, and *Williams v. Mayor*, 105 N. Y. 419, and similar cases, it appeared that the lands granted had been fully filled in, and had thus ceased to be within the domain of the regulatory power over navigable waters. These decisions apply, for example, to the land of the plaintiffs east of Twelfth Avenue, which we admit neither the State nor the city has the power to disturb. In *People v. Steeplechase Park Co.*, 218 N. Y. 459, it was held that the State has the power to convey such title to the foreshore as will permit the grantee to erect structures which prevent the passage of the public. There is nothing in that case which is inconsistent with our contention in the case at bar. Under these decisions, it seems clear that the plaintiffs hold the property subject to the regulations of its use by the Secretary of War and the state authorities.

The courts of New York have restrained the city and the other defendants from interfering with the plaintiffs' rights inshore of the bulkhead line, and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with

the land under water outshore of the bulkhead line. The only regulation by the federal government outshore of the bulkhead line is the pierhead line established by the Secretary of War, a considerable distance beyond the lands in controversy.

Plaintiffs' sole ground of complaint is the establishment, by the state authorities, inshore of the federal pier line, of limitations respecting the width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The plaintiffs complain that they are thus deprived of their property, and that their contract rights have been impaired. This Court has held that a State has the power to restrict the building of piers and wharves where the federal government has made no restrictions, or where the State's regulations do not conflict with those of the United States. *Montgomery v. Portland*, 190 U. S. 89.

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable water is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation.

The lands in question, lying as they do beneath the waters of the Hudson River, are subject to the public right of navigation. Because of the action of the public authorities, the lands in question may not be filled, but must remain under water. It necessarily follows that they may be navigated by the public, by the plaintiff, and by the defendant. It has often been stated that the State may grant land under water in such a manner and under such circumstances that the grantee becomes a proprietor to the same extent as a proprietor of upland. This may be true where the land under water granted consists of shallows unsuitable for general navigation, and where the grantee has actually filled in the lands and made upland of them. It may be conceded, as a general

proposition, that where an owner has lawfully filled in land under water with the consent of both the federal and state authorities it becomes upland, free from the trust subject to which land under water is held, and free from the regulatory power of the State over navigable waters. *Appleby v. New York*, 235 N. Y. 351.

The consent of the federal and state authorities is evidenced by the establishment of bulkhead lines, to which solid filling is permitted. By permitting filling out to a reasonable depth of water, vessels are enabled to moor alongside the shore or at piers extending therefrom. Out-shore of the bulkhead, however, are navigable waters. Here, every private right is subordinate to the rights of the public. All ownership is subject to public regulation. No right, whether of ownership or otherwise, can be granted which will prevent the full and free exercise of the regulatory power of Congress and of the State.

The Secretary of War has limited the distance to which piers may be extended; the State has prescribed their location and width. This is neither a taking of property nor an infringement of the plaintiffs' granted rights. It is an exercise of sovereign power to which all land under navigable waters is subject. *Prosser v. Northern Pacific R. Co.*, 152 U. S. 59; *Greenleaf Johnson Co. v. Garrison*, 237 U. S. 251; *Tampa Water Works v. Tampa*, 199 U. S. 241; *Sou. Wis. Ry. v. Madison*, 240 U. S. 457; *Milwaukee Elec. Ry. v. Milwaukee*, 252 U. S. 100.

Questions concerning the rights of grantees of lands under navigable waters are purely local; moreover, the doctrine of the New York courts is in accordance with the decisions of this Court in similar cases. *Martin v. Waddell*, 16 Pet. 367; *Shively v. Bowlby*, 152 U. S. 1; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Port of Seattle v. Oregon R. R. Co.*, 255 U. S. 56; *Packer v. Bird*, 137 U. S. 661; *Sanitary Dist. v. United States*, 266 U. S. 405; *Lumber Co. v. Garrison*, 237 U. S. 251; *Lewis Blue Point Co. v. Briggs*, 229 U. S. 82.

The piers and sheds at the foot of 39th, 40th and 41st streets are lawfully maintained. Plaintiffs contend that these are in the beds of public streets and constitute a diversion of the same from street uses. This contention overlooks the fact that, under regulations both of the federal and state governments, there may be no solid filling beyond a point about 150 feet west of Twelfth Avenue. Where there can be no solid filling, obviously there can be no public street. Plaintiffs complain that we have built piers instead of streets. Any structure except a pier would be a violation of governmental regulations, a purpresture, a nuisance and a crime against the United States. *People v. Vanderbilt*, 26 N. Y. 287; *Philadelphia Co. v. Stimson*, 223 U. S. 605.

The lands under water in controversy may be dredged to facilitate navigation. *Lewis Blue Point Co. v. Briggs*, 198 N. Y. 287 (aff'd. 229 U. S. 82); *Tempel v. United States*, 248 U. S. 121.

The affirmance by the Court of Appeals does not carry with it any approval of the conclusions of law made by the Appellate Division.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has interpreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.

The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course we should give all proper weight

to its judgment, but we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.

Ordinarily this Court must receive from the court of last resort of a State its statement of state law as final and conclusive, but the rule is different in a case like this. *Jefferson Bank v. Skelly*, 1 Black. 436, 443; *University v. People*, 99 U. S. 309, 321; *New Orleans Water Company v. Louisiana Sugar Company*, 125 U. S. 18, 38; *Huntington v. Attwill*, 146 U. S. 657, 684; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486; *Louisiana Railway & Navigation Company v. New Orleans*, 235 U. S. 164, 170, 171; *Long Sault Co. v. Call*, 242 U. S. 272, 277; *Columbia Railway v. South Carolina*, 261 U. S. 236, 245.

We must also consider here what effect the action of the United States in its dominant control over tidal waters for the preservation and promotion of navigation has had in affecting or destroying the rights of the plaintiffs

claimed to have been impaired by the Acts of 1857 and 1871, and consider whether such action has rendered the state legislative impairment innocuous and deprived plaintiffs of the right to complain of it.

Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States. *Shively v. Bowlby*, 152 U. S. 1. The rights of the plaintiffs in error under the two deeds here in question, with their covenants, are to be determined then by the law of New York as it was at the time of their execution and delivery. They were not deeds of gift—they were deeds for valuable consideration paid in money at the time, and a large amount of taxes on the lots have been collected from the plaintiffs by reason of their ownership. The principle applicable in the construction of grants of lands under navigable waters in the State of New York was announced by the Supreme Court of Errors in 1829, in *Lansing v. Smith*, 4 Wend 1. In that case, which has always been regarded as a leading one, the commissioners of the Land Office in New York granted without valuable consideration to an upland owner land under water on which he erected a wharf after filling in the same. Thereafter the legislature authorized the erection of a mole or pier in the river for the purpose of constructing a basin for the safety and protection of canal boats, and this mole or pier entirely encompassed the wharf on the side of the water so as to leave no communication between it and the river except through a sloop lock at one extremity of the basin. It was held that the loss sustained by the owner was *damnum absque injuria*; that the grant only conveyed the land described in it by metes and bounds, and, being in derogation of the rights of the public, nothing would be implied.

Chancellor Walworth, speaking for the Court of Errors of the State, said:

“By the common law, the king as *parens patriae* owned the soil under all the waters of all navigable rivers or arms of the sea where the tide regularly ebbs and flows, including the shore or bank to high water mark. He held these rights, not for his own benefit, but for the benefit of his subjects at large; who were entitled to the free use of the sea, and all tide waters, for the purposes of navigation, fishing, etc., subject to such regulations and restrictions as the crown or the parliament might prescribe. By *magna charta*, and many subsequent statutes, the powers of the king are limited, and he can not now deprive his subjects of these rights by granting the public navigable waters to individuals. But there can be no doubt of the right of parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. . . . The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all *public* rights belonging to the people at large. They are not the *private* unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals.”

In the case of *New York v. New York & Staten Island Ferry Company*, 68 N. Y. 71, the Court of Appeals, speaking of the common law, said, at p. 77:

“But while the sovereign can make no grant in derogation of the common right of passage over navigable waters, parliament may do so. . . . But a person claiming a special right in a navigable river or arm of the sea under a grant by parliament, as for example, a right to obstruct it, or to interfere in any way with the public easement,

must show a clear title. It will not be presumed that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence. . . . (at p. 78.) The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given by the federal Constitution."

In that case the question involved the effect of a legislative grant of lands under water, so far as appears without valuable consideration, by the land commission of the State, in 1818, to one John Gore, on the eastern shore of Staten Island, including the premises thereafter acquired by the New York & Staten Island Ferry Company. The grant extended from low water mark into the Bay a distance of 500 feet, to have and to hold to Gore, his heirs and assigns, as a good and indefeasible estate of inheritance forever, under a statute authorizing the grant of such lands as the Commissioners should "deem necessary to promote the commerce of the state." It was held that, as there was nothing to show that it was intended to restrict the State in the preservation of the navigation of the river in that 500 feet, the grant to Gore might be and was restricted by the subsequent statute of 1857 of the State of New York, providing that it should not be lawful to fill in the land granted with earth or other solid material beyond the bulkhead line established under that law, or by piers that should exceed 70 feet in width, with intervening water spaces of at least 100 feet between them. It was therefore decided that the erection of a clubhouse on the land granted was a purpresture.

It is apparent from these decisions that, under the law of New York when these cases were decided, whenever

the legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself from its exercise as sovereign of the *jus publicum*, that is the power to preserve and regulate navigation, it might do so; but that the conclusion that it had thus excluded the *jus publicum* could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted.

What is thus declared as the law of New York in these two cases, where it was found that the *jus publicum* had not been conveyed, is shown in a number of cases in the Court of Appeals in which the State and its agency, the city, did part with the *jus publicum* to private owners of land under tidal water, and of wharfage rights thereon, upon adequate compensation and in pursuance of a plan of harbor improvement for the public interest.

In the case of *Duryea v. The Mayor*, 62 N. Y. 592, and 96 N. Y. 477, a deed of land under tidal water by the City of New York, with the authority of the State, conferred upon the grantees a fee simple title with all the privileges of an absolute owner, except as restricted by the covenants and reservations contained in it. The covenants related to the filling of the streets running through the lots which were excepted from the grant. The grantees had partially filled the water lots and, while this was being done, the city had flowed the land with the contents of a sewer. The sewer had been placed under a revocable license of the owner, but, when the license was withdrawn, the city insisted on continuing to use the lots for sewer discharge, and this it was held the city could not do.

In the later case, in 1884, the Court of Appeals, speaking of the deed, said, at p. 477:

"As we have before seen the deed conferred upon the grantees therein the title and absolute ownership of the property conveyed, subject only to be defeated at the option of the grantor for a breach of the condition subsequent.

“The claim now made, that there was some right or interest in the property which still remained in the city notwithstanding its deed, is opposed to the principles declared in our former decision, and the express language of the conveyance.”

In *Towle v. Remsen*, 70 N. Y. 303, 308, the Court of Appeals, in dealing with the effect of a deed of New York City of land under tidal waters, said:

“The land under water originally belonged to the Crown of Great Britain, and passed by the Revolution to the State of New York. The portion between high and low water mark, known as the *tide-way*, was granted to the city by the early charters (Dongan charter §§ 3 and 14; Montgomerie charter, § 37), and the corporation have an absolute fee in the same (*Nott v. Thayer*, 2 Bosw. 61). It necessarily follows that the city had a perfect right, when it granted to the devisees of Clarke, to make the grant of their portion of the land in fee simple absolute. As to the land outside of the *tide-way*, the city took title under chapter 115 of the laws of 1807, with a proviso giving the pre-emptive right to the owners of the adjacent land in all grants made by the corporation of lands under water granted by said act. . . . The Legislature left it to the city to dispose of the interests mentioned upon the proviso referred to; but it enacted no condition that it should not dispose of that which it owned in fee simple upon such terms as it deemed proper, and in the absence of any such enactment, such a condition can not be implied.”

A deed of this class came before the Court of Appeals in *Langdon v. The Mayor*, 93 N. Y. 129. The State Commissioners of the Land Office, under a law of 1807, granted to the city a strip of land under water in the North River, the westerly line of which was in the river 400 feet west of the low water mark. The city laid out an extension of West Street along this strip, parallel with the river, the

westerly line of the street being about 200 feet out in the river west of low water mark. In 1810 the city granted to Astor, the owner of the adjoining uplands, certain lands under water, including a portion of the strip, the westerly bounds of the grant being "the permanent line of West street, saving and reserving so much of the same as will be necessary to make West street in accordance with the map or plan." In consideration of the grant the grantee covenanted to pay certain perpetual rents, to make such wharves as should be necessary to make the portion of West Street, within the bounds of the grant, of the width specified, and forever thereafter to maintain and keep them in repair. The city covenanted that the grantee should at all times thereafter have the wharfage, from the wharf or wharves to be erected on the west end of the premises granted. Astor constructed West Street across the land granted, in accordance with his covenant, and maintained the wharf on the westerly line of said street. Without making compensation to the plaintiff who succeeded to his title, the city erected a bulkhead out shore from such westerly line and filled up the space between it and the old bulkhead, and destroyed the use of the wharf. It was contended that the city and State could not part with the power to preserve and regulate navigation in the water between the wharf and the 200 feet beyond owned by the city. The Court of Appeals held that the covenant as to the wharf which the city made to Astor in the deed was a grant of an incorporeal hereditament of wharfage which the city or State could not impair; that the city acquired by its grant from the State the right to fill up the land granted, to build wharves thereon and to receive wharfage; that whatever property rights it thus acquired it could convey to individuals; that, by its grant to Astor, the city conveyed not only the land, excepting the part covered by West Street, but also the right of wharfage; that an

easement, i. e., a perpetual right of free access to the wharf across West Street over the land of the city therein, passed by necessary implication; that the city had the right to grant such easement; that the legislature could not by the act in question authorize a destruction or impairment of this easement without compensation to the owner; and that, therefore, the action for damages was maintainable.

In the course of his opinion for the court, Judge Earl, speaking of the power of the city conferred upon it by the State, said, at page 144:

“Here, taking the language of the charters and grants, the course of legislation, and all the statutes in *pari materia*, the situation of the lands granted and the use to which many portions of them had, with the knowledge and consent of the legislature, been from time to time devoted, it is very clear that the lands under water around the city were conveyed to it in fee, to enable it to fill them up as the interest of the city might require, and to regulate and control the wharves and wharfage.

“We think it equally clear that whatever title and property rights the city thus obtained, it could transfer and convey to individuals. Having the power to extend the *ripa* around the city, and thus make dry land, it could authorize any individual to do it. Whatever wharves and docks it could build, it could authorize individuals to build, and whatever wharfage it could take, it could authorize individuals to take. Its dominion over the lands under water, certainly for the purposes indicated in the preamble contained in section 15 above cited, was complete.”

Speaking of the wharfage granted, the judge said, at page 152:

“An easement for access to the wharf over the adjacent land of the city under water passed by necessary implication. Without the easement the wharf would be of no

use, there could be no wharfage, and the grant as to the wharf and wharfage would be futile. The grant was made for an adequate valuable consideration. It was not made solely or primarily for the benefit of the grantee, but primarily for the benefit of the city in pursuance of a policy for improving its harbor and furnishing its treasury. Under such circumstances there is no rule of construction which can confine the grant to the metes and bounds mentioned in the deed. If the city had owned this wharf and granted it, the right to wharfage and an easement for access to the wharf over the adjacent land of the city under water would have passed by necessary implication as incidents and appurtenances of the thing granted. So it would seem that a grant of the right to build and forever maintain a wharf upon the land of the city, would upon the same principle carry with it the right to take the wharfage and have access to the wharf. In addition to the right to build and maintain the wharf, however, here there was on the part of the city an express grant of the wharfage, and it must have been the intention of the parties that the grantee should have open water in front of his wharf for the accommodation of vessels that the wharfage which was granted to him might be earned."

The necessary effect of the *Langdon Case*, which has always been a leading authority in the State of New York, is that a grant upon a valuable consideration of the easement of wharfage related to land under water conveyed by the city by authority of the State, for the purpose of promoting commerce and the harbor of the city, takes away from the city and State the power to regulate navigation in any way which would interfere with or obstruct the grant, and that if the city desired in the interest of navigation to obstruct such easement, it must acquire it by condemnation. If it may do this, it follows necessarily that it may by an absolute deed of land under

water, with the right of the grantee to fill it, part with its own power to regulate the navigation of water over this land which would interfere with its ownership and enjoyment by the grantee.

The *Langdon Case* was approved and followed in the case of *Williams v. City of New York*, 105 N. Y. 419. In that case, the city under New York laws of 1813 and 1857, was held to have received authority from the State to fill in the east side of the Hudson River from an existing bulkhead to 13th Avenue with a new bulkhead there. The city made a grant to a private person of the land under water some eighty feet, with a requirement that he fill it in and build the new bulkhead with wharfage on the outer bulkhead. It was held that he took a fee, that he had an easement for the approach of vessels in its front, and that the property thus granted him could not be taken by the city for the public use without compensation. The court said in that case:

“The authority thus given being commensurate with the municipal limits, involved a grant of so much of the land of the State under water as those wharves would occupy if the city’s choice of location required such appropriation. This right was tantamount to an ownership. It embraced the entire beneficial interest, and was inconsistent with any title remaining in the State. The wharf when built completely occupied the land under water, and might be built, if need be, of stone and earth. All use for the floating of vessels disappeared, so far as it occupied the water. The new and substituted use created by the city or its grantees belonged wholly to them, for the entire benefit in the form of shippage, wharfage and cranage, was given to them. There was never any restraint put upon this general grant, and the ownership involved where the plans carried the wharves on to the State’s land in the stream, except the limitation of exterior lines beyond which the authority should not go,

or that imposed by general plans agreed upon by both parties. . . .

“ . . . So that when the State granted to the city wharf rights which might extend into the deep water covering its own land it granted two things: property in the land covered by the wharf and occupied by it and an easement for approach of vessels in its front. That easement the State by its own sole action could not take away or destroy without awarding adequate compensation.”

The same principle was announced in *Mayor v. Law*, 125 N. Y. 380.

In *People v. Steeplechase Park Company*, 218 N. Y. 459, it was held that where the State, through its land commissioners, unqualifiedly granted to defendants lands in navigable waters between high and low water marks, the exclusive use and right of possession vested in the grantee. Hogan, Cardozo and Seabury, Judges, dissented. The ruling went to the extent of deciding that fences, barriers, platforms, pavilions and other structures of a private amusement park constructed by the grantee on lands under navigable water between high and low water mark, although an interference with the public use of and access to such lands, could not be enjoined where the grant of such lands was unqualified.

In that case, at pp. 479, 480, the court said:

“During all our history the legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under

water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction. Where the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee except as against the rights of riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use."

The *Duryea* and the *Langdon* cases rest on the delegation by the State to the city of the State's sovereign right to control navigation or the *jus publicum* in the land to be disposed of by the city to private owners in pursuit of the promotion of filling land under water to a *ripa* or exterior line, and of the construction of docks to make a harbor. The rights of such private owners come not from riparian rights, or gratuitous statutory grants. They come from a deed absolute of the lots conveyed for a money consideration. The *Steeplechase Park Case* was a close case, as shown by the dissents, and was not nearly so strong a one for the application of the principle above stated as the case at bar, or the *Duryea* and *Langdon* cases.

If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1857 and 1871 as enforced in this case impair the contract made by the city with the grantees of these deeds.

Cases cited as contrary to the New York City water lot decisions just considered must be examined to see whether they involve grants of lots under tidewater by deed absolute in fee simple from the city or State in consideration of money paid and in promotion of harbor plans or other public purposes.

The Knickerbocker Ice Co. v. 42nd R. Co., 176 N. Y. 408, is relied on to show a conclusion adverse to the infer-

ences we have drawn as to the New York law. There the Court of Appeals sustained an order denying an injunction to restrain the city from effecting an extension of 43d Street into the Hudson River, sought by one who by deed of the city was given the right to wharfage at the end of 43d Street. In the same deed land under water on each side of the street was conveyed to the grantee in fee simple. The Court held that the street was held in trust by the city for the public use and that the grant of wharfage at the end of the street did not carry the fee in the street but only an easement of wharfage at the end of the street as the city might extend it into the river, and that, by virtue of a covenant in the deed, the grantee if he would enjoy the wharfage must erect a new wharf or pier at the new end of the extended street. The grant was not of the fee but only of an ambulatory easement of wharfage on any extension of the street. But the city was nevertheless thereafter required to condemn this grant of the easement. *American Ice Company v. City of New York*, 193 N. Y. 673, and 217 N. Y. 402.

The case of *Sage v. Mayor*, 154 N. Y. 61, 79, does not conflict in any way with the *Langdon* and other cases. That only concerned the right of a riparian owner in the tideway which the city owned and deeded to another. It was held that the riparian owner had no more right to complain of the city's disposition of the tideway for the public interest by deed than had the owner of a United States patent reaching to high water mark to complain of the State's disposition of the tideway in Oregon in *Shively v. Bowlby*, *supra*.

The cases of *Brookhaven v. Smith*, 188 N. Y. 74, and *Barnes v. Midland R. R. Terminal Company*, 193 N. Y. 378, concern conflicting rights of riparian owners and of persons with limited grants to put out a wharf without any fee simple title, and seem to us to have no bearing upon the question here.

In *Lewis Blue Point Co. v. Briggs*, 198 N. Y. 287, grantees under deeds made before 1700, conveying the exclusive right of fishing, leased for ten years the right to plant and cultivate oysters in the navigable waters of the Great South Bay, Long Island. The lessees were held subject to an Act of Congress authorizing and directing the dredging of a channel 2,000 feet long and 200 feet wide through their oyster beds, without claim for compensation. It was held that they had derived no more right in the fishery than the King had in his private ownership, and he could not convey the right to restrict navigation which he held in trust for the public. The colonial grant, therefore, which was not like a grant from the State, did not exclude the sovereign right to provide for navigation. Moreover, it was a federal right which the owners were opposing, and of course they had to yield. *Tempel v. United States*, 248 U. S. 121; *Lewis Blue Point Oyster Company v. Briggs*, 229 U. S. 82.

It is urged against our view of what these deeds conveyed, of the sovereign power of the State and the ownership of the city at the time of their execution, that it is opposed to the judgment of this Court in *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, in which the validity of a grant by the Illinois legislature to the Illinois Central Railroad Company of more than 1,000 acres, in the harbor of Chicago in Lake Michigan, was under consideration. It was more than three times the area of the outer harbor, and not only included all that harbor, but embraced the adjoining submerged lands which would in all probability be thereafter included in the harbor. It was held that it was not conceivable that a legislature could divest the State of this absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid. The limitations on the

doctrine were stated by Mr. Justice Field, who delivered the opinion, as follows, at page 452:

“The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant

of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled."

That case arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, but the general principle and the exception have been recognized the country over and have been approved in several cases in the State of New York.

In *Coxe v. State*, 144 N. Y. 396, a company was created to re-claim and drain all or any portion of the wet or overflowed lands and tidewater marshes on or adjacent to Staten Island and Long Island, except such portions of the same as were included within the corporate limits of any city, upon the deposit of \$25,000 and the payment to the State of a sum to be fixed by a commission after doing the work. This was a suit to recover a \$25,000 deposit, because the Attorney General had decided the law to be unconstitutional. The Court followed the *Illinois Central Railroad Case*, and held the law invalid, but said:

"For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York of the lands under water below the shore line around Manhattan island clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city and consequently of the people of the state." Citing *Langdon v. Mayor*, 93 N. Y. 129.

The opinion says:

"The title which the state holds and the power of disposition is an incident and part of its sovereignty that can not be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit."

The same rule and exception are laid down in *Long Sault Development Company v. Kennedy*, 212 N. Y. 1, where the Legislature of New York attempted to give complete control of the navigation of the St. Lawrence River in the region of Long Sault Rapids, to a private corporation, and abdicate its sovereign function. The court held the grant invalid, but said, in stating the exception:

“The power of the Legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this Court too often to be open to serious question at this late day.” Citing *Lansing v. Smith*, *supra*; *New York v. New York & Staten Island Ferry Company*, *supra*; and *Langdon v. The Mayor*, *supra*; and added,

“ . . . The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the Public.”

There is an interesting discussion of the same exception by Chief Justice Bartlett in *People v. Steeplechase Park*, *supra*, at p. 482, in which he cites *United States v. Mission Rock Company*, 189 U. S. 391, 406, and emphasizes the distinction between the *Illinois Central*, the *Coxe*, and *Long Sault* cases, and grants like those we are considering. It is clear that the ruling in those cases has no application here.

But it is said, and the court below held, that the fee simple granted by the deeds in this case did not exclude the right of the city to regulate and preserve navigation over the waters covering the land conveyed until they were filled, and that this distinguishes the *Duryea*, *Langdon*, and other cases, in which the filling had taken place, from the present one.

The suggestion that rights of ownership in lands under water conveyed by the city, by such a deed in fee simple,

are restricted, and the city's control of navigation of the water over them remains complete until they are filled, can not be accepted without qualification in respect of grants which are intended to part both with the *jus publicum* and *jus privatum*, as we have found these deeds to do. The suggestion does not find support in the case of *First Construction Company of Brooklyn v. State*, 221 N. Y. 295, cited to sustain it. In that case, Beard was an upland owner whose land bordered on Gowanus Bay. The legislature in three acts granted to a private person the right to build wharves and fill in lands in a salt meadow marsh and mud flats partially submerged at high tides. The court, Hiscock, C. J., in stating the case, said, p. 303:

“It may be stated generally that none of them [the legislative acts] did more than grant to Beard and others the privilege to build wharves, etc., and fill in lands; none of them purported in terms to grant and convey the title to lands under water included within the area now appropriated, and none of them was passed by a two thirds vote.”

It was held that no title could pass, because it was a gratuity, and no grant could be made under the Constitution without a two-thirds vote of the legislature, which was not the case here, and that it was only a privilege or franchise which could not ripen into a title until the land was filled. It does not bear on the case here except in the necessary inference from the treatment of the matter in the opinion that, if title had passed, filling was not necessary to vest full fee simple in the grantee.

Of course we do not intend to say that, under such deeds as these, as long as water connected with the river remains over the land conveyed and to be filled, navigation may not go on and boats may not ply over it, and that, incident to such use, occasional mooring may not take place. But it is a very different thing to say that

the city which has parted with the *jus publicum* and *jus privatum* over such water lots, remains in unrestricted control of navigation with the right to dredge them, or appropriate the water over them as a slip or regular mooring place for its adjoining piers, in the doing of a great business, largely excluding plaintiffs and all others from use of the water over those lots, for the constant private use of the city's tenants, for its profit. This distinction and conclusion is borne out by the decision of the Court of Appeals in *In re Mayor of The City*, 193 N. Y. 503, where the court was dealing with the question of the elements of value of a pier-right in the Hudson River, granted by the city to an individual in a deed with covenants quite like those in this case, when the pier adjoined an unfilled water lot of the city. The court said:

“The deed of the pierhead can not be construed as conferring any right of access from or over the lands which the city might at its pleasure cause to be filled in. It is obvious of course that so long as this territory was not filled in, it served the purpose of access to the pier, but that was merely a privilege of sufferance and not a legal right.”

The evidence shows that two slips between the city piers at 39th Street and 40th Street, and those between 40th Street and 41st Street, are usually blocked with coal barges, with railroad floats carrying box cars on them, with cattle boats using a runway for cattle at the side of the piers; and all are being moored in the slips for the use and benefit of the lessees and other tenants of the city for the pecuniary profit of the city. This and the dredging of the soil of the plaintiffs certainly are more than a privilege of sufferance. *Whitaker v. Burhans*, 62 Barb. 237; *Wall v. Pittsburg Harbor Co.*, 152 Pa. 427.

The wharfage rights of the city at the piers in 39th, 40th and 41st Streets as far as 13th Avenue, under the deeds before us, cover only the ends of those piers and not

their sides. This is clear, because the grantees of the deeds were vested with the wharfage on 13th Avenue along the river extending from 39th Street to 41st Street, except that at the ends of the cross streets. In this state of the case, the rights of the city, having parted with the sovereign regulation of navigation in the water over these lots, are not different from those of the owner of the upland who builds out his pier to deep water. His right is limited to the front or end of the pier for his private use.

Judge Cullen, in *Jenks v. Miller*, 14 App. Div. 480, points out that "though the owner of an adjacent upland has the right of access to the river, and also the right to construct a proper pier thereon, he has no easement or interest in the lands under water in front of the adjacent proprietors, and that the riparian right of access, so far as it is a proper right incident to the ownership of the upland, is strictly a right of access by the front."

The same principle is approved in *Consumers Coal & Ice Company v. City of New York*, 181 App. Div. 388, 394, where it is said that privately owned land under public waters is subject to the navigation of vessels over it, but can not be appropriated by others to enlarge the berths at private piers. Compare *Keyport Steamboat Company v. Transportation Co.*, 18 N. J. Eq. 511, 515; *United States v. Bain*, 24 Fed. Cases 940, No. 14496.

Our conclusions are that Appleby and Latou were vested with the fee simple title in the lots conveyed, and with a grant of the wharfage at the ends of the lots on the river; that with respect to the water over those lots and the wharfage, the State and the city had parted with the *jus publicum* and the *jus privatum*; and that the city can only be re-vested with them by a condemnation of the rights granted.

What, then, is the effect upon the rights of the parties of the fact that the grantees only filled the part of lots

conveyed east of 12th Avenue? The plaintiffs are not in default in this, because there was no covenant on their part to fill. *Duryea v. Mayor, supra*, at p. 596; 96 N. Y. 477, 496; *Mayor v. Lane, supra*, at p. 391. The filling was left to their convenience. They were not in default with reference to filling in the streets and avenues, because their covenant to do so was only on condition that the city should require it, and only when it did so. The reason for their delay in filling the remainder of the lots beyond 12th Avenue was doubtless due to the passage of the Act of 1857 and of the Act of 1871, and their reasonable expectation that the city would condemn their rights—an expectation that was confirmed by the condemnation proceeding which was directed to be begun in 1890 by the Dock Commission, and was begun in 1894, and remained without prosecution, and operated as a dead hand upon this property for twenty years until 1914, when the city discontinued it. Thereupon this suit was promptly brought.

The rights of the plaintiff with reference to the use of the water over their lots lying between the bulkhead line and 12th Avenue are not affected by the order of the Secretary of War. The evidence shows that for 100 feet or more inside the line the water over these lots is made part of the slip and city mooring place for the city's pier; that in order to adapt it to such a purpose the soil in the lots is being constantly dredged, the dredging having increased the depth of the water from three feet to sixteen and twenty feet. This has been done by the city on the assumption that, because it is water connected with the river, the city may improve its navigation. As the city has parted with the *jus publicum* in respect of these lots, it may not exercise this power, and must be content with sailing over it with boats as it finds it. The dredging of the mud to a depth of fifteen feet in their lots is a trespass upon the plaintiffs' rights. They have a right, at

their convenience, to fill both lots from the bulkhead line easterly to 12th Avenue and beyond. And we know from a record in a related case, argued with this and to be decided this day, that they have applied for permission to fill the lots and are pressing their right to do so. So, too, the use of the water over these lots inside the bulkhead line, for mooring places, berths or slips, by the city and its tenants, as we have shown, violates the rights of the plaintiffs. They are entitled to an injunction against both.

The order of the Secretary of War, of 1890, fixing the bulkhead line 150 feet west of 12th Avenue, and allowing pier extensions far beyond 13th Avenue, to 700 feet from the bulkhead line, does not take away the right of the plaintiffs to object to the city's dredging their lots or to its using the water over their lots for what is in effect an exclusive slip and mooring place. The order did not restore to the city the power, as against these plaintiffs, to regulate navigation over their lots, and so did not make the Act of 1857 and the Act of 1871 with respect to the spacing of 100 feet between piers and for mooring places adjoining the piers effective to defeat those deeds. The action of the city in making these deeds and covenants was of course subject to the dominant right of the Government of the United States to control navigation, but the exercise of that dominant right did not revert in the city a control and proprietary right which it had parted with by solemn deed and covenant to these plaintiffs.

The only just and possible result of the Secretary of War's order is that the enjoyment by the plaintiffs of their rights under the deeds is qualified to the extent of a compliance with it, without conferring any affirmative power upon the city to detract from the rights which it had granted. The plaintiffs are prevented from solidly filling between the bulkhead line and 13th Avenue; but the order expressly authorizes the substitution for such

filling of the construction of piers on piling driven into the lots of the plaintiffs. To whom is given the right to build piers over these lots? The Government does not attempt to take it away from the owners of the lots. It does not attempt to vest it in the city. It could not do so if it would. The right must reside in those who have the ownership of the land under the water and who, until the Secretary had made his order, were entitled by their grants to use the solid filling up to the line of 13th Avenue, without reference to the bulkhead lines or to the 100 feet spacing between the piers under the Acts of 1857 or 1871.

The lots have been bought and paid for subject only to control by the General Government in the interest of navigation. The General Government, through its agent, says it does not require open water for navigation, but is sufficiently satisfied by piers on piles extending over the water. The city has by deed granted to the Applebys the wharfage and cranage rights upon these lots. What is there to prevent the Applebys, by the construction of piers on piles over their lots, in conformity to the Secretary of War's order, from enjoying the profit from that wharfage?

It thus is seen that the limitations on the right of the city to use the water over the lots outshore from the bulkhead line are no different from what they are inshore of the bulkhead line. The right of the city in respect to the use of the water over the lots beyond the bulkhead line is, as is said in *In re Mayor of the City, supra*, already quoted, merely a privilege by sufferance and not a legal right, and lasts only until these lots may be covered by piers on piles as allowed by the Secretary of War.

The plaintiffs are therefore entitled also to an injunction to prevent the dredging of their lots by the city from the bulkhead line to 13th Avenue, and also to prevent the continued use of the water over their lots in that same

extent as a slip or permanent mooring place for the adjoining piers of the city. They are also entitled to a specific injunction against the overhanging platform which was put out by the city for its tenants on the north side of the 39th Street pier.

The application of the Acts of 1857 and 1871 by the courts of New York would reduce the rights which were intended to be conveyed in these deeds to practically nothing, and would leave the grantees only the privilege of paying taxes for something quite unsubstantial. The qualification of those rights by the order of the Secretary of War still leaves value in the deeds, if the Acts of 1857 and 1871 are invalid, as we hold them to be when applied as they have been in this case.

The judgment of the Supreme Court of New York is reversed for further proceedings not inconsistent with this opinion.

Reversed.

APPLEBY *ET AL.* *v.* DELANEY, COMMISSIONER.

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

No. 16. Argued October 7, 1925; reargued March 1, 2, 1926.—
Decided June 1, 1926.

1. Acting under general authority contained in a New York statute of 1871, the Dock Commissioner of New York, with the approval of the Sinking Fund Trustees of the city, adopted a plan of harbor improvement inconsistent with the right of the plaintiffs, under contracts made with the city before the date of the statute, to fill in their water lots out to a bulkhead line; and their application to the Commissioner for permission to do such filling was therefore denied by him. *Held*, that the refusal was equivalent of a law of the State impairing the obligation of the contracts, within the meaning of Article I, § 10, of the Constitution; and that this court had jurisdiction, under Jud. Code, § 237, to review by writ of error a judgment of the state court sustaining the refusal over the constitutional objection. P. 409.
2. Where the grantees of water lots, conveyed to them by the City of New York, in fee simple, "to be made and gained out of the

Hudson River," together with wharfage rights, covenanted to build wharves, bulkheads, and certain avenues and streets within the outboundaries of the premises conveyed, upon request of the city, but not to build them without its permission, and the ordinance under which the deeds were made provided that "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council." *Held*:

(1) That the requirement of the city's consent before filling should be construed as relating to the streets, and not to the lots between them, since, otherwise, the enjoyment of the lots,—for which the grantees gave valuable considerations and on which for many years they had paid the city taxes in reliance on this construction, as supported by utterances of the state courts and declared to have become a rule of property,—would be dependent upon the mere pleasure of the city. P. 409.

(2) That, if the provision applied at all to the lots, it should be regarded as a mere police regulation, requiring a permit for the purpose of supervising the filling, in protection of the public order. P. 413.

235 N. Y. 364; 199 App. Div. 552; reversed.

This is a writ of error to a judgment of the Supreme Court of New York in a suit for mandamus entered by direction of the Court of Appeals of New York, in a case involving the same deeds of water lots between 39th and 41st Streets, on the east side of North or Hudson River, which have been under consideration in the case just decided. The petition of the Applebys as relators in this case shows, that they have performed all the covenants they had to perform under the deeds; that neither they nor their predecessors in title had ever been required to build or erect piers, wharves or bulkheads, referred to in the deeds; that, under the Act of 1871, a Department of Docks was created, with general supervision and control of the dock property of the city; that it was given authority, with the approval of the Sinking Fund trustees of the city, to make a plan or plans for the improvement of the harbor, to lay out wharves, and to condemn such vested

property interests of individuals as might interfere with such plans and make compensation therefor; that in June, 1891, the city instituted a condemnation proceeding to acquire the Appleby property, but that, in 1914, it discontinued it and since that has never attempted to acquire title to the premises; that a plan was adopted, in 1916, by the Dock Commission for harbor improvement, with the approval of the Sinking Fund trustees, for a marginal wharf to be 250 feet wide, to include all of 12th Avenue, and so much of the Appleby property as lay west of 12th Avenue, and within a distance of 100 feet westerly therefrom, which would interfere with relators filling their lots; that in December, 1919, the Applebys made application to the Commissioner of Docks to begin and continue the filling of the two lots of the Applebys within the government bulkhead line as permitted by their deeds; that the Commissioner of Docks, in answer to this application, wrote as follows:

“January 31st, 1920.

“Replying to your letter of the 26th instant, I beg to advise you that the application of Edgar S. Appleby and John S. Appleby for permission to construct either a platform between West 39th and West 41st Streets, North River, or a concrete wall on platform construction with sheet piling along the inner side to retain filling is hereby formally denied on account of the fact that the proposed construction is not in accordance with the new plan.”

Thereupon this suit was brought by the Applebys against the Dock Commissioner to compel the issuing of the necessary permit. This was denied by the Supreme Court in special term. The denial was reversed in the Supreme Court, Appellate Division, and that reversal was in turn reversed by the Court of Appeals in an opinion as follows:

“Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

“The facts herein are substantially the same as in *Appleby v. City of New York*, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the secretary of war. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

“We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must re-acquire the property right in the land under water which it has conveyed before it can carry out its plans for such improvement.

“This application should not, however, be granted. Section 15 of title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

“‘No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council.’

“The water grants under which relators hold title also provide:

“‘And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained

from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose.'

"In *Duryea v. Mayor, etc.* (62 N. Y. 592) it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea v. Mayor, etc.*, 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission."

The Sinking Fund ordinance, referred to in the opinion of the Court of Appeals, does not appear in the record. The Court of Appeals, however, took judicial notice of it, and the following statement with respect to it is taken from the opinion of that court in the case of *Duryea v. The Mayor*, 96 N. Y. 477, 485, 486:

"These ordinances adopted in 1844 provide, among other things, that the lands under water on the shores of the island of New York, belonging to that city under its several charters, might be sold and conveyed by such city to parties desiring to purchase the same, giving priority to the owner of the adjacent upland upon certain terms and conditions therein mentioned."

“Section 15 reads:

“‘No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity thereto without permission so to do is first had and obtained from the common council, and the grantee shall be bound to make such lands, piers and bulkheads at such times and in such manner as the common council shall direct under penalty of forfeiture of such grant for noncompliance with such terms of the common council.’

“These ordinances were recognized and approved by the state legislature in ch. 225 of the Laws of 1845, and were attempted thereby to be placed beyond the power of the local authorities of the city to limit or amend without the previous consent of the Legislature.”

Mr. Charles E. Hughes, with whom *Mr. Banton Moore* was on the briefs, for plaintiffs in error.

Mr. Charles J. Nehrbas, with whom *Mr. George P. Nicholson* was on the briefs, for defendant in error.

It seems plain that the decision of the Court of Appeals was not based on any act of legislation of the State of New York passed subsequently to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. *Ross v. Oregon*, 227 U. S. 150; *Moore-Mansfield Co. v. Electrical Install. Co.*, 234 U. S. 619; *Cleveland & Pittsburgh R. Co. v. Cleveland*, 235 U. S. 50; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444; *Fleming v. Fleming*, 264 U. S. 29. It is not true, as claimed by the plaintiffs, that the New York courts have given effect to the limitation attempted to be provided by the new bulkhead line of 1916. On the contrary, the Court of Appeals has expressly held that the rights of the plaintiffs are not limited by that line. The sole ground of the decision is that the grants from the city to the plaintiffs' predecessors in title, construed in the light of

the ordinance pursuant to which they were made, required the permission of the common council of the City of New York before any filling could be done. *Duryea v. Mayor*, 96 N. Y. 477; 62 N. Y. 592.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The relators base their writ upon the alleged impairment of their contract rights contained in the grant and covenants of their deeds by the plan, adopted in 1916, under the Act of 1871, by the Dock Department, and approved by the Sinking Fund trustees, the execution of which the Dock Commissioner is enforcing by a formal refusal to grant permission, as requested by the relators, to fill up their lots. The authority of the Dock Commissioner and the Sinking Fund trustees, under the Act of 1871, is such as to make the plan and the refusal equivalent to a statute of the State, and, assuming that it is in conflict with the grant and covenants of relators' deeds, it is a law of the State impairing a contract obligation under § 10, Article I, of the Federal Constitution. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Williams v. Bruffy*, 96 U. S. 176, 183; *Walla Walla City v. Walla Walla Water Works Company*, 172 U. S. 1; *Mercantile Trust & Deposit Company v. Columbus*, 203 U. S. 311; *Zucht v. King*, 260 U. S. 174. We have jurisdiction of the writ of error under § 237 of the Judicial Code.

The question in this case then is whether the deeds before us, construed in connection with the Sinking Fund ordinance of 1844, gave to the plaintiffs the right to fill in the lots without the consent of the city. Each deed described the land conveyed as follows: "All that certain water lot or vacant ground and soil under water *to be made land and gained out* of the Hudson or North River or harbor of New York, and bounded," etc., "together with all

and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining." The grants were in fee simple. The grantees respectively covenanted that they would, upon the request of the city, build bulkheads, wharves, streets and avenues to form part of 12th and 13th Avenues, and 39th, 40th and 41st Streets, which were within the general description of the premises conveyed. These were excepted therefrom for public streets. The grantees agreed to pay the taxes on the lots lying between the streets. There was a covenant that they would not build the wharves, bulkheads, avenues or streets previously mentioned until permission had been given by the city. The city covenanted that the grantees might have wharfage on the westerly side of the granted premises fronting on the Hudson River, excepting at the westerly ends of the cross streets, which was reserved for the city.

In a deed of a similar water lot on the east side of the city, with exactly the same covenants, the question arose in the case of *Duryea v. The Mayor, etc.*, 62 N. Y. 592, 596, whether the covenants with respect to filling the streets applied to the filling of the water lots between the streets, and it was held that they did not. The court said, at page 596:

"The only covenant in the deed for making lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces."

In the same case reported in 96 N. Y. 477, the Sinking Fund ordinance, not referred to in the first decision, was pressed upon the court to change its conclusion in the first hearing and to hold that the city had the absolute right, by reason of the ordinance, to forbid the filling of the land conveyed. As to that, the court said:

"It may well be doubted whether the construction formerly given by this Court to the covenants contained in

the deed should not also be deemed applicable to the provision of the sinking fund ordinance. The object of this provision was not to cause any interest in the land conveyed to be retained by the grantor, or to postpone the period of enjoyment of its owners, or increase the security of the public creditors, but was obviously designed to enable the grantor to shield itself from the burden of caring for and maintaining the piers, wharves and streets until such time as it should deem the assumption thereof profitable and expedient, and to fix the time and manner of erecting those structures with reference to the introduction therein of water, gas, sewer pipes and other necessary conveniences which naturally fell under the supervision and control of the city authorities. The accomplishment of this object would in no way be materially interfered with by allowing the grantees to proceed with their contemplated work of redeeming their lands from the water and realizing the benefits, which were the sole inducement to them, for its purchase."

It referred to the conduct of the city through all its departments for a period of upwards of twenty years in dealing with the ordinance and deeds like this as having affixed the interpretation claimed by the relators as the true intent and meaning of both. It said further:

"The rule by which this ordinance is to be construed is such as applies to the interpretation of the acts of other legislative bodies, and is that which shall best effectuate the intent of its authors. The reason and object of an act are to be regarded to arrive at its meaning, and while it is not competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the legislature.

“The only lands expressly provided to be made by the ordinance are those constituting the piers, wharves, streets and avenues, and since it is unnecessary in order to give the clause in question an office to perform, to extend it to lands outside of such streets, and to create a right unconnected with those clearly intended to be granted, it is in accordance with settled rules of interpretation to limit the effect of general language to the accomplishment of the object undoubtedly intended. If it be held that the words ‘make land in conformity thereto,’ as used in the ordinance, apply only to the lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved.

“It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect, should only be adopted when no other is possible or sustainable.”

After giving this construction to the deed and ordinance, the court then examined the evidence and found that the common council had by its conduct consented to the filling in of the lots; and, because in its summing up the court referred to the latter ground, it is insisted that its chief discussion and conclusion upon the construction of the ordinance and deed are not to be treated as authority. It should be noted that the construction of the deed by the court in the *Duryea Case* upon this point was referred to approvingly as authority in *Mayor v. Law*, 125 N. Y. 380, 381, where, citing the *Duryea Case*, the court used this language with respect to a similar covenant:

“The grantee became the absolute owner of the land between the streets—the land granted, and [that] he

could fill it up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up."

The court of Appeals in the present case disposed of the question we are discussing as follows:

"To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee, and prohibiting the building of the wharves and streets, without the consent of the common council would be unreasonable."

We can not agree with this. We think the reasons advanced by that Court in the second *Duryea Case* to sustain the opposite construction of the deed and ordinance are much more persuasive. It has added force when it appears from the opinion in the *Duryea Case*, and the conclusion of the Appellate Division in this case, that such construction of such deeds and the ordinance has become a rule of property for more than fifty years. It is not reasonable to suppose that the grantees would pay \$12,000, in 1852 and 1853, and leave to the city authorities the absolute right completely to nullify the chief consideration for seeking this property in making dry land, or that the parties then took that view of the transaction. In addition to the down payment, the grantees or their successors have paid the taxes assessed by the city for seventy-five years, which have evidently amounted to much more than \$70,000. It does not seem fair to us, after these taxes have been paid for sixty years, in the confidence, justified by the decision of the highest state court, that there was the full right to fill in at the pleasure of the grantees and without the consent of the city, now to hold that all this expenditure may go for naught at the pleasure of the city.

If the Sinking Fund ordinance is to be applied at all to the filling in of the land in the limits within the deeds, it should in our judgment be regarded as a mere police

requirement of a permit incident to the filling and to supervising its execution by regulation as to time and method, so that it should not disturb the public order. Had the refusal of the Commissioner of Docks, charged with the police regulation as to the docks, taken this form, an application for mandamus might well have been denied, because only an effort to control the police discretion of the public authorities, but the refusal to permit the filling to begin is not put on any such ground. It is denied because the city has a different plan, which does not permit the filling at all. This is an assertion of the right of the city absolutely to prevent the filling which is an impairment of the obligation of the contract made by the city with these plaintiffs, in violation of the Constitution of the United States.

The judgment of the Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

THORNTON ET AL. *v.* UNITED STATES.

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

No. 255. Argued April 20, 1926.—Decided June 1, 1926.

1. Regulations of the Secretary of Agriculture issued pursuant to statute are noticed judicially. P. 418.
2. Under the Acts governing the subject, it is not essential to the validity of regulations of the Secretary of Agriculture respecting live stock diseases that the regulations be certified to, or accepted by, the State. P. 422.
3. An indictment for conspiracy to commit the offense, under § 62 of the Penal Code, of interfering with and assaulting agents of the Bureau of Animal Industry while discharging their duties in supervising and causing the dipping of cattle to prevent the spread of a contagious disease, and charging the use of deadly weapons, need not allege that the cattle dipped were subject-matter of interstate

commerce, that they had come under the supervision or control of the Secretary of Agriculture, or that the agents were working to prevent the disease from spreading from one State to another. P. 423.

4. Congress has power, (as in the Animal Industry Act and subsequent legislation,) to provide measures for quarantining and disinfecting cattle in a State to prevent spread of disease to other States. P. 424.
 5. The ranging of cattle across a state line is interstate commerce, as well as driving them across, or transporting them by rail. P. 425.
 6. Spread of disease from State to State by ranging cattle is a burden on interstate commerce which Congress may prevent. *Id.*
- 2 Fed. (2d) 561, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction in the District Court for conspiracy to violate § 62 of the Penal Code.

Mr. Lee W. Branch, with whom *Messrs. E. K. Wilcox, John W. Bennett*, and *Omer W. Franklin* were on the brief, for petitioners.

Section 3 of the Animal Industry Act, when read in the light of the entire statute, plainly has as its purpose coöperation with the state authorities on the part of the Bureau of Animal Industry in an advisory way, insofar as the work of extirpating the cattle tick from domestic animals is concerned.

If, by the Act of May 29, 1884, establishing the Bureau of Animal Industry, it was the intention of Congress to confer upon the Secretary of Agriculture authority to send agents and employees of the Bureau into the borders of any State in the Union and empower them to supervise the dipping and by compulsion and force cause domestic cattle to be dipped, the Act must be held unconstitutional and void. *Kidd v. Pearson*, 128 U. S. 1; *United States v. Boyer*, 85 Fed. 425; *Covington Bridge Co. v. Kentucky*, 154 U. S. 210; *The Daniel Ball*, 10 Wall. 557; *Coe v. Errol*, 116 U. S. 517; *In re Greene*, 52 Fed. 113; *Gibbons v. Ogden*, 9 Wheat. 1; *Shafer v. Farmers*

Grain Co., 268 U. S. 189; *Ills. Cent. R. Co. v. McKendree*, 203 U. S. 514; *United States v. Shauver*, 214 Fed. 154; *United States v. McCullagh*, 221 Fed. 288; *Howard v. Ills. Cent. R. Co.*, 207 U. S. 463; *Robertson v. Memphis R. Co.*, 109 U. S. 3; *Butts v. Merchants & Miners Trans. Co.*, 230 U. S. 125; *Hill v. Wallace*, 259 U. S. 44. The Act itself, properly construed, does not give to such employees any authority to enforce the disinfection and quarantine measures, except where animals are subjects of interstate commerce. *United States v. Gibson*, 47 Fed. 833.

The allegations of the indictment were not sufficient to bring it within the provisions of the Act of May 29, 1884. *Abby Dodge v. United States*, 223 U. S. 166; *United States v. Birdsall*, 195 Fed. 980; *United States v. Baird*, 48 Fed. 554; *United States v. Pittoto*, 267 Fed. 603; *United States v. Hollowell*, 271 Fed. 795; *United States v. Page*, 277 Fed. 459.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

If the employees of the Bureau of Animal Industry named in the indictment were performing any duty legally imposed upon them pursuant to the federal statutes, the conspiracy alleged in the indictment and established by the evidence was a conspiracy to violate § 62 of the criminal code, whether or not they were also performing other work beyond the scope of their federal duties. *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399. Under the rule expressed in the above cases, there can be no doubt that the federal government may use, in the performance of its functions, persons who are also engaged in performing duties for a State. Some portion, at least, of the work performed by the employees of the

Bureau of Animal Industry was authorized by the federal statutes. *M. K. & T. Ry. v. Haber*, 169 U. S. 613; *Reid v. Colorado*, 187 U. S. 137; *Oregon-Wash. R. R. & Nav. Co. v. Washington*, 270 U. S. 87.

The power of Congress to regulate commerce includes power to quarantine areas where contagious diseases of cattle exist, to prohibit interstate movements of cattle from such areas, and to authorize the supervision of dipping of cattle in such areas by federal agents. *United States v. Ferger*, 250 U. S. 199; *Stafford v. Wallace*, 258 U. S. 495; *I. C. C. v. Goodrich Tr. Co.*, 224 U. S. 194; *California v. Pacific R. R. Co.*, 127 U. S. 1; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *United States v. Gettysburg Elec. Ry.*, 160 U. S. 668; *Massachusetts v. Mellon*, 262 U. S. 447.

The indictment is valid. *Stokes v. United States*, 157 U. S. 187; *United States v. Rabinowich*, 238 U. S. 78; *Williamson v. United States*, 207 U. S. 425; *Wolf v. United States*, 283 Fed. 885; *Foster v. United States*, 256 Fed. 207; *Ledbetter v. United States*, 170 U. S. 606; *Connors v. United States*, 158 U. S. 408; *Armour Packing Co. v. United States*, 209 U. S. 56; Rev. Stats. § 1025.

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

This case comes here by certiorari from the Circuit Court of Appeals of the Fifth Circuit. 267 U. S. 589. The judgment is one of conviction of the petitioners under an indictment found in the District Court for the Southern District of Georgia, charging the petitioners and sixteen others with the crime of conspiracy under § 37 of the Criminal Code to commit the offense against the United States denounced in § 62 of the same Code. Section 62 punishes anyone who shall assault or interfere with an employee of the Bureau of Animal Industry of the Agricultural Department in the execution of his

duties or on account of his execution of them, and who shall use a deadly weapon in resisting any such employee in such execution. The indictment was demurred to and the demurrer was overruled. The defendants were tried and found guilty. On writ of error the Circuit Court of Appeals affirmed the judgment. 2 Fed. (2d) 561.

The first count of the indictment charged that the defendants conspired to deter and prevent certain employees of the Bureau of Animal Industry from discharging their duties in supervising the dipping of, and causing to be dipped, cattle in order to prevent the spread of splenic fever among them, and to eradicate the cattle fever tick, and that for this purpose the defendants used deadly weapons and killed one such employee and wounded others, all in the county of Echols, Georgia. The second count charged that the conspiracy was directed not only to the use of force against the employees themselves but also to the dynamiting of spray pens and dipping vats used by such employees in their duties in causing the dipping of the cattle and the supervision thereof.

Under the Act of May 29, 1884, 23 Stat. 31, c. 60, a Bureau of Animal Industry was organized in the Department of Agriculture. It is made the duty of the Bureau, by § 1, to investigate and report upon the condition of the domestic animals, their protection and use, to inquire into and report the causes of contagious, infectious and communicable diseases among them, and to collect information on the subject. By § 2 it is authorized to employ experts. By § 3, it is made the duty of the Commissioner of Agriculture to prepare such rules and regulations as may be deemed necessary for the supervision and effective suppression and extirpation of such diseases, and to certify such rules and regulations to the executive authorities of each state and territory, and invite them to coöperate in the execution and enforcement of the Act. Whenever the plans and methods are accepted by any

state or territory, in which such diseases are declared to exist, and the state or territory has adopted plans and methods for the suppression and extirpation of the diseases, and those plans shall be accepted by the Commissioner of Agriculture, and whenever a governor or other properly constituted authority of a state signifies his readiness to coöperate for the extinction of such disease in conformity with the Act, the Commissioner is authorized to expend so much of the money appropriated as may be necessary in such investigation and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one territory or state into another.

By an Act of February 9, 1889, 25 Stat. 659, c. 122, the Department of Agriculture was made an executive department of the Government under a Secretary of Agriculture, who was vested with all the authority conferred by the Act of May 29, 1884, *supra*, on the Commissioner of Agriculture. By Act of February 2, 1903, 32 Stat. 791, c. 349, the Secretary of Agriculture was authorized and directed from time to time to make regulations concerning the exportation and transportation of live stock from any place within the United States where he had reason to believe a contagious cattle disease existed into and through any other state or territory as he might deem necessary, and all such rules and regulations were to have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry issued a certificate showing that the officer had inspected any cattle or other live stock to be transported from one locality to another and had found them free from Texas or splenic fever infection or other disease, it was provided that the cattle might be shipped, driven or transported from one state or territory to another without further inspection, but that such animals should at all times be under the control and supervision of the Bureau for the purposes of

such inspection, and that the Secretary might make regulations to prevent the introduction or dissemination of contagion from one state to another.

By Act of March 3, 1905, 33 Stat. 1264, c. 1496, the Secretary is authorized and directed to quarantine any state or territory, or any portion of any state or territory, when he shall determine the fact that cattle or other live stock therein are affected with any communicable disease. Section 2 of that Act prohibits the transportation, delivery for transportation, or driving on foot, from any quarantined state or territory into any other state or territory, cattle or live stock except as provided in the Act. Sections 3 and 4 give the Secretary authority to make rules and regulations for the inspection, disinfection, certification, treatment, handling and method and manner of delivery and shipment of cattle or other live stock from a quarantined state into any other state when the public safety will permit, but prohibits such movement in manner or method or under conditions other than those prescribed by the Secretary.

Under date of June 15, 1916, various regulations were issued by the Secretary of Agriculture. They are not printed in the record, but they are matters of which we may take judicial notice. *Caha v. United States*, 152 U. S. 211. Under the regulations, when the Secretary determines that cattle in any state or territory are affected with a contagious disease, and he thinks a quarantine should be established, a rule is to be issued giving notice of the fact, to forbid the interstate movement of live stock from the quarantined area to be prescribed. Regulation 2 provides that cattle of the quarantined area exposed to or infested with ticks, which have been properly dipped twice with a certain solution and in the proper way under the supervision of an inspector of the Bureau, may be moved interstate for any purpose when the inspector certifies them to be free of infection from

splenetic fever; provided that the conditions are such that the cattle may be moved to the free area without exposure to infection. The cattle are to be accompanied by a statement of dipping by the inspector supervising the same at the point of origin, and showing the ownership of the cattle, etc.; and cattle located in areas where tick eradication is being conducted in coöperation with the state authorities, and which are on premises known by the Bureau of Inspection to be free from ticks, may upon inspection and certification at a suitable season by a bureau inspector be moved interstate for any purpose without dipping. One rule issued by the Secretary of Agriculture shows a description of the areas quarantined, which included Echols County, Georgia.

The evidence for the Government at the trial showed that Echols County, where this conspiracy was formed and the overt acts took place, was on the line between Georgia and Florida; that cattle ranged between one state and the other in that region; that the Department of Agriculture had quarantined in interstate transportation the cattle coming from Echols County because of the presence of the cattle tick among them; that under the Act an agreement had been made between the Secretary of Agriculture and the Georgia authorities acting under a Georgia statute, by which the regulations of the Secretary had been accepted as guidance for the state employees engaged in attempting to suppress the disease by requiring tick infested cattle to be dipped; that spray pens and dipping vats had been erected in Echols County at the expense of the United States, to carry out the duties of the Bureau of Animal Industry; that the state law authorized and directed the county and state officers to enforce the dipping of cattle in the counties which were tick infested, by process served in the name of the State, and that the state officers served such processes upon cattle-owners in the county; that the cattle which were

thoroughly dipped were marked with indelible paint; that United States inspectors were not always present at the dipping, but usually supervised what was done to gain a knowledge of what the state officers were doing in enforcing the state law, so that if successful the quarantine against cattle for shipment out of Georgia against Echols County could be discontinued; that this was only one instance of the investigations required under the Act of 1884 by the Bureau of Animal Industry employees to help cattle movements from the southern States to the north in promotion of interstate commerce; that it was while these activities of the employees of the Federal Bureau were progressing that the defendants and others, residents of Echols County, owners of cattle and neighbors, resenting the necessity for dipping, dynamited the spray pens and the dipping vats and assaulted the United States employees of the Bureau, wounded several and killed one by gun shot.

The first objection to the conviction is based on the indictment in that it contains no allegation that the regulations of the Secretary of Agriculture for the suppression and extirpation of the disease among live stock have been certified to the executive authority of the State of Georgia and accepted. The legality and validity of the action of the Secretary of Agriculture and the Bureau of Animal Industry in preventing the spread of disease from one state to another do not depend upon the consent of the state authorities. In the broad provisions of the legislation we have quoted, the authority of the Secretary of Agriculture to direct the employees of the Bureau of Animal Industry to engage in quarantine measures and the inspection of animals suspected of or known to have communicable diseases, is not limited to cases in which there is coöperation between the United States and the state authorities in the suppression of the spread of disease among cattle, the one as between states and the other as

within a state. In order to make the action of both more effective, they may coöperate so that their respective purposes may be more effectively carried out, but the power of each to act in its field does not depend upon the consent of the other. Therefore it is that such an averment as that suggested by the defendants' objection would be superfluous for the indictment of the federal crime, although it would be quite relevant in evidence as one of the circumstances to explain what happened.

It is next objected that there were no allegations in the indictment that the cattle being dipped were the subject matter of interstate commerce or had in any way under the law become subject to the supervision or control of the Secretary of Agriculture, or that what the employees were doing was to prevent the spread of communicable disease among the cattle from one state to another. The charge is of a conspiracy to commit the offense of an assault upon employees of the Bureau of Animal Industry, to prevent the execution of their duties as such, and does not charge the substantive offense itself. The rules of criminal pleading do not require the same degree of detail in an indictment for conspiracy in stating the object of the conspiracy as if it were one charging the substantive offense. *Williamson v. United States*, 207 U. S. 425, 447; *Wolf v. United States*, 283 Fed. 885; *Foster v. United States*, 256 Fed. 207. Compare *Ledbetter v. United States*, 170 U. S. 606, 612; *Connors v. United States*, 158 U. S. 408, 411; *Armour Packing Co. v. United States*, 209 U. S. 56, 84.

The assaults upon the employees of the Bureau of Animal Industry and the interference with their duties were described in the indictment as having to do with the inspection of suspected cattle and the supervision of their dipping. As their duties in connection with suspected and diseased cattle were described in the statute as imposed for the purpose of preventing the spread of con-

tagious cattle disease from one state to another, it is sufficient certainty to a common intent to describe generally that they were performing their duties under the statute in the supervision and dipping of cattle, without further definition.

It is finally urged against this conviction that the statute of 1884, *supra*, is unconstitutional in that Congress had no power to make it a duty of a federal employee to dip cattle and suppress disease among cattle within a State; that such power is vested in the Legislature of the State under the reservations of the Tenth Amendment to the Federal Constitution; and that such legislation by Congress can not be sustained as a regulation of interstate commerce, because it is not confined to interstate commerce and the cattle treated were not in interstate commerce.

It is very evident from the Act of 1884 and the subsequent legislation and the regulations issued under them that everything authorized to be done was expressly intended to prevent the spread of disease from one State to another by contagion, which of course means by the passage of diseased cattle from one state to another. This is interstate commerce. The quarantine provided for was to stop and regulate such interstate commerce until it could be safely carried on. Not until suitable inspection by the federal authorities and treatment prescribed for dipping of the cattle could the cattle be certainly rid of the ticks and splenetic fever and prevented from being a dangerous source of contagion in the state into which they were going. The duties of the employees of the Bureau of Animal Industry here interfered with were all part of the measure of quarantine reasonably adapted to prevent the spread of contagion in and by interstate commerce.

The requirement of dipping was a reasonable condition of allowing cattle from a suspected district to pass

into another state, and the provision of dipping vats and other means of complying with this requirement in a border county by the United States, and the supervision of such dipping by federal employees and, indeed, the dipping itself by them, were conveniences promoting interstate commerce where quarantine was necessary. There is no evidence that federal employees took part in enforcing dipping of all cattle of the county. That was done by state officers under the state law.

But it is said that these cattle do not appear to have been intended to be transported by rail or boat from one state to another and this only is interstate commerce in cattle under the Constitution. They were on the line between the two States. To drive them across the line would be interstate commerce, and the Act of 1905 expressly prohibits driving them on foot when carrying contagion. It is argued, however, that when the cattle only range across the line between the States and are not transported or driven, their passage is not interstate commerce. We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states, made possible by the failure of owners to restrict their ranging and is due, therefore, to the will of their owners.

More than this, it is established by *United States v. Ferger*, 250 U. S. 199, that the authority of Congress over interstate commerce extends to dealing with and preventing burdens to that commerce and the spread of disease from one state to another by such cattle ranging would clearly be such a burden, if it were not to be regarded as commerce itself, and is therefore properly within the congressional inhibition. *Stafford v. Wallace*, 258 U. S. 495.

Judgment affirmed.

OLD COLONY TRUST COMPANY *v.* CITY OF
SEATTLE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON.

No. 194. Argued March 5, 1926.—Decided June 1, 1926.

1. In a suit in the District Court to enjoin distraint of property to satisfy taxes or for subrogation to a tax lien on other property, the effect of payment of the taxes under protest and alleged coercion, before dismissal of the bill for want of jurisdiction, and the effect of a subsequent judgment in another suit, are questions relating to the merits and cannot be considered as grounds for dismissing a jurisdictional appeal. P. 429.
2. In virtue of the Eleventh Amendment, a federal district court has no jurisdiction over a suit by a private party against a State. P. 430.
3. A bill against state tax-collecting agents to enjoin, not the collection, but a wrongful and abusive use of the process of collecting, state taxes, is not a suit against the State. P. 430.

Reversed.

APPEAL from a judgment of the District Court dismissing the suit for want of jurisdiction. The appellant, as trustee for bonds secured on street railway property, sued the City of Seattle, The County of King, W. W. Shields, as Treasurer of King County, and Matt W. Starwich, as Sheriff of King County, to enjoin wrongful and inequitable distraint of that property for collection of taxes.

Messrs. James B. Howe, Hugh A. Tait, and Edgar L. Crider for appellant, submitted.

Messrs. Howard A. Hanson and George A. Meagher, with whom *Messrs. Ewing D. Colvin and Thomas J. L. Kennedy* were on the brief, for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

In the beginning of the year 1919 the Puget Sound Power & Light Company owned and was operating two public utilities in the City of Seattle—one a power and lighting system and the other a street railway system. It still owns and operates the power and lighting system, and the Old Colony Trust Company is the trustee in a mortgage which was given thereon in 1921 to secure a large issue of bonds still outstanding.

The City of Seattle now owns and operates the street railway system. The transfer from the Puget Sound Company to the city was effected March 31, 1919, under a contract between them entered into six weeks before. Anticipating that the system would be taxed for that year by reason of the company's ownership in the early months, they stipulated in the contract, and again in the deed of transfer, that "state, county and municipal taxes" laid on the property for 1919 should be borne and paid by them in proportions conforming to their respective periods of possession during the year. On that basis the company became obligated to pay one-fourth and the city three-fourths.

Shortly after the transfer, state, county, and municipal taxes aggregating over \$400,000 were laid on the property for the year 1919. Of that amount over \$179,000 represented taxes imposed by the city. The taxes became a lien on the property March 15, 1919, and were listed against the company in the tax records by reason of its ownership on that date. The county treasurer was to collect the taxes and pay the money over to the State, county, and city in definite proportions. If it became necessary to collect through distraint and sale that was to be done through the sheriff.

When the taxes became due the city refused to pay any part of them; and the county treasurer refused to receive

from the company the part allotted to it by the contract and deed of transfer, and also refused to receive from it the whole of the state and county taxes unless it also paid the city taxes. Then, because the company would not accede to paying all, the treasurer caused the sheriff to take steps to collect the whole out of the power and lighting system by distraint and sale.

The present suit was brought in the federal district court by the Old Colony Trust Company, the mortgagee of the power and lighting system, to prevent the threatened distraint and sale of that property to pay the taxes so laid on the street railway property. The bill grounded the jurisdiction on diverse citizenship, the plaintiff being a Massachusetts corporation and the defendants being public corporations and individual citizens of the State of Washington. The original bill was brought when the sheriff was about to distraint the property. Besides setting forth the matters we have stated, it charged that the defendants were acting in concert and collusion to collect out of the mortgaged power and lighting property the taxes which had been laid on the street railway property and made a special lien thereon, and thus to relieve the city from the performance of its obligation under the contract and deed. The principal prayer was that the defendants be enjoined from resorting to the mortgaged property until after appropriate steps were taken to collect the taxes out of the property on which they were laid and were a lien. There was also a prayer for an interlocutory injunction. After the bill was filed the sheriff distrained the mortgaged property, as before threatened, and gave public notice of intended sale. This was set up by the court's leave in a supplemental bill, which repeated the prayers of the original bill and prayed further that the plaintiff, if coerced by the threatened sale into paying the taxes, be accorded the benefit of the lien on the street railway property.

The defendants appeared and moved that the two bills—original and supplemental—be dismissed for want of jurisdiction of the subject matter and want of equity, both said to be apparent on the face of the bills. After a hearing on the prayer for an interlocutory injunction and the motion to dismiss, the prayer for the injunction was refused; and three weeks later a decree was entered dismissing the bills for want of jurisdiction. The court allowed a direct appeal to this Court, and also certified that the sole ground of the dismissal was that the suit was, in effect, a suit against the State and therefore not cognizable in a federal district court. The statute in force when the appeal was taken limits the consideration here to the jurisdictional question shown in the certificate.

The defendants ask that the appeal be dismissed on two grounds in support of which they make a showing by affidavits. One ground is that the taxes have been paid and that this has put an end to the effort to collect them from the mortgaged property. The showing is that the taxes were paid by the mortgagor almost three weeks prior to the decree of dismissal. The plaintiff makes a counter showing that the payment was made by it and the mortgagor acting together; that they were coerced into this by an impending sale which the court refused to restrain; and that they at the time not only protested that the distraint and intended sale were arbitrary and an abusive use of legal process but reserved all their legal and equitable rights. Obviously, the fact of payment and its legal effect pertain to the merits and cannot be considered on this jurisdictional appeal. The other ground is that since the appeal was taken a decree has been rendered in another suit between the mortgagor and some or all of the defendants which determined the questions relating to these taxes. That decree may have a bearing on the merits, but affords no ground for dismissing this appeal. *Illinois Central R. R. Co. v. Adams,*

180 U. S. 28, 31; *Male v. Atchison, Topeka & Santa Fe Ry. Co.*, 240 U. S. 97, 99.

We come then to the question whether the suit was in effect a suit against the State. If it was, the court below was forbidden by the Eleventh Amendment to the Constitution to take jurisdiction of it; otherwise the jurisdiction was plain.

The bills did not name the State as a defendant; nor did they complain of any act or omission by it, or seek any relief against it. They did show that some of the taxes were state taxes and when collected were to be paid over to the State. But they were not directed against the collection of the taxes. On the contrary, they distinctly treated the taxes as valid and collectible. The complaint was that those who were attempting the collection were wrongfully pursuing a course which was so much in violation of the rights of the plaintiff as to entitle it to an injunction—not against collection, but against that course of action. On this point the bills alleged that the street railway property on which the taxes were laid and were a special lien was readily available and amply sufficient to satisfy them; that the city in acquiring that property had engaged to pay three-fourths of them; and that with knowledge of these matters the defendants wrongfully and collusively entered into an arrangement to refrain from collecting any part of the taxes out of the street railway property or from the city and to collect them out of the power and lighting property which was mortgaged to the plaintiff; and that the distraint and threatened sale were in pursuance of that arrangement and intended to relieve the city from its obligation through a sacrifice of the plaintiff's mortgage security. In short, the charge was that the defendants were wrongfully and abusively using the process of collection for a purpose and in a mode at variance with applicable legal and equitable principles and hurtful to the plaintiff.

We think it apparent from this review of the bills that the suit was not in name or in effect a suit against the State, but only a suit against state agents to restrain them from wrongful acts threatened and attempted under color of their agency.

The test to be applied is illustrated in *Hopkins v. Clemson College*, 221 U. S. 636. There a state agent when sued on account of a wrongful act done under color of the agency advanced the contention that the State was a necessary party and that its immunity from suit extended to the agent. But this Court, on a full review of prior decisions, rejected the contention and said (p. 642):

“But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State’s citizens. To grant them such immunity would be to create a privileged class free from liability from wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law.”

In *Poindexter v. Greenhow*, 114 U. S. 270, 285, *et seq.*, the question presented was whether a suit against a tax collector to recover specific property which he had distrained for a state tax and was proceeding to sell was in substance a suit against the State. Prior to the distraint the plaintiff had tendered in payment of the tax certain coupons from state bonds, and the collector had rejected them as not receivable for the tax. The plaintiff stood on the tender and after the distraint brought the suit on the theory that the tender was valid and the subsequent distraint wrongful. This Court held that the suit was not against the State in form or in substance, but

against the collector for his personal wrong. In the opinion it was said (pp. 293, 299):

“Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the state. . . . His [the plaintiff’s] tender, as we have already seen, was equivalent to payment so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrongdoer the officer who seizes his property to enforce it.”

Other cases well in point, although not relating to taxes, are *Philadelphia Company v. Stimson*, 223 U. S. 605, 619; *Johnson v. Lankford*, 245 U. S. 541.

The dismissal below for want of jurisdiction was error.

Decree reversed.

MR. JUSTICE HOLMES did not participate in the consideration or decision of this case.

UNITED STATES *v.* CANDELARIA ET AL.

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

No. 208. Argued November 18, 19, 1925.—Decided June 1, 1926.

1. The Pueblo Indian tribes in New Mexico are dependent communities under the protective care of the United States, and their lands, though held by title in fee simple, are subject to the legislation of Congress enacted in the exercise of the Government’s guardianship. P. 439.
2. The purpose of Congress to subject the lands of these Indians to such legislation has been made certain in various ways, including an act annulling and forbidding taxation of lands by the Territory

- of New Mexico and provision of a special attorney to represent the Pueblo Indians and protect their interests. P. 440.
3. The Pueblos are "Indian tribes" within the meaning of Rev. Stats, § 2116, (adopted in 1834,) providing that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution," and within the meaning of the Act of 1851, extending this provision, with others "regulating trade and intercourse with the Indian tribes," to "the Indian tribes" of New Mexico. P. 441.
 4. Under the Spanish and Mexican law, Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. P. 442.
 5. Under territorial laws, sanctioned by Congress, a Pueblo community in New Mexico is a juristic person with capacity to sue and defend with respect to its lands. P. 442.
 6. But judgments against a Pueblo tribe in New Mexico, in suits brought by it to quiet title to its lands—one in a territorial court concluded in the state courts after statehood, the other in the federal court,—did not bar the United States from afterwards maintaining a suit to quiet the title to the same lands against the same defendants, on behalf of the Indians, where the United States was not a party to the former litigation and the attorney therein representing the Indians did so without the United States' authority. P. 443.
 7. A state court of New Mexico has jurisdiction to enter a judgment in an action by an Indian Pueblo against opposing claimants concerning title to land, which would be conclusive on the United States if it authorized the bringing and prosecution of the suit. P. 444.
 8. The question whether such a judgment disregarded an official survey of a Spanish or Mexican grant confirmed by Congress to the Indians, relates to the merits and not to the jurisdiction of the state court. P. 444.

RESPONSE to questions certified by the Circuit Court of Appeals, upon an appeal from a decree of the District Court dismissing a bill brought by the United States to quiet the title to certain lands in the Indian Pueblo of Laguna.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* were on the brief, for the United States.

The United States possesses the power to control the Pueblo Indians of New Mexico with respect to their lands. *United States v. Sandoval*, 231 U. S. 28.

What was decided in the *Santa Rosa Case*, 249 U. S. 110, was that that Pueblo had capacity to institute and maintain an action to protect its lands from unauthorized encroachments of executive officers. The action which the bill in that case asserted was threatened, was not an exercise of guardianship, but of confiscation. Cf. *United States v. Mille Lac Chippewas*, 229 U. S. 498.

The United States is suing to vindicate its policy with respect to the Indians and to discharge its obligations to them—a distinct governmental interest. As Congress owes the Pueblo Indians the duty of protection, and of safeguarding their rights, when it acts to discharge those obligations it proceeds in its own right and to vindicate its own policy. This interest is entirely distinct from any property interest of the Indians for whom it acts, and indeed a property or pecuniary interest in the United States is not a prerequisite to give it capacity to sue. *Heckman v. United States*, 224 U. S. 413. We submit that there is no greater need for protection of the Cherokees than there is for the Pueblo Indians of New Mexico, and that what was said in the *Heckman Case* is equally applicable to their situation. And the power of the Government to protect does not fall short of the need. *Sunderland v. United States*, 266 U. S. 226.

That the Pueblo of Laguna has fee simple title does not remove it from governmental supervision. *Brader v. James*, 246 U. S. 88; *United States v. Osage County*, 251 U. S. 128. It is enough if there be an interest or concern arising out of an obligation to those for whose benefit the

suits are brought. *United States v. New Orleans Pac. Ry. Co.*, 248 U. S. 507; *Alaska Pacific Fisheries v. United States*, 248 U. S. 78; *Cramer v. United States*, 261 U. S. 219.

Since the United States was not a party to the previous suits brought by the Pueblo of Laguna, it can not be bound thereby, especially since the right which it seeks to vindicate is entirely distinct from the property rights of the Pueblo, the subject matter of the previous suits. *United States v. Moser*, 266 U. S. 236; *Bowling v. United States*, 233 U. S. 528; *Privett v. United States*, 256 U. S. 201; *Sunderland v. United States*, 266 U. S. 226.

The answer to Question I disposes of Question II, unless the latter be considered independently of the former. In that event, we concede that the state court did have jurisdiction to enter the judgment specified, but do not concede it to have a binding effect as to the United States.

Mr. Frank W. Clancy for defendants.

The former adjudications in the state court and in the United States District Court bar the present suit. The real question here to be considered, is as to the right of the Pueblo of Laguna to bring a suit concerning its claimed ownership of land. The answer to this is clearly given by the opinion in *Lane v. Santa Rosa*, 249 U. S. 110. If the Pueblo has power to bring a suit it is absurd to say that the decision of that suit is a nullity if the United States is not a party, as is now contended by the Government. If that were sound, a Pueblo, with its right to bring a suit, declared unmistakably by this Court, could gain nothing even if successful. Clearly, if the Pueblo has power to sue, it must be bound by the result as must be its adversary.

It is clear that the subject-matter of the suits is the same and the relief sought is the same, which is to quiet title to the land in the Pueblo of Laguna. It is now

argued that, while the Pueblo had a right to bring its suit, and its interest which entitled it to maintain the two previous suits was its property interest derived from the title by patent from the United States, yet the results of the previous suits cannot bar the United States in the present case because the interests of the United States and of the Pueblo are different and distinct, and there can be no privity between them. The distinction is difficult to understand; but it would seem that the contention is that the interest of the Pueblo which justified the bringing of its suits in its own name, was its claimed interest in the same land which is the subject matter of this, the third suit, while the interest of the United States is in the discharge of its assumed duty to protect the rights of the Pueblo of Laguna, and that this interest is different from the interest of the Pueblo. As applied to this case, this is a distinction without a difference, and is based upon the mere words by which counsel undertake to state their conception of the duty of the United States to the Indians, and upon nothing else. The conceded fact remains that the state court had jurisdiction to enter its judgment, but it is contended that the United States is not affected by the judgment and now must be allowed to re-litigate the same matters which were considered and passed upon by the state court acting within its undoubted jurisdiction. No case can be found to which can be better applied the doctrine of "*interest republicae ut sit finis litium.*"

The duty of the United States, if there is any, to the Pueblo of Laguna, is to protect the claimed right of the Pueblo to land in the Paguete Purchase, and its interest is as to the Pueblo's right to that land, which is identical with what was litigated by the Pueblo in the state court, within its jurisdiction.

As to the question of the binding effect of the former judgment on the right to prosecute the present case, there

are authorities which will be found interesting to say the least. *People v. Smith*, 93 Cal. 490; *People v. Beaudry*, 27 Pac. 610; *Foust v. Huntington*, 15 N. E. 337; *Lichty v. Lewis*, 63 Fed. 535; *Featherson v. Turnpike Co.*, 24 N. Y. S. 603; *Palmer v. Ins. Co.*, 30 N. Y. S. 1044; *Tausiede v. Jumel*, 30 N. E. 1000; *Carmody v. Hanick*, 85 Mo. App. 659; *M'Mullen v. Brown*, 2 Hill Ch. 457.

It is submitted that the interest of the Pueblo of Laguna and the interest of the United States in the subject matter of these suits, are identical, and the effort to distinguish between them, may properly, without discourtesy, be characterized as but little, if any, better than camouflage.

This court has decided that it has no jurisdiction of this controversy. *Pueblo of Laguna v. Candelaria*, 257 U. S. 623.

It being clearly established by the decision in *Lane v. Santa Rosa*, 249 U. S. 110, that the Pueblo has capacity to sue, an adverse decision is conclusive as to all matters adjudicated in such a suit or which might properly be adjudicated therein.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

In 1922 the United States brought a suit in the federal district court for New Mexico against José Candelaria and others to quiet in the Indian Pueblo of Laguna the title to certain lands alleged to belong to the pueblo in virtue of a grant from Spain, its recognition by Mexico and a confirmation and patent by the United States. The suit was brought on the theory that these Indians are wards of the United States and that it therefore has authority and is under a duty to protect them in the ownership and enjoyment of their lands. The defendants were alleged to be asserting a false claim to the lands and to be occupying

and fencing the same to the exclusion of the Indians. In their answer the defendants denied the wardship of the United States and also set up in bar two decrees rendered in prior suits brought against them by the pueblo to quiet the title to the same lands. One suit was described as begun in 1910 in the territorial court and transferred when New Mexico became a State to the succeeding state court, where on final hearing a decree was given for the defendants on the merits. The other was described as brought in 1916 in the federal district court and resulting in a decree of dismissal on the grounds that the complaint disclosed that the matters presented "were *res judicata* and that there was no federal question in the case." In the replication the United States alleged that it was not a party to either of the prior suits; that it neither authorized the bringing of them nor was represented by the attorney who appeared for the pueblo; and therefore that it was not bound by the decrees.

On the case thus presented the court held that the decrees operated to bar the prosecution of the present suit by the United States, and on that ground the bill was dismissed. An appeal was taken to the Circuit Court of Appeals, which after outlining the case as just stated, has certified to this Court the following questions:

1. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States?

2. Did the state court of New Mexico have jurisdiction to enter a judgment which would be *res judicata* as to

the United States, in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an act of Congress confirming such grant to said Pueblo Indians?

The status of the Pueblo Indians and their lands, and the relation of the United States to both, were considered in *United States v. Sandoval*, 231 U. S. 28. We there said (pp. 45-47):

“Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. . . . ‘It is for that body [Congress] and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.’

“Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts.

“As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of

New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling."

And also (p. 48): "We are not unmindful that in *United States v. Joseph*, 94 U. S. 614, there are some observations not in accord with what is here said of these Indians, but as that case did not turn upon the power of Congress over them or their property, but upon the interpretation and purpose of a statute not nearly so comprehensive as the legislation now before us, and as the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long continued action of the legislative and executive departments, that case cannot be regarded as holding that these Indians or their lands are beyond the range of Congressional power under the Constitution."

While we recognized in that case that the Indians of each pueblo, collectively as a community, have a fee simple title to the lands of the pueblo (other than such as are occupied under executive orders), we held that their lands, like the tribal lands of other Indians owned in fee under patents from the United States, are "subject to the legislation of Congress enacted in the exercise of the Government's guardianship" over Indian tribes and their property.

The purpose of Congress to subject the Pueblo Indians and their lands to that legislation, if not made certain before the decision in the *Joseph Case*, was made so in various ways thereafter. Two manifestations of it are significant. A decision of the territorial court in 1904 holding their lands taxable, 12 N. M. 139, was promptly

followed by a congressional enactment annulling the taxes already levied and forbidding further levies, c. 1479, 33 Stat. 1069; and a decision of that court in 1907 construing the statute which prohibits the sale of liquor to Indians and its introduction into the Indian country as not including these Indians or their lands, 14 N. M. 1, was shortly followed by an enactment declaring that the statute should be construed as including both, c. 310, 36 Stat. 560. It also is of significance that in 1898 Congress provided for the employment by the Secretary of the Interior of a special attorney to represent the Pueblo Indians and protect their interests, c. 545, 30 Stat. 594, and that from that time to this a special attorney has been so employed and has been paid out of appropriations made by Congress for the purpose, c. 42, 42 Stat. 1194.

Many provisions have been enacted by Congress—some general and others special—to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges. One of these provisions, now embodied in section 2116 of the Revised Statutes, declares: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." This provision was originally adopted in 1834, c. 161, sec. 12, 4 Stat. 730, and, with others "regulating trade and intercourse with the Indian tribes," was extended over "the Indian tribes" of New Mexico in 1851, c. 14, sec. 7, 9 Stat. 587.

While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government,

always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U. S. 261, 266. In that sense the term easily includes Pueblo Indians.

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. See *Chouteau v. Molony*, 16 How. 203, 237. Text writers have differed about the situation under the Mexican law; but in *United States v. Pico*, 5 Wall. 536, 540, this Court, speaking through Mr. Justice Field, who was specially informed on the subject, expressly recognized that under the laws of Mexico the government "extended a special guardianship" over Indian pueblos and that a conveyance of pueblo lands to be effective must be "under the supervision and with the approval" of designated authorities. And this was the ruling in *Sunol v. Hepburn*, 1 Cal. 254, 273, *et seq.* Thus it appears that Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.

It was settled in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, that under territorial laws enacted with congressional sanction each pueblo in New Mexico—meaning the Indians comprising the community—became a juristic person and enabled to sue and defend in respect of

its lands. But in that case there was no occasion and no attempt to determine whether or to what extent the United States would be bound by the outcome of such a litigation where it was not a party. That was a suit brought by the Pueblo of Santa Rosa to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from carrying out what was alleged to be an unauthorized purpose and attempt to dispose of the Pueblo's lands as public lands of the United States. Arizona was formed from part of New Mexico and when in that way the pueblo came to be in the new territory it retained its juristic status. Beyond establishing that status and recognizing that the wardship of the Indians was not an obstacle to the suit the case is without bearing here. In the opinion it was said: "The Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit, we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this Court, of which *Lone Wolf v. Hitchcock*, 187 U. S. 553 is an illustration."

With this explanation of the status of the Pueblo Indians and their lands, and of the relation of the United States to both, we come to answer the questions propounded in the certificate.

To the first question we answer that the United States is not barred. Our reasons will be stated. The Indians of the pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any-wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an inter-

est in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree. This Court has said in dealing with a like situation: "It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." *Bowling and Miami Improvement Co. v. United States*, 233 U. S. 528, 534. And that ruling has been recognized and given effect in other cases. *Privett v. United States*, 256 U. S. 201, 204; *Sunderland v. United States*, 266 U. S. 226, 232.

But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 486; *Lovejoy v. Murray*, 3 Wall. 1, 18; *Claffin v. Fletcher*, 7 Fed. 851, 852; *Maloy v. Duden*, 86 Fed. 402, 404; *James v. Germania Iron Co.*, 107 Fed. 597, 613.

Coming to the second question, we eliminate so much of it as refers to a possible disregard of a survey made by the United States, for that would have no bearing on the court's jurisdiction or the binding effect of the judgment or decree, but would present only a question of whether error was committed in the course of exercising jurisdiction. With that eliminated, our answer to the question is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree. Whether the

outcome would be conclusive on the United States is sufficiently shown by our answer to the first question.

Questions answered as stated in this opinion.

KANSAS CITY TERMINAL RAILWAY COMPANY
ET AL. v. CENTRAL UNION TRUST COMPANY
OF NEW YORK ET AL.

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

No. 265. Argued April 23, 1926.—Decided June 1, 1926.

1. Where the property of a railroad corporation, to be sold under foreclosure, is so great as to render coöperation between bondholders and stockholders essential in order to secure a bidder and prevent undue sacrifice of their interests, they may enter into a fair and open reorganization arrangement to that end. P. 453.
2. But such arrangements are invalid if they recognize and preserve the interests of stockholders at the expense of the prior rights of the secured or unsecured creditors of the corporation. *Nor. Pac. Ry. v. Boyd*, 228 U. S. 482. *Id.*
3. A plan of reorganization, to bind the unsecured creditor, must "give precedence to," i. e., recognize the superior importance of, the creditor's claim over any interest of the stockholder in the old company. P. 455.
4. Subject to the qualifications that the primary right of unsecured creditors to the assets of the insolvent corporation, remaining after lienholders are satisfied, must be adequately protected, and that to each one of them must be given such opportunity as the circumstances permit to secure the full enjoyment of this preference, a plan of reorganization which offers them securities of the same grade as those offered the stockholders, but greater in amount, will be fair, and bind the unsecured creditors, if, in the opinion of the court, it tenders to such creditors all that could be reasonably expected under all the existing circumstances. P. 455.
5. Where the same grade of securities is offered both to unsecured creditors and to stockholders, the difference being that the stockholders are called upon to pay an assessment, or a relatively greater assessment than that asked of creditors, it may never-

theless be fair and binding, if the court is of the opinion that it tenders them all that could reasonably be expected under all the existing circumstances; but the prior rights of creditors, as above pointed out, must be recognized; and assessments, whenever demanded, must be adjusted to the purpose of according to the creditor his full right of priority against the corporate assets, as far as possible in the existing circumstances. P. 456.

RESPONSE to questions certified by the Circuit Court of Appeals on an appeal from a decree of the District Court in a railway foreclosure suit. See 294 Fed. 32.

Mr. Samuel W. Sawyer, with whom *Messrs. Edward J. White, N. H. Loomis, Bruce Scott, and Gardiner Lathrop* were on the brief, for appellants.

The ultimate question is whether the general creditor is entitled to retain in the new corporation his priority over the old stockholder, or must be content with what the chancellor may find to be "fair" treatment; whether his rights and status are to be determined according to a definite principle, or according to the personal conceptions of individual judges.

The case of *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, recognizes the practical necessity of permitting stockholders to participate in a railroad re-organization, provided the unsecured creditors are also permitted to participate, and provided the priority of creditors over stockholders is not impaired. The court says that the creditor's interest "can be preserved by the issuance on equitable terms of income bonds or preferred stock." While the court does not say that the method suggested is the only method, it is implied that either the method suggested or some substantial equivalent is essential. This Court, moreover, in *Louisville Trust Co. v. Louisville Ry. Co.*, 174 U. S. 674, which preceded the *Boyd Case*, plainly indicated that, if any interest of the mortgagor is preserved after foreclosure, the "prior rights" of general creditors must necessarily be secured and preserved and

“any arrangements of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors, comes within judicial denunciation.”

The suggestion of the court in the *Boyd Case* that general creditors need not be paid in cash is really a relaxation of the general principle of equity that the property of a corporation in the hands of a voluntary transferee, or of the mortgagor purchasing at its own sale, is still subject to all claims existing against it before the transfer. This indulgence to the reorganizer grows out of the practical impossibility of selling railroad properties for cash, the public interest in their successful financing and operation, and the practical need of securing co-operation, instead of conflict, between the bondholder and the stockholder. It is analogous to the judicial rules regarding preferential claims for operating expenses and the issuance of receiver's certificates to insure continued operation of railroads. Like them, it must not be extended beyond the reason for its existence, nor be allowed to degenerate into a mere phrase to be applied according to the individual whim of the chancellor. The *Boyd Case* emphatically declared that the question whether any provision must be made for the creditor must be determined by a “fixed principle.” Equally, the question what provision must be made for the creditor must be determined by a fixed principle. The only fixed principle which is consonant with the spirit of the *Boyd Case* is suggested by the language of that case—the issuance of securities to the general creditor which will preserve the normal relation between him and the stockholder of the old company. It is difficult, if not impossible, to formulate any other fixed principle which is not purely arbitrary. This principle has the advantage of enabling re-organization managers to know what they can do and creditors to know what their rights are.

It is thoroughly practical. It was successfully applied as early as 1882 in the Toledo, Peoria and Warsaw reorganization (9 Fed. 738) and has aided two of the largest and most successful railroad reorganizations of recent years—the Missouri Pacific (280 Fed. 38) and the Rock Island (284 Fed. 945).

The only offers to creditors which have been upheld by any of the Circuit Courts of Appeals since the *Boyd Case* upon direct attack are the offers in the *Missouri Pacific Case* and the *Rock Island Case*, both of which gave the creditor preferred stock to the full amount of his claim.

These conclusions require negative answers to the questions certified.

See *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; *Kansas City Sou. Ry. Co. v. Guardian Trust Co.*, 240 U. S. 166; *Pierce v. United States*, 255 U. S. 398; *C. R. I. & P. R. Co. v. Howard*, 7 Wall. 392; *Louisville Trust Co. v. Louisville R. Co.*, 174 U. S. 674; *Canada Sou. Ry. Co. v. Gebhard*, 109 U. S. 527; *Hancock v. Toledo R. Co.*, 9 Fed. 738; *Paton v. Nor. Pac. Ry. Co.*, 85 Fed. 838; *Georgia Ry. Co. v. Paul*, 93 Fed. 878; *Farmers L. & T. Co. v. M. I. & N. Ry. Co.*, 21 Fed. 264; *C. R. & C. R. Co. v. Evans*, 66 Fed. 809; *St. Louis Trust Co. v. Des Moines Ry. Co.*, 101 Fed. 632; *Farmers L. & T. Co. v. Louisville Ry. Co.*, 103 Fed. 110; *Wenger v. Chicago R. Co.*, 114 Fed. 34; *Central R. Co. v. Farmers L. & T. Co.*, 114 Fed. 263; *Keech v. Stowe-Fuller Co.*, 205 Fed. 887; *Western Union Co. v. U. S. & Mexican Trust Co.*, 221 Fed. 545; *Howard v. Maxwell Motor Co.*, 269 Fed. 292; *Walsh Timber Co. v. Missouri Pac. Ry. Co.*, 280 Fed. 38; *Phipps v. C. R. I. & P. Ry. Co.*, 284 Fed. 945, 261 U. S. 611, 262 U. S. 762; *Mountain States Power Co. v. Jordan Lumber Co.*, 293 Fed. 502; *St. Louis, S. F. Ry. Co. v. McElvain*, 253 Fed. 123; *North Amer. Co. v. St. Louis & S. F. R. Co.*, 288 Fed. 612; *Guaranty Trust Co. v. Missouri Pac. Ry.*

Co., 238 Fed. 812; *Wabash Ry. Co. v. Marshall*, 224 Mich. 593; *Fontain v. Ravenel*, 17 How. 369; *Rees v. Watertown*, 19 Wall. 107.

Mr. Joseph M. Bryson, with whom *Messrs. Albert Rathbone, Arthur H. Van Brunt, Nicholas Kelley, Edward Cornell, Edward C. Eliot, H. C. McCollom, Edward H. Blanc, Allen C. Orrick, W. W. Miller, Charles W. Bates, George H. Williams, Roberts Walker, Perry D. Trafford*, and *George C. Hitchcock* were on the brief, for appellees.

The test of a fair and reasonable offer under the doctrine of the *Boyd Case* is whether the value of the offer made to creditors adequately represents, in the light of all the facts in the case, their proportionate interest in the reorganized property. The character of the securities offered to creditors is immaterial. *Louisville Trust Co. v. Louisville etc. Ry.*, 174 U. S. 674; *Nor. Pac. Ry. v. Boyd*, 228 U. S. 482; *Kansas City Sou. Ry. v. Guardian Trust Co.*, 240 U. S. 166; *Western Union Tel. Co. v. United States*, 221 Fed. 545; *Phipps v. C. R. I. & P. Ry.*, 284 Fed. 945; *Mountain States Power Co. v. Jordan Lumber Co.*, 293 Fed. 502; *Howard v. Maxwell Motor Co.*, 269 Fed. 292; *Walsh Tie & Timber Co. v. Missouri Pac. Ry.*, 280 Fed. 38; *Wabash Ry. v. Marshall*, 224 Mich. 593.

There is no logical basis for the contention that the character of the securities offered to creditors is the test of a fair offer. *Walsh Tie & Timber Co. v. Missouri Pac. Ry.*, *supra*.

There is no basis in the decisions or in the principles of equity for the contention that this Court should establish a fixed formula by which all cases of this nature can be decided. *Howard v. Maxwell Motor Co.*, *supra*; *Mountain States Power Co. v. Jordan Lumber Co.*, *supra*.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

This cause is here on certificate from the United States Circuit Court of Appeals, Eighth Circuit. Jud. Code § 239. The relevant facts and the submitted questions follow.

In a proceeding by creditors, the United States District Court, Eastern District of Missouri, appointed a receiver for the Missouri, Kansas & Texas Railway Company. Appellees asked foreclosure of liens upon the whole property, and procured an order of sale. According to a plan for purchase and reorganization, with definite offers to lien creditors, unsecured creditors and stockholders, Blumenthal and another bid in the assets and then assigned the rights so acquired to the Missouri-Kansas-Texas Railroad Company, a newly-organized Missouri corporation.

Pending entry of the final decree, appellants asserted preferential rights. These were denied, and they were held to be unsecured contract creditors. *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 294 Fed. 32. Thereupon, they challenged the reorganization plan as unfair to them and unduly preferential to stockholders of the insolvent corporation. The trial court overruled their objection; the matter went to the Circuit Court of Appeals and it has asked for instruction.

The reorganization scheme required the issuance of four classes of securities by the new company—

- (1) Prior lien mortgage bonds (authorized, \$250,000,000);
- (2) Cumulative adjustment, or income, bonds (authorized, \$100,000,000), secured by mortgage as to principal;
- (3) Preferred stock (authorized, \$200,000,000);
- (4) Common stock, without par value (authorized, 2,500,000 shares).

Specified amounts of each of these were reserved for future use by the new company. Some of the prior lien

bonds bore interest at four, some at five and some at six per cent.

New securites were offered to the holders of seventeen separate issues of outstanding bonds of the old company and its various subsidiaries, secured by mortgage, and one issue of notes, secured by the pledge of mortgage bonds. In some cases, but not all, cash was offered to holders of these secured claims in addition to the new securities. Always the par amount of the new securites offered (taking the new non-par-value common stock at \$100 per share) plus the cash offered, if any, equalled, but never exceeded, the principal amount of the old securities, in respect of which the offer was made, plus interest to January 1, 1922.

Of these eighteen outstanding issues, five were offered new prior lien bonds and cash; one was offered new prior lien bonds; five were offered new prior lien bonds and new adjustment bonds; three were offered new prior lien bonds, new adjustment bonds and new preferred stock; one was offered new adjustment bonds and new preferred stock; three were offered new adjustment bonds, new preferred stock and new common stock.

In all cases the new prior lien bonds and the new adjustment bonds (whether offered to secured creditors, unsecured creditors or stockholders) were to bear interest from January 1, 1922.

As to stockholders and unsecured creditors, it was provided—(1) Preferred stockholders might receive \$14 in prior lien bonds (bearing six per cent.,) \$6 in adjustment bonds and one share of common stock in the new company, upon payment of \$20 for each \$100 share of old stock. (2) Common stockholders might receive \$17.50 in six per cent. prior lien mortgage bonds, \$7.50 in adjustment bonds and one share of common stock, upon payment of \$25 for each \$100 share of old stock. (3) Unsecured creditors were given the choice of two plans:

(a) one-third of a share of preferred stock, \$100 par value, and two-thirds of a share of common stock without par value, for each \$100 of their claims, plus interest to January 1, 1922, (whereas the receiver was appointed and took possession of the property September 27, 1915, foreclosure decree was entered June 30, 1922, offer to creditors was dated July 15, 1922, foreclosure sale was had December 13, 1922, order confirming the sale was entered February 9, 1923, and order approving the master's deed conveying the property to the new company was entered on March 10, 1923); (b) \$14 in prior lien mortgage six per cent. bonds, \$6 in adjustment mortgage bonds and one share of common stock, upon payment of \$18 for each \$100 of their claims.

Appellants maintained below that *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482, and *Louisville Trust Co. v. Louisville Railway Co.*, 174 U. S. 674, require that an offer in a reorganization plan, in order to be fair and binding upon him, must preserve "to the creditor his relative priority over the stockholder. It is not sufficient that he should get a little more than the stockholder. His entire claim must take precedence over any part of the interest of a stockholder. It is not sufficient that he be offered securities of the same grade as the stockholder but a trifle more in amount, or that the stockholder's right to participate be conditioned upon the payment of an assessment."

The questions—

"I. Is a plan of reorganization of a railway company sufficient as to unsecured creditors and binding upon them which does not give precedence to the entire claim of the creditor over any part or interest of a stockholder in the old company?

"II. Is such a plan fair and binding upon such creditors even though they be offered securities of the same grade as the stockholders, the difference being only in the

greater amount offered the creditors, provided the court shall be of the opinion that the offer tenders to such creditors all that could reasonably be expected under all of the existing circumstances?

“ III. Is such offer as to such creditors fair and binding if it consists only of the same grade of securities as offered the stockholders, the difference being that the right of the stockholders to participate is conditioned upon the payment of an assessment or the payment of a relatively greater assessment than that asked of such creditors, provided the court shall be of the opinion that the offer tenders to such creditor all that could reasonably be expected under all of the existing circumstances?”

These questions lack precision, and the accompanying statement of facts fails to reveal the detail of the situation with desirable clearness. There is nothing to show the amount or character of the insolvent company's outstanding securities, or the amount of the unsecured indebtedness, or the probable value of the equity in the property beyond secured debts, or the amount of money deemed necessary to insure successful operation of the new company. The questions, therefore, must be defined and answered with certain qualifications.

Chicago, etc., Railroad Co. v. Howard, 7 Wall. 392; *Louisville Trust Co. v. Louisville Railway Co.*, 174 U. S. 674; and *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482, gave much consideration to the general principles which must control the present cause. These were applied in *Kansas City, etc., Railway Co. v. Guardian Trust Co.*, 240 U. S. 166, and *Pierce v. United States*, 255 U. S. 398.

We accept those opinions as authoritative; and it now may be announced as settled doctrine, that where the value of corporate property to be sold under foreclosure is so great as to render coöperation between bondholders and stockholders essential in order to secure a bidder and

prevent undue sacrifice of their interests, they may enter into a fair and open arrangement to that end. But "no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co. v. Louisville Railway Co.*, pp. 683, 684.

This doctrine is the "fixed principle" according to which *Northern Pacific Railway Co. v. Boyd* (p. 507,) declares the character of reorganization agreements must be determined; and to it there should be rigid adherence. But, as that opinion states, this does not require the impossible and make it necessary always to pay unsecured creditors in cash before stockholders may retain any interest whatever in the reorganized company. By way of illustration it further pointed out, that such creditors can be protected "by the issuance, on equitable terms, of income bonds or preferred stock." And we now add that, when necessary, they may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them

fair opportunity, measured by the existing circumstances, to avail himself of this right.

Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lienholders are satisfied, whether this is present or prospective, for dividends or only for purposes of control. But reasonable adjustments should be encouraged. Practically, it is impossible to sell the property of a great railroad for cash; and, generally, the interests of all parties, including the public, are best served by coöperation between bondholders and stockholders. If creditors decline a fair offer based upon the principles above stated, they are left to protect themselves. After such refusal they cannot attack the reorganization in a court of equity. *Northern Pacific Railway Co. v. Boyd*, p. 508.

Question I, if interpreted strictly and according to the ordinary meaning of the words employed, must be answered in the negative. We assume that to "give precedence" implies recognition of superior importance. As above stated, to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation. But it does not follow that in every reorganization the securities offered to general creditors must be superior in rank or grade to any which stockholders may obtain. It is not impossible to accord to the creditor his superior rights in other ways. Generally, additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them unless stockholders are permitted to contribute and retain an interest sufficiently valuable to move them. In such or similar cases the chancellor may exercise an informed discretion concerning the practical adjustment of the several rights.

Question II is answered in the affirmative, with the qualifications which follow. The primary right of unsecured creditors to the assets of an insolvent corporation

remaining after lienholders are satisfied, must be adequately protected; and to each one of them there must be given such opportunity as the circumstances permit to secure the full enjoyment of this preference.

Question III is also answered in the affirmative, subject to the following qualification. No offer is fair which does not recognize the prior rights of creditors, as above pointed out; but circumstances may justify an offer of different amounts of the same grade of securities to both creditors and stockholders. Whenever assessments are demanded, they must be adjusted with the purpose of according to the creditor his full right of priority against the corporate assets, so far as possible in the existing circumstances.

HOME FURNITURE COMPANY ET AL. v. UNITED STATES ET AL.

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

No. 324. Argued and submitted May 6, 1926.—Decided June 1, 1926.

An order of the Interstate Commerce Commission, made upon petition of two railroad companies, permitting the one to acquire control of the other by stock ownership and leases, with the object of coördinating and improving their operation in connection with another railroad system, is an order relating to transportation, within the meaning of the Act of October 22, 1913; and therefore a suit to set the order aside cannot be brought in a district where neither of the petitioning companies resides. P. 459.

2 Fed. (2d) 765, affirmed.

APPEAL from a decree of the District Court sustaining a plea for the dismissal of a suit to set aside an order of the Interstate Commerce Commission, upon the ground that it was in the wrong venue.

Messrs. Joseph U. Sweeney and Edward C. Wade, Jr., for appellants, submitted.

Solicitor General Mitchell and *Messrs. Blackburn Esterline*, Assistant to the Solicitor General, and *P. J. Farrell* for the United States and Interstate Commerce Commission.

Mr. Joseph P. Blair, with whom *Messrs. William F. Herrin, H. M. Garwood, and J. H. Tallichet* were on the brief, for Southern Pacific Company and El Paso & Southwestern Railroad Company.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Appellants are residents of El Paso, Texas, and there engage in the business of buying and selling furniture. By a bill presented to the United States District Court for the Western District of Texas, they sought annulment of an Interstate Commerce Commission order, which permitted acquisition of control over the Southwestern System by the Southern Pacific Company.

They alleged—

That the Southern Pacific Company is a corporation under the laws of Kentucky, which operates railroads in California, Arizona, New Mexico and other States.

“That defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the States of Arizona, New Mexico and Texas; that said defendant is engaged in the transportation of passengers and property in interstate commerce subject to the Interstate Commerce Act; that defendant is part of what is known as the El Paso & Southwestern Railway System, consisting of the following railroad companies, viz: The El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway

Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamo-gordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tide Water Railway Company, hereinafter, for convenience sake, referred to as the Southwestern System; that all of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies comprising said System are owned directly or indirectly by the El Paso & Southwestern Company, a holding corporation of the State of New Jersey; that of the railway companies comprising said system only the defendant El Paso & Southwestern Railroad Company is engaged in the transportation of passengers and property in interstate commerce, which said company, in addition to operating the lines of railway owned by it, operates under lease all of the existing railways of the remaining companies comprising said system."

That the Southern Pacific Company and the El Paso & Southwestern Railroad Company, on July 1, 1924, petitioned the Interstate Commerce Commission for an order approving the former's proposal to acquire control of the Southwestern System by stock ownership and through leases.

That, on September 30, 1924, the Commission approved the proposal.

That they will be injured, by the proposed control, through loss of opportunity to route their goods over either of two competing systems, and the depreciation of service and increase of rates which will naturally result from suppression of competition. The gravamen is that transportation facilities, service and charges will be adversely affected by the union of the two systems under one management.

Appellees denied jurisdiction of the court and asked dismissal of the bill. They set up, by plea—

“That the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if the suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said districts, for the following reasons, to wit:

“Because it affirmatively appears from the face of complainants’ Bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky, having its domicile in said State of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in the State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.”

This plea was sustained January 15, 1925, 2 Fed. (2d) 765, and the cause is here by direct appeal. Act October 22, 1913, c. 32, 38 Stat. 208, 220. Decision of the question at issue must turn upon the proper construction and application of the following provision of that Act, pp. 219, 220—

“The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation

or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

The language of this provision was not happily chosen, but when consideration is given to the situation of the complaining parties here, the gravamen of their bill and the report of the Commission, we think it becomes sufficiently clear that its order has direct relation to transportation, within the meaning of the statute.

The Commission found:

"The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 I. C. C. 455. Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the Santa Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange

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of a large traffic to and from communities served by one but not the other. Better coördination and more efficient and economical operation will follow as to this traffic and as to transcontinental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved."

The challenged order was made upon a petition, and neither party thereto resides within the Western District of Texas. It related to transportation. Consequently, the court below was without jurisdiction. See *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 563. Moreover, the bill alleged no probable direct legal injury to appellants except such as might arise out of changed conditions in respect of transportation to and from the City of El Paso. Accordingly, they had no proper cause of complaint unless the order had definite relation to transportation. *Hines, etc. v United States*, 263 U. S. 143, 148.

The decree of the court below must be

Affirmed.

 EX PARTE BUDER.

 MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF
 MANDAMUS.

—, Original. Motion submitted March 1, 1926.—Denied June 1, 1926.

1. This Court has power to issue a writ of mandamus to compel a lower federal court to allow an appeal to this Court, but will deny leave to file the petition when a right to such an appeal clearly does not exist. P. 463.
2. Under Jud. Code, § 238, as amended by the Jurisdictional Act of February 13, 1925, a decree of the District Court is appealable directly to this Court on constitutional grounds only when the case arises under § 266 of the Code, as amended by the Jurisdictional Act of 1925. P. 464.
3. Section 266 of the Judicial Code, as so amended, permits direct appeals to this Court from decrees of injunction, permanent or

interlocutory, but relates to suits seeking relief by interlocutory injunction restraining the execution of orders of administrative boards, etc., upon the ground of the unconstitutionality of the state statutes upon which they acted. P. 464.

4. A suit in the District Court for a permanent injunction against enforcement of a tax on the shares of a national bank under a state statute enacted pursuant to Rev. Stats. § 5219, is not of the character specified in Jud. Code, § 266, and the final decree is therefore not appealable directly to this Court under § 238, as amended, where the ground of the suit and the decree was not that the state statute was unconstitutional, but that it went out of force when § 5219 was amended by the Act of March 4, 1923, so as to allow the State to choose between taxing national bank shares, their dividends, or the income of the bank. P. 465.

Motion denied.

MOTION for leave to file a petition for a mandamus requiring the judge of the District Court of the Eastern Division of the Eastern Judicial District of Missouri to allow an appeal to this Court from a decree permanently enjoining the petitioning state officers from enforcing a tax on shares of a national bank. See *First Nat. Bank v. Buder*, 8 Fed. (2d) 883.

Mr. James T. Blair for petitioner.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a motion by Buder and other taxing officers of the City of St. Louis for leave to file in this Court a petition for a writ of mandamus against the federal District Judge of the Eastern Division of the Eastern Judicial District of Missouri; or, in the alternative, for a writ of certiorari to that court; and for a rule to show cause why such writs should not issue. The purpose of the petition is to compel the District Judge to allow a direct appeal to this Court from a final decree entered by that court on December 7, 1925, against the taxing officers in a suit

brought by the First National Bank in St. Louis for a permanent injunction restraining the enforcement of a tax levied upon its stockholders. *First National Bank v. Buder*, 8 Fed. (2d) 883.

The decree was entered upon a hearing before a single judge. An interlocutory injunction had not been prayed for in the bill or otherwise sought. The taxing officers took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which was allowed and is now pending. Then they applied to the District Judge for the allowance also of a direct appeal to this Court, because they were uncertain whether the appeal lay to it or to the Circuit Court of Appeals. The District Judge refused the application, and stated as his reasons, that the appeal had been properly taken to the Court of Appeals, had been allowed and was pending there; and that this Court did not have jurisdiction of the case on appeal. An application for allowance of the appeal was then presented to the Justice of this Court assigned to that Circuit and was denied. Thereupon, within three months after entry of the decree in the District Court, this motion for leave to file a petition for a writ of mandamus was made.

That this Court has power to issue a writ of mandamus to compel a lower federal court to allow an appeal to this Court has long been settled. *Ex parte Crane*, 5 Pet. 190; *United States v. Gomez*, 3 Wall. 752, 766. In a few instances the writ of mandamus has issued for that purpose, *Vigo's Case*, 21 Wall. 648; *Ex parte Jordan*, 94 U. S. 248; *Ex parte Railroad Company*, 95 U. S. 221. In other cases where there was reason to believe that an appeal was wrongly denied by the lower court and no other remedy appeared to be available, this Court granted the motion for leave to file the petition and issued a rule to show cause. *Mussina v. Cavazos*, 20 How. 281; *Ex parte Cutting*, 94 U. S. 14. Where it was clear that the petitioner

had another remedy the motion for leave to file the petition was denied. *Ex parte Virginia Commissioners*, 112 U. S. 177. The motion should likewise be denied where it is clear that the appeal does not lie, or for other reasons the relief sought by the petition cannot be granted. *Ex parte Brown*, *post*, p. 645. Compare *In re Green*, 141 U. S. 325; *Iowa v. Slimmer*, 248 U. S. 115. In the case at bar, we deem it clear that there was no right to a direct appeal to this Court. We, therefore, deny the motion for leave to file the petition.

In support of the claim to a direct appeal, it is contended that the injunction complained of was granted on the ground that the state taxing statute violates the federal Constitution. The assignment of errors, which accompanied the petition for allowance of the appeal, alleged that the District Court erred also in not holding unconstitutional a recent federal statute involved. These contentions, if substantial, would have supplied the basis for a direct appeal under § 238 of the Judicial Code before that section was amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938. But § 238 was so far changed by that Act that now there is no right to such a direct appeal on constitutional grounds unless the case arises under § 266 of the Judicial Code as amended by that Act. Otherwise it must go in the first instance to the Circuit Court of Appeals and may come here only for the review of that court's action.

The suits to which § 266 relates are those in which the relief sought is an "interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State . . . upon the ground of the unconstitutionality of such statute." In any such suit the application

for an interlocutory injunction was required to be heard before three judges and from their decree a direct appeal lay to this Court; but, prior to the Act of February 13, 1925, the final hearing in the suit was had before a single judge. Compare *Patterson v. Mobile Gas Co.*, ante, p. 131. From his decree a direct appeal to this Court could be founded only upon the provisions of § 238 as originally enacted. *Shaffer v. Carter*, 252 U. S. 37, 44. Where the jurisdiction of the District Court was invoked upon other federal grounds, as well as the one attacking the constitutionality of the state statute, an appeal might be taken to the Circuit Court of Appeals, with ultimate review in this Court if the case was of the class within its jurisdiction. *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 53. To remove the existing anomaly and to prevent that which would otherwise have resulted from the repealing provisions of the Act of February 13, 1925, that Act further amended § 266, as amended by Act of March 4, 1913, c. 160, 37 Stat. 1013, by adding at the end thereof: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." As so amended § 266 also permits a direct appeal to this Court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges.

First National Bank v. Buder, supra, is not a case of that character because no state statute was assailed as being repugnant to the Federal Constitution. The tax upon the shares in the bank was assessed as of June 1, 1923, for the year 1924. It was assessed pursuant to a statute in force ever since 1889—which had been incorporated as § 12,775 in the Revised Statutes of Missouri of 1919. Prior to the Act of Congress of March 4, 1923, c. 267, 42 Stat. 1499,

amending § 5219 of the Revised Statutes of the United States, that statute was confessedly valid and operative.¹ It was then the only method of taxation permitted by the federal law. The Act of 1923 enlarged the scope of the State's power to tax national banks. It authorized the State either to tax the shares of a national bank, or to include dividends derived therefrom in taxable income of the holder thereof, or to tax the income of the bank; and provided that the "imposition by said State of any one of the above three forms of taxation shall be in lieu of the others." In 1917, Missouri enacted a law taxing income which, so far as here material, has remained in force without change. After the 1923 Act of Congress, the State might, in the exercise of the option which that Act conferred, have elected to tax national banks by taxing the income—instead of by taxing the shares as had theretofore been done. The State did not by any new legislation signify its election among the three permissible modes of taxation. Because it had not done so, the District Court held the assessment void and enjoined the taxing officials. Whether it erred in so holding is the question for decision on the appeal.

The claim that the tax is void rests, not upon a contention that the state statute under which it was laid is unconstitutional, but upon a contention that the statute is no longer in force. The State confessedly has the same power to tax the shares that it had before Congress enacted the 1923 amendment. The argument is that, as the State after 1923 had the option to tax either the shares or the income, it must manifest its election and has not done so. Whether, in order to do so, it must enact new legislation depends upon the construction of the Act of Congress. Whether, if this is not necessary, it has manifested its election by the existing legislation, depends upon

¹Section 5219 of the Revised Statutes has been further amended by Act of March 25, 1926, c. 88, 44 Stat. 223.

the construction of the state statutes. But in neither of these questions is the constitutionality of the state statutes involved; and a substantial claim of unconstitutionality is necessary for the application of § 266. See *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 304. The decree is thus not one from which a direct appeal lies to this Court.

Additional objections to granting the motion for leave to file the petition are suggested, but need not be considered.

Motion denied.

UNITED STATES *v.* RAMSEY ET AL.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 1061. Argued April 22, 1926.—Decided June 1, 1926.

1. The authority of the United States to punish crimes committed by or against tribal Indians in the "Indian country" (Rev. Stats. § 2145) in Oklahoma continued after the admission of that State as before. P. 469.
 2. The term "Indian country" within the meaning of § 2145, applies to a restricted Osage Indian allotment. P. 470.
 3. There is no difference in respect of the applicability of § 2145 between a "restricted" and a "trust" allotment. *Id.*
- Reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment.

Solicitor General Mitchell, with whom *Assistant Attorney General Luhring* and *Mr. Roy St. Lewis* were on the brief, for the United States.

Messrs. William S. Hamilton and *S. P. Freeling*, with whom *Messrs. J. M. Springer, Edward C. Gross, and J. I. Howard* were on the brief, for defendants in error.

The allotment was not Indian country at the time of the commission of the alleged offense, within the purview of § 2145, Rev. Stats., or any other section of ch. 4 of the Act of June 30, 1834, relating to the government of the Indian country. *Bates v. Clark*, 95 U. S. 204; *United States v. Laribiere*, 93 U. S. 188; *Dick v. United States*, 208 U. S. 340; *United States v. Myers*, 206 Fed. 387; *Clairmont v. United States*, 225 U. S. 551; *United States v. Rickert*, 188 U. S. 432; *United States v. McCurdy*, 264 U. S. 483; *Bluejacket v. Johnson County*, 5 Wall. 737; *McCulloch v. Maryland*, 4 Wheat. 316; *Choate v. Trapp*, 224 U. S. 665; *Morgan v. Ward*, 224 Fed. 698; *United States v. Wright*, 229 U. S. 226; *United States v. Nice*, 241 U. S. 591; *Sunderland v. United States*, 266 U. S. 226; *United States v. Brown*, 8 Fed. (2d) 564.

Distinguishing *United States v. Pelican*, 231 U. S. 442; *Donnelly v. United States*, 228 U. S. 243; *United States v. Celestine*, 215 U. S. 278; *United States v. Thomas*, 151 U. S. 577; *Draper v. United States*, 164 U. S. 240; *United States v. McBratney*, 104 U. S. 621.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendants in error, two white men, were charged, by an indictment returned in the court below, with the murder of one Henry Roan, a full-blood Osage Indian and a legal member of the Osage Tribe, committed "in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the exclusive jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to

the act of Congress approved June 28, 1906, . . . the title to which said allotment . . . was held in trust by the United States and was inalienable" by the allottee, who had never had issued to her a certificate of competency authorizing her to sell the allotment. The indictment is drawn under § 2145 R. S., which extends the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, to the Indian country, with certain exceptions not material here. The court below sustained a demurrer to this indictment upon the ground that the allotment described in the indictment as the *locus* of the crime was not Indian country within the meaning of § 2145. Thereupon, the construction of the statute upon which the indictment is drawn being involved, the case was brought here on writ of error under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The authority of the United States under § 2145 to punish crimes occurring within the State of Oklahoma, not committed by or against Indians, was ended by the grant of statehood. *United States v. McBratney*, 104 U. S. 621, 624; *Draper v. United States*, 164 U. S. 240. But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before, *Donnelly v. United States*, 228 U. S. 243, 271, in virtue of the long-settled rule that such Indians are wards of the nation in respect of whom there is devolved upon the Federal Government "the duty of protection, and with it the power." *United States v. Kagama*, 118 U. S. 375, 384. The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation, *United States v. Osage County*, 251 U. S. 128, 133; *United States v. Nice*, 241 U. S. 591, 598; and it rests with Congress alone to determine when that relationship shall cease.

Matter of Heff, 197 U. S. 488, 499; *United States v. Celestine*, 215 U. S. 278, 290.

The sole question for our determination, therefore, is whether the place of the crime is Indian country within the meaning of § 2145. The place is a tract of land constituting an Indian allotment, carved out of the Osage Indian reservation and conveyed in fee to the allottee named in the indictment, subject to a restriction against alienation for a period of 25 years. That period has not elapsed, nor has the allottee ever received a certificate of competency authorizing her to sell. As pointed out in *United States v. Bowling*, 256 U. S. 484, 486, there are two modes by which Indians are prevented from improvidently disposing of their allotments. One is by means of a certificate, called a trust patent, by the terms of which the Government holds the land for a period of years in trust for the allottee with an agreement to convey at the end of the trust period. The other mode is to issue a patent conveying to the allottee the land in fee but prohibiting its alienation for a stated period. Both have the same effect so far as the power of alienation is concerned, but one is commonly called a trust allotment and the other a restricted allotment. The judgment of the court below turns upon this narrow difference.

In *United States v. Pelican*, 232 U. S. 442, a case involving the murder of an Indian upon a trust allotment, this court held (p. 449) that trust allotments retain "during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation," and that they are embraced within the term "Indian country" as used in § 2145. But the opinion makes it clear that the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important. The court said:

“The explicit provision in the act of 1897, as to allotments,* we do not regard as pointing a distinction but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the Government. . . . The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.”

The essential identity of the two kinds of allotments—so far as the question here under consideration may be affected—was recognized in the *Bowling Case*, where it was said (p. 487) that in one class as much as the other “the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.” In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.

Since Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, the question presented is not one of power but wholly one of statutory construction. Viewed from that premise, it would be

* This refers to c. 109, 29 Stat. 506, an act to prohibit the sale of intoxicating drinks to Indians. It provides that the term Indian country “shall include any Indian allotment, while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, . . .”

quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term Indian country to one and not to the other.

It follows that the judgment sustaining the demurrer to the indictment is erroneous and must be

Reversed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY *v.* COOGAN, SPECIAL ADMINISTRA-
-TRIX, ETC.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
MINNESOTA.

No. 268. Argued April 26, 1926.—Decided June 1, 1926.

1. Upon review of a judgment of a state court in a case under the Federal Employers' Liability Act, this Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. P. 474.
2. Evidence considered and found to lend no substantial support to the contention that the death of plaintiff's intestate, a brakeman who was run over by a car in a train, which was in process of being made up and coupled, was caused or contributed to by a pipe near the rail, which the railroad company had negligently permitted to remain in a bent condition. P. 474.
3. When circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. P. 477.
4. It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. P. 478.

160 Minn. 411, reversed.

CERTIORARI to a judgment of the Supreme Court of Minnesota which sustained a recovery of damages in an action brought under the Federal Employers' Liability Act by the administratrix of a brakeman who was killed by an accident.

Mr. A. C. Erdall, with whom *Messrs. F. W. Root, O. W. Dynes*, and *C. O. Newcomb* were on the brief, for petitioner.

Mr. T. D. Sheehan, with whom *Messrs. S. A. Anderson* and *H. J. Goodwin* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner is an interstate carrier by railroad. William Coogan came to his death at Farmington, Minnesota, July 14, 1923, while employed as a brakeman on one of its interstate trains. Respondent brought this action in the district court of Dakota County in that State under the Federal Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, to recover damages for the benefit of the widow and children of the deceased. At the close of all the evidence, petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture. The motion was denied, and there was a verdict for respondent. A motion for judgment in favor of petitioner notwithstanding the verdict was overruled. Judgment for respondent was given by the trial court; and, on appeal, it was affirmed in the highest court of the State. 160 Minn. 411. The case is here on writ of certiorari. § 237, Judicial Code.

Petitioner contends that the evidence is not sufficient to sustain a finding that any negligence on its part caused or contributed to cause the death.

By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Seaboard Air Line v. Horton*, 233 U. S. 492, 501. The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. *St. L. & Iron Mtn. Ry. v. McWhirter*, 229 U. S. 265, 277; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371; *New Orleans & N. E. R. R. Co. v. Scarlet*, 249 U. S. 528.

Petitioner's train 92 was made up at the Farmington yard by a switch crew shortly after seven o'clock in the morning. Deceased was the rear brakeman of the road crew which was to take the train to Austin. He was killed before the train was ready to start. There was no eye witness, and the case depends on circumstantial evidence. The tracks in the yard run east and west. The most northerly is the main line track; and, commencing with that one, the others are numbered consecutively 1, 2, 3, etc. Cars were taken from other tracks and put upon track 1 to make up the train. The caboosé was kicked—that is, detached from the engine in motion and sent by momentum—east to a place where it was stopped by deceased who rode and controlled it by handbrake. Two cars were in like manner put upon that track. They were controlled by a brakeman of the switch crew at the handbrake on the east

car, which coupled automatically to the caboose. Deceased was then standing on the ground beside the caboose. That was the last time he was seen before the accident. Similarly nine or ten more cars were sent east on track 1, and under control of the same brakeman were coupled to the others. And then three or four cars—making up all that were to go in the train—were moved east on that track attached to the engine until they came into contact with the cars already there. Then the engine was stopped to discover whether the coupling made. It was found that it had; and, in order to clear the switch, the engine moved all the cars east about two car lengths—66 to 80 feet. Then the switch engine was detached. Immediately the road engine came and was coupled to the cars. The air hose was coupled between the engine and the first car. But it was found that the air line was open at some other place. The brakeman of the switch crew walked east along the south side of the train and coupled the hose at the east end of the last cut that was set in. After that, and while going toward the rear, he found the body of deceased. It was near the west end of the second car from the caboose, and was lying parallel with the track outside the south rail and on or at the ends of the ties. There were indications on the ground sufficient to show that he had been between the rails of the track; that he had been run over by the east truck of the car next to the caboose; that his left leg and left arm had been crushed between wheel and rail, and that his body had been dragged about 15 feet. There was evidence to support respondent's contention that it was the duty of deceased to couple the air hose, and that prior to the accident all couplings had been made except that made by the brakeman of the switch crew and the one at the caboose.

The breach of duty relied on is this. About 12 inches south of the south rail of the track, and fastened to the ties by clamps and spikes, there was an air pipe line ex-

tending about 800 feet. It was installed three or four years before the accident. At the time of the accident, a stretch of the pipe line about 15 feet in length had been loosened and bent three or four inches toward the rail and upward leaving a space of from three and one-half to four inches between it and the ties. It had been in that condition for some months. The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. The east end of the part so loosened and bent was about 15 feet west of the place where the body of deceased was found. Respondent argues that a brakeman, going in from the south side to couple the hose between the caboose and rear car, naturally would step inside the south rail with his right foot, leaving his left foot between the rail and the air pipe line. As to that the evidence is in conflict, but it will be taken to be sufficient to sustain the contention. The shoes worn by deceased at the time of the accident were received in evidence. The outside of the counter of the left shoe was scratched and showed a marked rounding depression parallel with the sole and just above the heel. This condition was first noticed some days after the accident. In the meantime the shoes had been left in a garage and no attention was given to them. The depression in the counter was not so clear at the trial as when first noticed. The foregoing indicates the substance of all the evidence bearing on the cause of death.

The case was tried, and respondent supports the judgment, on the theory that when the switch engine stopped after the last coupling deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose, his left foot slipped back-

ward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe and he was forced backward, run over and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *United States v. Ross*, 92 U. S. 281, 284; *Manning v. Insurance Co.*, 100 U. S. 693, 698. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went between the cars in the manner claimed—his right foot between the rails leaving his left foot outside where, it is argued, it was caught under the bent pipe.

The "rounding depression" on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed; and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to

justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pawling v. United States*, 4 Cr. 219, 221; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 488; *St. L. & Iron Mtn. Ry. Co. v. McWhirter*, *supra*, 282; *St. Louis-San Francisco Ry. v. Mills*, *ante*, p. 344.

Judgment reversed.

Opinion of the Court.

MA-KING PRODUCTS COMPANY v. BLAIR,
COMMISSIONER.

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

No. 333. Argued May 7, 1926.—Decided June 1, 1926.

1. Under the Prohibition Act, the Commissioner of Internal Revenue may refuse to grant a permit to deal in liquor for non-beverage purposes when, in the exercise of a sound discretion, he determines that the applicant is not a fit person to be trusted with the privilege. P. 481.
2. In a suit in equity, under the Prohibition Act, to review a decision of the Commissioner refusing such an application, the court does not exercise the administrative function of determining whether the permit should be granted, but merely determines whether, upon the facts and law, the action of the Commissioner is based upon an error of law, or is wholly unsupported by the evidence, or clearly arbitrary or capricious. P. 482.
- 3 Fed. (2d) 936, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill in a suit against the Commissioner of Internal Revenue to require him to issue to the plaintiff a permit to operate a plant for denaturing alcohol.

Mr. B. D. Oliensis, with whom *Mr. Charles L. Guerin* was on the brief, for appellant.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. John J. Byrne*, Attorney in the Department of Justice, were on the brief, for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is a suit in equity brought by the Ma-King Products Company, a corporation, in the Federal District

Court for Western Pennsylvania, against the Commissioner of Internal Revenue. The bill alleged that the Company had duly made application to the Commissioner, in accordance with the National Prohibition Act¹ and regulations, and accompanied by a proper bond, for a permit to operate a plant for denaturing alcohol; and that, while under the law the Commissioner was authorized to grant such a permit, he had "arbitrarily, illegally and without any reason or warrant in law or in fact" disapproved the application and refused to issue the permit. The prayer was that the court review the Commissioner's action, reverse his findings as to fact and law, and direct him to approve the application and grant the permit.

The Commissioner answered, denying that he had acted arbitrarily and illegally in disapproving the Company's application; and, alleging that, as the result of an investigation conducted by his agents, he was informed that the president and secretary-treasurer of the Company were not individually, or as its officers, "entitled to be entrusted with a permit of the nature and kind set forth in the application," under the provisions of the Act; and that, upon this information, he "acted under full warrant of law and fact" in disapproving the application and refusing to issue the permit.

After a hearing before two District Judges, at which evidence was introduced by both sides, the judges concurred in the opinion that there was nothing in the record which would justify the court in finding that the Commissioner in refusing the application for the permit had "abused the wide discretion invested in him by the Act of Congress," and that the bill should therefore be dismissed; and a decree was entered accordingly. This was affirmed, on appeal, by the Circuit Court of Appeals,

¹ 41 Stat. 305, c. 85.

which said that: "After an examination of the proofs in the case we are of the opinion the associations and business connections of . . . the principal officers of this company, were such that the commissioner had ample ground for declining to issue the company the permit. The holder of such a permit is entrusted by the government with a power which subjects him to the approaches and bribes of law-breakers and where, as in this case, the business associations of applicants have been with men whose conduct has already invited prohibition prosecutions against them, it goes without saying that the commissioner would have been derelict in duty in granting them a permit." 3 Fed. (2d) 936. This appeal was allowed in March, 1925.

Title II of the Prohibition Act provides that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented"; that, with certain exceptions not here material, no one "shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do"; that no permit shall be issued to any person who within one year prior to the application therefor shall have violated the terms of any permit or any federal or state law regulating traffic in liquors; that no permit shall be issued "until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used"; that the Commissioner "may prescribe the form of all permits and applications and the facts to be set forth therein," and before any permit is granted "may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of" the title; and that if the Commissioner refuses any application for a permit, the applicant "may have a review of the decision by a court of equity," which may "affirm,

modify or reverse" his finding "as the facts and law of the case may warrant."²

It is clear that the Act does not impose on the Commissioner the mere ministerial duty of issuing a permit to anyone making an application on the prescribed form, but, on the contrary, places upon him, as the administrative officer directly charged with the enforcement of the law, a responsibility in the matter of granting the privilege of dealing in liquor for nonbeverage purposes, which requires him to refuse a permit to one who is not a suitable person to be entrusted, in a relation of such confidence, with the possession of liquor susceptible of diversion to beverage uses.

The dominant purpose of the Act is to prevent the use of intoxicating liquor as a beverage, and all its provisions are to be liberally construed to that end. It does not provide that the Commissioner shall issue any liquor permit, but merely that he may do so. It specifically requires the application to show "the qualification of the applicant," and authorizes the Commissioner to prescribe "the facts to be set forth therein." These provisions, as well as the purpose of the Act, are entirely inconsistent with any intention on the part of Congress that the Commissioner should perform the merely perfunctory duty of granting a permit, to any and every applicant, without reference to his qualification and fitness; and they necessarily imply that, in order to prevent violations of the Act, he shall, before granting a permit, determine, in the exercise of his sound discretion, whether the applicant is a fit person to be entrusted with such a privilege. This is emphasized by the provision that if the Commissioner refuses an application, his action may be reviewed by a court of equity in matter of fact and law; there being no substantial reason for this provision if he is imperatively

² §§ 3, 5, 6.

required to grant a permit upon the mere presentation of an application in due form.

On the other hand, it is clear that Congress, in providing that an adverse decision of the Commissioner might be reviewed in a court of equity, did not undertake to vest in the court the administrative function of determining whether or not the permit should be granted; but that this provision is to be construed, in the light of the well established rule in analogous cases, as merely giving the court authority to determine whether, upon the facts and law, the action of the Commissioner is based upon an error of law, or is wholly unsupported by the evidence or clearly arbitrary or capricious. See *Silberschein v. United States*, 266 U. S. 221, 225, and cases cited.

Here, plainly, the refusal of the permit involved no error of law. And the two courts below have, in effect, concurred in finding, upon the entire evidence, that there was no abuse of discretion on the part of the Commissioner; the Circuit Court of Appeals specifically finding that the associations and business connections of the principal officers of the company were such that he had ample ground for declining to issue the permit. An examination of the evidence—which need not be recited here—discloses no clear error which would authorize us to set aside this concurrent finding. *United States v. State Investment Co.*, 264 U. S. 206, 211.

The decree is

Affirmed.

DAVIS ET AL. v. WILLIFORD ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
OKLAHOMA.

No. 316. Submitted May 4, 1926.—Decided June 1, 1926.

1. Case held reviewable by certiorari and not by writ of error. P. 486.
2. Under the Act of April 26, 1906, permitting members of the Five Civilized Tribes to will their property, but providing that "no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner,"—to give validity to such a will, it was necessary not only that it be in fact acknowledged by the testator before the officer, but that the officer place a certificate of such acknowledgment upon the will, as an essential part of the acknowledgment itself. P. 486.
3. Parol evidence inadmissible to supply lack of such certificate. *Id.* 106 Okla. 208, affirmed.

CERTIORARI to a judgment of the Supreme Court of Oklahoma which reversed a judgment upholding an instrument as the will of a deceased full-blood Chickasaw Indian devising his surplus allotment away from his wife and children. A writ of error was also taken, and is dismissed.

Messrs. Charles J. Kappler, I. R. McQueen, and C. B. Kidd were on the brief for petitioners.

No appearance for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves a single question relating to the construction and effect of § 23 of the Act of April 26, 1906,

c. 1876,¹ dealing with the Five Civilized Tribes. This reads: "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

The subject-matter of the controversy—which arose in the course of a proceeding instituted in a local court of Oklahoma to foreclose a mortgage—is a part of a surplus allotment of 160 acres out of tribal lands made in 1904 to Frazier McLish, a full-blood Chickasaw Indian, and held by him subject to restrictions against alienation. In July, 1906, he executed a will by which he bequeathed one dollar to his wife and each of his children, and devised all the residue of his property, including this allotment, to his sister. In 1907, McLish having died, the will was probated and recorded, the only endorsement which it bore being the following: "Approved by me July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906. (Seal)."

For present purposes it suffices to say that the proceeding in the district court involved a controversy as to the title to part of this allotment, arising between J. A. White, to whom it had been conveyed by the devisee, and S. H. Davis, to whom White had given a mortgage, on the one side; and the widow and children of the testator, on the other side. White and Davis claimed that the will was valid and had passed title to the devisee; and the widow and children claimed that it was invalid, since it had not

¹ 34 Stat. 137, 145.

been acknowledged before a commissioner or judge as required by the Act of 1906, and that the title to the allotment had descended to them.

On the trial the United States Commissioner testified that at the time he approved the will, the testator had appeared before him and acknowledged its execution for the purposes therein mentioned, but that, by inadvertence, the certificate of such acknowledgment had been omitted. The court, in view of this evidence, held that as the will had been in fact acknowledged before the Commissioner, it was valid and vested title to the allotment in the devisee; and gave judgment accordingly. On appeal, this was reversed by the Supreme Court of Oklahoma, which held that parol testimony was inadmissible to supply the lack of a certificate of acknowledgment, and that under the Act of 1906 the will was invalid. 106 Okla. 208.

The case is now before us on a writ of error, which was allowed in March, 1925, and a petition for a writ of certiorari, which was postponed to the hearing on the merits. The writ of error must be dismissed under the Jurisdictional Act of 1916; and the writ of certiorari is granted.

Davis and White do not deny that the will disinherited the testator's wife and children, *Re Byford's Will*, 65 Okla. 159, 162, and that it was invalid unless acknowledged before the Commissioner, as well as approved by him. Their contention is, that under a proper construction of § 23 of the Act of 1906, where a full-blood Indian who devises his lands to the exclusion of his wife and children, appears before a Commissioner and acknowledges the document presented to be his will, "it is the fact of such acknowledgment by said testator, and not any certificate by the officer, which gives validity to the will"; and they expressly concede that "if, on the other hand, Congress intended to require that a certificate of acknowledgment be placed on the will itself by the officer," they cannot prevail.

Construing § 23 of the Act in the light of its manifest purpose, we think that Congress intended that to give validity to such a will it was necessary not only that it be in fact acknowledged by the testator before the officer, but that the officer place a certificate of such acknowledgement upon the will, as an essential part of the acknowledgement itself.

Prior to the Act of 1906, Indians of the Five Civilized Tribes had no power to dispose of their restricted lands by will. *Taylor v. Parker*, 235 U. S. 42, 44; *Blundell v. Wallace*, 267 U. S. 373, 374. And in giving them generally such power by § 23 of the Act, it was specifically provided that no will of a full-blood Indian devising real estate and disinheriting his parent, spouse or children, should be valid "unless acknowledged before and approved by a judge of a United States court . . . or a United States Commissioner."

It is clear that it was intended by this proviso to prevent a full-blood Indian from being overreached and imposed upon, and induced for an inadequate consideration or by trickery, to deprive his heirs of their inheritance; and that, to this end, a will devising his land to other persons should not be valid unless acknowledged before and approved by a judicial or quasi-judicial officer of the United States. To make certain of this, the officer was not to approve the will unless the testator appeared before him in person and acknowledged its due execution, and, upon the examination of the testator, the will appeared to be of such a character and based upon such consideration as to warrant its approval. Plainly, it was not intended that such acknowledgment and approval should be a perfunctory matter. And as the will when probated and recorded would be a muniment of title to the land, necessarily a certificate both of the acknowledgment and the approval should appear upon it. We cannot think that Congress intended that in a matter of this solemnity and importance, involving the recorded

title to land, the effect of a will, which when probated and recorded bore no certificate of the acknowledgment or approval essential to its validity, should thereafter rest in parol, subject to all the uncertainty that would follow if its validity could be established—when the lips of the testator were closed—by parol evidence as to the fact of acknowledgment or approval. This would destroy the certainty which is essential in muniments of title appearing upon the public records. If this were possible, the subsequent establishment of the validity of the will would largely depend upon the lapse of time before it was brought into litigation, and the availability, at that time, of evidence to establish or to contradict a claim that it had in fact been acknowledged or approved; and where portions of the land had been conveyed by the devisee to different persons, the result of suits involving the validity of the will, might often depend upon the weight attached by the courts to diverse evidence in different suits, and lead to judgments establishing the validity of the will as to the purchaser of one portion of the land, and its invalidity as against another.

Clearly, we think, Congress did not contemplate such a disastrous result, but in granting by the Act to a full-blood Indian, under its guardianship, the power to dispose of his restricted land by will, intended that a will disinheriting those to whom his land would otherwise descend, should be valid only when the facts of acknowledgment and approval should both be certified by the officer on the will, and appear upon it when probated and placed of record.

We conclude here that the will, by reason of the lack of any certificate of acknowledgment, was not "acknowledged before" the Commissioner within the meaning of the Act, and, being therefore invalid, did not pass title to the allotment to the devisee. The judgment is accordingly

Affirmed.

Counsel for Parties.

CITY OF DOUGLAS v. FEDERAL RESERVE BANK
OF DALLAS.

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

No. 279. Argued April 28, 1926.—Decided June 1, 1926.

1. When paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes owner of the paper, and in making the collection is not the agent for the depositor. P. 492.
 2. Upon the deposit of paper unrestrictedly indorsed, and credit of the amount to the depositor's account, the bank becomes the owner of the paper, notwithstanding a custom or agreement to charge the paper back to the depositor in the event of dishonor. P. 493.
 3. A depositor who has thus surrendered his rights in paper which is later dishonored, and whose account, under his agreement with the depositary bank, has been charged with the amount previously credited, has no relation with a bank to which the depositary sent the paper for collection upon the basis of which he may recover from the second bank for its want of diligence in that regard. P. 494.
- 2 Fed. (2d) 18, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment in favor of the Federal Reserve Bank, defendant, rendered by the District Court (300 Fed. 573,) in an action brought by the City of Douglas to recover the amount of a check, alleged to have been dishonored, and recharged to the plaintiff, because of defendant's negligence in failing to collect it.

Mr. Harry E. Pickett, with whom *Messrs. Cleon T. Knapp* and *James P. Boyle* were on the brief, for plaintiff in error.

Mr. E. B. Stroud, with whom *Mr. A. H. Culwell* was on the brief, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

The County of Cochise, Arizona, on December 22, 1920, drew its check on the Central Bank of Willcox, Arizona, in favor of plaintiff in error, hereafter called plaintiff. Plaintiff delivered the check indorsed in blank to the First National Bank of Douglas, Arizona, and that bank credited plaintiff's account and passbook with the amount of the check. The passbook had printed upon its face, "All out of town items credited subject to final payment." The Douglas Bank indorsed the check, "Pay to the order of the El Paso Branch, Federal Reserve Bank of Dallas," which will be referred to as defendant, and forwarded it to that bank for collection.

Defendant forwarded the check, in due time, to the drawee bank at Willcox. The latter debited the drawer's account with the amount of the check, stamped it "paid," later returning it to the drawer, and transmitted to the defendant, in lieu of cash, its own check upon the Central Bank at Phoenix, in an amount covering this and other items. The last check was dishonored; both the Willcox Bank and the Central Bank of Phoenix having failed, the First National Bank of Douglas received no proceeds of the check and charged back the amount of it to the account of plaintiff.

Plaintiff brought suit in the District Court for western Texas to recover the amount of the check, on the ground that defendant was negligent in accepting the check of the Willcox Bank in payment instead of cash, especially because it was chargeable with notice that both the Willcox Bank and the Phoenix Bank were then insolvent. The case was tried without a jury, and resulted in a judgment for defendant, 300 Fed. 573, which was affirmed by the Court of Appeals for the Fifth Circuit. 2 Fed. (2d) 818. The case comes here on writ of error. See Jud.

Code, §§ 241, 128 and 24, First (a); *Sowell v. Federal Reserve Bank*, 268 U. S. 449. Plaintiff assigns as error the holding of the Circuit Court of Appeals that defendant was not in such a relationship with plaintiff as to permit plaintiff to recover for the defendant's negligence.

Both plaintiff and defendant concede that it is the rule of the federal courts that a bank which receives commercial paper for collection is not only bound to use due care itself, but is responsible to its customer for a failure to collect, resulting from the negligence or insolvency of any bank to which it transmits the check for collection. This is the so-called "New York rule," which in effect makes the first bank a guarantor of the solvency and diligence of the correspondents which it employs to effect the collection. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276. And see *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 164, for a comparison of this rule of liability with the "Massachusetts rule" by which the initial bank is liable only for its failure to exercise due care in the selection of an agent to make the collection. Under the Massachusetts rule the agent selected becomes the agent of the owner of the paper, who may maintain an action directly against it for the negligent performance of its undertaking. See *Federal Reserve Bank v. Malloy*, *supra*, 164. Compare *Bank of Washington v. Triplett*, 1 Pet. 25, where the undertaking of the initial bank was to transmit paper for collection.

From this the defendant argues that under the rule applied in the federal courts, the First National Bank of Douglas became liable by its contract with plaintiff for the negligence of the defendant; hence that there was no privity of contract between plaintiff and defendant, and no basis for a recovery even though defendant was negligent in accepting an exchange check from the Willcox Bank. See *Federal Reserve Bank v. Malloy*, *supra*, 164.

This was the view taken by the Circuit Court of Appeals, but the plaintiff objects that it is not a necessary corollary of the New York rule applied in *Exchange National Bank v. Third Nat. Bank*, *supra*, that one who deposits paper for collection may not proceed against a correspondent selected by the initial bank for that purpose, for negligent failure to make the collection, and that neither *Exchange Nat. Bank v. Third Nat. Bank* nor *Federal Reserve Bank v. Malloy* so held. It objects also that in any event the rule is not applicable here because of the stipulation appearing on the face of the passbook "All out of town items credited subject to final payment."

It is said that the effect of this language was to relieve the initial bank, the First National Bank of Douglas, from the liability which would otherwise have resulted under the New York rule, and to make it a mere agent to transmit the paper to defendant for collection, and thus to make applicable the Massachusetts rule. See *Federal Reserve Bank v. Malloy*, *supra*. In that case, a local statute relieved the bank receiving paper for collection, from any liability except that of due care in selecting a sub-agent for collection and in transmitting the paper to it; and it was held that the owner of the paper might proceed against the sub-agent for negligent failure to collect the paper.

It is not necessary to decide any of these questions here. For when paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes owner of the paper, and in making the collection is not the agent for the depositor. *Burton v. United States*, 196 U. S. 283; *Union Electric Steel Co. v. Imperial Bank*, 286 Fed. 857; *General Amer. Tank Car Corp. v. Goree*, 296 Fed. 32, 36; *In re Ruskay*, 5 Fed. (2d) 143; Scott, *Cases on Trusts*, p. 64, note, par. 8, pp. 66-67.

Such was the relation here between the plaintiff and the Douglas Bank, unless it was altered by the words printed on the pass-book to the effect that out of town items were credited "subject to final payment." The meaning of this language, as the cashier of the Douglas Bank testified, and as the court below held, was that if the check was not paid on presentation, it was to be charged back to plaintiff's account. The check was paid and the drawer and indorsers discharged. *Malloy v. Federal Reserve Bank*, 281 Fed. 997; *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 166; *Nineteenth Ward Bank v. Weymouth Bank*, 184 Mass. 49; *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225. Without these words the relationship between the plaintiff and the bank was that of indorser and indorsee; and their use here did not vary the legal rights and liabilities incident to that relationship, unless it dispensed with notice of dishonor to the depositor. As was said by the court in *Burton v. United States*, *supra*, 297:

"The testimony . . . as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."

While there is not entire uniformity of opinion, the weight of authority supports the view that upon the deposit of paper unrestrictedly indorsed, and credit of the amount to the depositor's account, the bank becomes the owner of the paper, notwithstanding a custom or agreement to charge the paper back to the depositor in the event of dishonor. *Burton v. United States*, *supra*;

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Brusegaard v. Ueland, 72 Minn. 283; *Nat. Bank of Commerce v. Bossemeyer*, 101 Neb. 96, 102; *Walker & Brock v. Ranlett Co.*, 89 Vt. 71; *Aebi v. Bank of Evansville*, 124 Wis. 73. See *Scott v. McIntyre Co.*, 92 Kans. 503; *Vickers v. Machinery Warehouse & Sales Co.*, 111 Wash. 576. But see *Implement Co. v. Bank*, 128 Tenn. 320; *Packing Co. v. Davis*, 118 N. C. 548.

Plaintiff having thus surrendered its rights in the paper, only rights arising out of its contract with the initial bank remained. If those rights were affected by the act or omission of defendant, they were affected only because that contract so stipulated. Defendant's duties arose out of its contract with the initial bank, or out of its relation to that bank as owner of the paper. Hence there was no relationship between plaintiff and defendant which could be made the basis of recovery for defendant's want of diligence.

Judgment affirmed.

RAFFEL *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT.

No. 307. Submitted May 4, 1926.—Decided June 1, 1926.

1. A defendant in a criminal case who voluntarily testifies in his own behalf, waives completely his privilege under the Fifth Amendment, and the Act of March 16, 1878. P. 495.
2. It is not error to require a defendant offering himself as a witness upon a second trial and denying the truth of evidence offered by the prosecution to disclose upon cross examination that he had not testified as a witness in his own behalf upon the first trial, and to explain why he did not deny the same evidence when then offered. P. 497.

IN ANSWER to a question propounded by the Circuit Court of Appeals upon a review of a conviction under the Prohibition Act.

Messrs. James B. Adamson and George B. Martin were on the brief for plaintiff in error.

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

MR. JUSTICE STONE delivered the opinion of the Court.

Raffel, with another, was indicted and twice tried for conspiracy to violate the National Prohibition Act. Upon the first trial, a prohibition agent testified that, after the search of a drinking place, Raffel admitted that the place belonged to him. On that trial Raffel did not offer himself as a witness, and the jury failed to reach a verdict. Upon the second trial the prohibition agent gave similar testimony. Raffel took the stand and denied making any such statement. After admitting that he was present at the former trial, and that the same prosecuting witness had then given the same testimony, Raffel was asked questions by the court which required him to disclose that he had not testified at the first trial, and to explain why he had not done so. The questions and answers are printed in the margin.* The second trial resulted in a conviction. On writ of error, the Circuit Court of Appeals for the Sixth Circuit certified to this

* " Q. Did you go on the stand and contradict anything they said?

A. I did not.

Q. Why didn't you?

A. I did not see enough evidence to convict me.

Defendants object to the questions of the Court.

The Court: I am not commenting; I am just asking why he didn't.

Defendant excepts.

The Court: That is so?

The Witness: I did not think there was enough evidence to do it.

By Raffel's Counsel:

Q. The failure to take the stand on the trial was under the advice of counsel, was it not?

A. Yes sir."

Court (Jud. Code § 239) a question necessary to the disposition of the case as follows:

“Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.”

To this, and to the similar questions which involve, not a previous trial, but a previous preliminary examination, or a hearing upon *habeas corpus* or application for bail, the authorities have given conflicting answers. Cases which support the Government's position are *Commonwealth v. Smith*, 163 Mass. 411, and *People v. Prevost*, 219 Mich. 233. See also *Taylor v. Commonwealth*, 17 Ky. L. 1214; *Sanders v. State*, 52 Tex. Cr. 156. Compare *Garrett v. Transit Co.*, 219 Mo. 65, 90-95.

Other cases take an opposite view, with perhaps less searching examination of the principles involved. See *Parrott v. Commonwealth*, 20 Ky. L. 761; *Newman v. Commonwealth*, 28 Ky. L. 81; *Smith v. State*, 90 Miss. 111; *Parrott v. State*, 125 Tenn. 1; *Wilson v. State*, 54 Tex. Cr. 505. And see *People v. Prevost*, *supra*, 246, *et seq.* Compare *Masterson v. Transit Co.*, 204 Mo. 507; *Garrett v. Transit Co.*, *supra*.

The Fifth Amendment provides that a person may not “be compelled in any criminal case to be a witness against himself”; and by the Act of March 16, 1878, c. 37, 20 Stat. 30, it is enacted:

“That in the trial of all indictments . . . against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts . . . the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

The immunity from giving testimony is one which the defendant may waive by offering himself as a witness.

Reagan v. United States, 157 U. S. 301; *Fitzpatrick v. United States*, 178 U. S. 304; *Powers v. United States*, 223 U. S. 303; *Caminetti v. United States*, 242 U. S. 470; *Gordon v. United States*, 254 Fed. 53; *Austin v. United States*, 4 Fed. (2d) 774. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. *Reagan v. United States*, *supra*, 305; *Fitzpatrick v. United States*, *supra*; *Tucker v. United States*, 5 Fed. (2d) 818. He may be examined for the purpose of impeaching his credibility. *Reagan v. United States*, *supra*, 305; *Fitzpatrick v. United States*, *supra*, 316. His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. *Caminetti v. United States*, *supra*. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.

If, therefore, the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion.

We may concede, without deciding, that if the defendant had not taken the stand on the second trial, evidence that he had claimed the same immunity on the first trial would be probative of no fact in issue, and would be inadmissible. See *Malone v. State*, 91 Ark. 485, 491; *Lowenherz v. Merchants Bank*, 144 Ga. 556; *Bunckley v. State*, 77 Miss. 540; *People v. Willett*, 92 N. Y. 29; but see *People v. Prevost*, *supra*.

Making this concession, and laying aside for the moment any question whether the defendant, notwithstanding his offering himself as a witness, retained some vestige of his immunity, we do not think the questions asked of him

were irrelevant or incompetent. For if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.

It is elementary that a witness who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. The value of such testimony, as is always the case with cross-examination, must depend upon the nature of the answers elicited; and their weight is for the jury. But we cannot say that such questions are improper cross-examination, although the trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny.

There can be no basis, then, for excluding the testimony objected to, unless it be on the theory that under the peculiar circumstances of the case, the defendant's immunity should be held to survive his appearance as a witness on the second trial, to the extent at least, that he may be permitted to preserve silence as to his conduct on the first.

Whether there should be such a qualification of the rule that the accused waives his privilege completely by becoming a witness, must necessarily depend upon the reasons underlying the policy of the immunity, and one's view as to whether it should be extended. The only suggested basis for such a qualification is that the adoption of the rule contended for by the Government might operate to bring pressure on the accused to take the stand on the first trial, for fear of the consequences of his silence in the event of a second trial; and might influence the defendant to continue his silence on the second trial be-

cause his first silence may there be made to count against him. See *People v. Prevost, supra*, 247; 36 Harv. L. Rev., 207, 208.

But these refinements are without substance. We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence. See *State v. Bartlett*, 55 Me. 200, 219; *State v. Cleaves*, 59 Me. 298, 300. When he does take the stand, he is under the same pressure: to testify fully, rather than avail himself of a partial immunity. And the accused at the second trial may well doubt whether the advantage lies with partial silence or with complete silence. Even if, on his first trial, he were to weigh the consequences of his failure to testify then, in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

The answer to the question certified is "No."

YU CONG ENG ET AL. *v.* TRINIDAD, COLLECTOR,
ET AL.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE
ISLANDS.

No. 623. Argued April 12, 13, 1926.—Decided June 7, 1926.

1. The Supreme Court of the Philippine Islands has discretionary jurisdiction, under § 516, Philippine Code of Civil Procedure, to determine the validity of a new penal statute seriously affecting numerous persons and extensive property interests, by a writ of prohibition against criminal proceedings under it in the Court of First Instance, rather than await judgment in those proceedings and determine the question on review, in the usual way. P. 507.
2. Act No. 2972 of the Philippine Legislature, approved February 21, 1921, making it a crime, punishable by fine and imprisonment, for any person engaged in business for profit in the Islands to keep his account books in any language other than English, Spanish, or any local dialect, must be taken as absolutely prohibiting Chinese merchants from keeping any accounts in their own language and writing. P. 517.
3. This is made plain by the history as well as the language of the enactment. P. 513.
4. The Act is not susceptible of a construction limiting its requirement to the keeping of such account books in English, Spanish, or the Filipino dialects, as would be reasonably adapted to the needs of the taxing officials in preventing and detecting evasions of the local sales tax and other taxes, but leaving the Chinese merchant free to keep books also in Chinese. P. 515.
5. The duty of a court to construe an act of legislation in harmony with the fundamental law does not authorize the court to depart from the plain terms and intention of a statute, and thus in effect to make a new law. P. 518.
6. Especially is such a departure objectionable when the result is to introduce uncertainty into the meaning of a highly penal statute. *Id.*
7. The court may not in a criminal statute reduce its generally inclusive terms by construction so as to limit its application to that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity. P. 522.

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Argument for Petitioners.

8. On a question of the construction of the Philippine Code of Procedure, adopted by the United States Philippine Commission, this Court, in reviewing a decision of the Supreme Court of the Philippines, may exercise its independent judgment. P. 522.
9. The application of American constitutional limitations to a Philippine statute dealing with the rights of persons living under the government established there by the United States, is not a local one, especially when the persons are the subject of another sovereignty with which the United States has made a treaty for protection of their rights. P. 523.
10. The limitations in the Philippine Bill of Rights are to be enforced in the light of the construction by this Court of such limitations as recognized by it since the foundation of our Government. P. 523.
11. In view of the history of the Islands, the large and important mercantile interests of Chinese residing there, who are unacquainted with other languages than their own, the above Act of the Legislature, in prohibiting them from maintaining a set of account books in Chinese, and thus preventing them from keeping advised of their business and directing its conduct, is not within the police power, but is arbitrary and discriminatory and deprives them of liberty and property without due process of law and denies them the equal protection of the laws, in violation of the Philippine Bill of Rights. P. 524.

Reversed.

CERTIORARI to a judgment of the Supreme Court of the Philippine Islands denying an original petition for a writ of prohibition against officials in the Philippine Islands to prevent enforcement by criminal proceedings of an Act of the Legislature making it an offense to keep business account books in any language except English, Spanish, or a Filipino dialect.

Mr. Frederic R. Coudert, with whom *Messrs. Allison D. Gibbs* and *Mahlon B. Doing* were on the brief, for petitioners.

Act No. 2972 is void as contrary to the prohibitions of the Philippine Bill of Rights and the Fifth Amendment to the Federal Constitution. *Balzac v. Porto Rico*, 258 U. S. 298; *Serra v. Mortiga*, 204 U. S. 470; *Tonawanda v.*

Lyon, 181 U. S. 389; *Kepner v. United States*, 195 U. S. 100; *Yick Wo v. Hopkins*, 118 U. S. 356; *Lawton v. Steele*, 152 U. S. 133; *The King v. Lau Kiu*, 7 Haw. Rep. 489; *Meyer v. Nebraska*, 262 U. S. 390; *Terrace v. Thompson*, 263 U. S. 197; *Pierce v. Society of Sisters*, 268 U. S. 510; *Truax v. Raich*, 239 U. S. 33; *Adams v. Tanner*, 244 U. S. 590; *Southwestern Oil Co. v. Texas*, 217 U. S. 114; *Coppage v. Kansas*, 236 U. S. 1; *Burns Baking Co. v. Bryan*, 264 U. S. 504; *Penn. Coal Co. v. Mahon*, 260 U. S. 393; *Truax v. Corrigan*, 257 U. S. 312; *Buchanan v. Warley*, 245 U. S. 60; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *In re Lee Sing*, 43 Fed. 359; *In re Jacobs*, 98 N. Y. 98.

Even though the Act did not, as it obviously does, discriminate directly against the Chinese, nevertheless "the purpose of an act must be found in its natural operation and effect." *Truax v. Raich*, *supra*, at p. 40. In *Yick Wo v. Hopkins*, 118 U. S. 356, this Court pierced the veil of ordinances couched in the most general terms and not expressly discriminatory, and ascertained that the ordinances were in their administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws. *Mugler v. Kansas*, 123 U. S. 623. Other cases where this Court has looked back of the form of the statutes to find illegal classifications are, *Henderson v. Mayor*, 92 U. S. 259; *Bailey v. Alabama*, 219 U. S. 219; *Guinn v. United States*, 238 U. S. 347; *Penn. Coal Co. v. Mahon*, 260 U. S. 393. See *Quong Wing v. Kirkendall*, 223 U. S. 59, 63.

The Act is also void because it denies to petitioners and others similarly situated the rights, privileges and im-

munities secured to them by the treaties between the United States and China, which assure to Chinese nationals "most favored nation" treatment. *Fulco v. Schuylkill Stone Co.*, 169 Fed. 98.

This Court may determine the validity of the Act untrammelled by the construction adopted by the Philippine Supreme Court. That construction is clearly erroneous and wholly at variance with the plain import and language of the Act. *Philippine Sugar, etc. Co. v. Philippine Islands*, 247 U. S. 385; *Yick Wo v. Hopkins, supra*; *Scott v. McNeal*, 154 U. S. 34. The legislative debates upon this law demonstrate clearly that the keeping of all account books was intended to be prohibited, although the law itself fails entirely to define "books of account." The limitation attempted to be injected into this law by the Philippine Supreme Court, restricting its operation to indefinite and unnamed books for "taxation" purposes, clearly violates the intention of the Act.

Mr. Paul Shipman Andrews, Special Assistant to the Attorney General, with whom Messrs. *Gregory Hankin*, Special Assistant to the Attorney General, *Guillermo B. Guevara*, *A. R. Stallings*, *Charles R. Brice*, and *Stanley Suydam* were on the brief, for respondents.

The interpretation of the Act by the Supreme Court of the Philippines is controlling under the circumstances of this case. The lower court's findings as to the purpose of the Act, its history, and the mischief it was designed to cure, will be adopted by this Court. *De la Rama v. De la Rama*, 201 U. S. 303; *Reavis v. Fianza*, 215 U. S. 16; *Roura v. Philippine Islands*, 218 U. S. 386. It was proper for the lower court to interpret the Act with reference to its purpose and the mischief it was designed to cure. *Takao Ozawa v. United States*, 260 U. S. 178. Petitioners object to this method of interpretation. But it is submitted that under no theory of construction are

the petitioners entitled to complain when the interpretation by the lower court involves not an extension of the scope of the statute to cover actions or persons which might not otherwise have been affected, but involves construction of the statute resulting in a narrowing of its scope and a limiting of the type of books to which its provisions were to be applicable. *Gould v. Gould*, 245 U. S. 151; *United States v. Field*, 255 U. S. 257. Indeed, in this case it was not only within the discretion of the court so to interpret the Act, but it was its duty to interpret it so as to confine it within constitutional limits. *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407; *Federal Trade Comm. v. Lorillard Co.*, 264 U. S. 298; *Hill v. Wallace*, 259 U. S. 44.

The lower court was bound to interpret this Act in accordance with existing law in the Philippine Islands. The interpretation of a statute by the highest court of the jurisdiction, whose legislature enacted it, is binding on this Court when the effect of such interpretation is to cure constitutional difficulties which otherwise might have existed. *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320; 29 Harv. L. Rev. 582; *Londoner v. Denver*, 210 U. S. 373.

Act 2972 is not a deprivation of liberty or property without due process of law. The phrase "due process" takes its meaning with reference to the body of law of the jurisdiction whose legislature enacted the statute under consideration. It should be borne in mind that the Fifth Amendment does not apply to the Philippine Islands, being a limitation only on the federal Government. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Brown v. New Jersey*, 175 U. S. 172. It has been further held by this Court, in *Dorr v. United States*, 195 U. S. 138, that the Philippine Islands do not constitute an incorporated territory and that the constitutional limita-

tions affecting Congress do not apply to the Philippines nor to its governing body, which may exercise all powers delegated by the Congress. The Philippine Autonomy Act, 39 Stat. 545, provides "that no law shall be enacted in said Islands which shall deprive any persons of life, liberty or property without due process of law or deny to any person therein the equal protection of the laws." It is true that this has been interpreted by this Court in *Serra v. Mortiga*, 204 U. S. 470, as extending to the Philippine Islands guarantees equivalent to the due process and equal protection clauses of the federal Constitution. The connotation of due process, however, when applied to legislative acts, depends on the body of existing law in the jurisdiction. *Murray v. Hoboken Land Co.*, 18 How. 272; *Brown v. New Jersey*, 175 U. S. 172. The question whether the Act offends against the due process clause of the Philippine Bill of Rights, therefore, while it is to be tested by substantially the same principles as have been applied in similar cases in this country, must be measured not as petitioners contend by exactly the same considerations which have moved our courts in their decisions under the Fifth and Fourteenth Amendments, but rather with reference to the body of law in the Philippine Islands. The Philippine Autonomy Act did not abrogate, but continued in effect the laws already in operation at the time of its enactment.

Any injury or hardship caused by this Act is purely incidental. The requirement of due process is not a limitation on an otherwise valid exercise of the power of taxation. *Brushaber v. Union Pac. R. R.*, 240 U. S. 1; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324.

Act 2972, as limited by the Supreme Court of the Philippine Islands, does not offend against the equal protection clause, either in language or in operation. Neither the wisdom of the Act, nor the motives of the legislature, undisclosed in its language or operation, are material

here. The requirement of equal protection forbids, not classification, but only arbitrary classification. Act 2972 contains no classification beyond the inclusion of all merchants and the specification of certain languages. That an Act affecting all merchants in a given territory does not constitute arbitrary classification is elementary; that the choice of languages is not an arbitrary one likewise seems obvious. English and Spanish are the official languages of the Islands. As to the native dialects, it is surely not unreasonable or arbitrary for the Government of the Philippine Islands to exert itself, in behalf of its own subjects, to the small extent required to examine their books in the native languages.

Act 2972 as limited by the Supreme Court of the Philippine Islands is sufficiently definite and certain in its requirements.

The treaty between the United States and China assuring the Chinese nationals "most favored nation" treatment has no bearing on this case.

Act 2972 is a proper exercise of the taxing power and of the police power.

MR. CHIEF JUSTICE TAFT prepared the opinion of the Court.¹

This case comes here on a writ of certiorari to review a decision of the Supreme Court of the Philippine Islands denying an original petition for prohibition against the enforcement by criminal prosecution of Act No. 2972 of the Philippine Legislature, known as the Chinese Book-keeping Act, on the ground of its invalidity. The petitioner, Yu Cong Eng, was charged, by information in the Court of First Instance of Manila, with its violation. He was arrested, his books were seized, and the trial was about to proceed when he and the other petitioner, Co Liam, on

¹ The opinion was announced by Mr. JUSTICE HOLMES, the CHIEF JUSTICE being absent.

their own behalf, and on behalf of all the other Chinese merchants in the Philippines, filed the petition against the Fiscal, or Prosecuting Attorney, of Manila, and the Collector of Internal Revenue engaged in the prosecution, and against the Judge presiding.

By the Code of Civil Procedure of the Philippine Islands, § 516, the Philippine Supreme Court is granted concurrent jurisdiction in prohibition with courts of first instance over inferior tribunals or persons, and original jurisdiction over courts of first instance, when such courts are exercising functions without or in excess of their jurisdiction. It has been held by that court that the question of the validity of a criminal statute must usually be raised by a defendant in the trial court and be carried regularly in review to the Supreme Court. *Cadwallader-Gibson Lumber Company v. Del Rosario*, 26 Philippine Reports, 192. But in this case, where a new Act seriously affected numerous persons and extensive property rights, and was likely to cause a multiplicity of actions, the Supreme Court exercised its discretion to bring the issue of the Act's validity promptly before it and decide it in the interest of the orderly administration of justice. The court relied by analogy upon the cases of *Ex parte Young*, 209 U. S. 123; *Truax v. Raich*, 239 U. S. 33; and *Wilson v. New*, 243 U. S. 332. Although objection to the jurisdiction was raised by demurrer to the petition, this is now disclaimed on behalf of the respondents, and both parties ask a decision on the merits. In view of broad powers in prohibition granted to that court under the Island Code, we acquiesce in the desire of the parties.

Act No. 2972, the validity of which is attacked, was passed by the Philippine Legislature, and approved February 21, 1921. It reads as follows:

"No. 2972. An act to provide in what languages account books shall be kept, and to establish penalties for its violation.

“Be it enacted by the Senate and House of Representatives of the Philippines in legislature assembled and by the authority of the same:

“Section 1. It shall be unlawful for any person, company, partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, in according with existing law, to keep its account books in any language other than English, Spanish, or any local dialect.

“Section 2. Any person violating the provisions of this Act shall, upon conviction, be punished by a fine of not more than ten thousand pesos, or by imprisonment for not more than two years, or both.

“Section 3. This Act shall take effect on November 1st, Nineteen Hundred and Twenty-One.”

This was amended as to its date by a subsequent act and it did not take effect until January 1st, 1923. Various efforts were made to repeal the Act or amend it, but they were defeated.

The petition, after setting out the prosecution in the court of first instance, and the text of the Act, avers that the petitioner Yu Cong Eng is a Chinese merchant engaged in the wholesale lumber business in Manila; that he neither reads, writes nor understands the English or Spanish language or any local dialect; that he keeps the books of account of his business in Chinese characters; that by reason of his ignorance of the English and Spanish languages and of all local dialects he is unable to keep his books in any other language than his own; that even if he should employ a bookkeeper capable of keeping his books in the English or Spanish language, he would have no means of personally revising or ascertaining the contents or correctness of the books thus kept; that the employment of such a bookkeeper, unless he should be a linguist, would entail as a necessary consequence the employment of a translator or interpreter familiar with the

Chinese language and the language or dialect in which such books might be kept, in order to enable the petitioner to ascertain by hearsay the contents thereof; that he would be completely at the mercy of such employees, who if dishonest might cheat and defraud him of the proceeds of his business, and involve him in criminal or civil liability in its conduct; that under the provisions of the Act he is prohibited from even keeping a duplicate set of accounts in his own language, and would, in the event of the enforcement of the law, be compelled to remain in total ignorance of the status of his business; and that the enforcement of the Act would drive the petitioner and many other Chinese merchants in the Philippines, who do sixty per cent. of the business of the Islands and who are in like circumstance, out of business.

The petition avers that the other petitioner in this case, Co Liam, is a Chinese person and conducts a small general merchandise business in Manila, commonly known in the Philippines as a Chinese tienda; that he carries a stock of goods of about 10,000 pesos, or \$5,000; that his sales taxes amount to from 40 to 60 pesos per quarter; that he neither reads, writes nor understands the English or Spanish languages, or any local dialect; that he keeps books of account of his small business in Chinese, the only language known to him, without the assistance of a bookkeeper; that he has been losing money for some time in the operation of his business, but that even in prosperous times his profits could never be sufficient to justify the employment of a Filipino bookkeeper, and that, without the opportunity to keep Chinese books, he would be kept completely ignorant of the changing condition of his business, were he compelled to keep his books in English, Spanish or a local dialect, and that the enforcement of the Act would drive him and all the small merchants or tienda keepers in the Islands who are Chinese out of business.

The petitioners aver that the Act, if enforced, will deprive the petitioners, and the twelve thousand Chinese merchants whom they represent, of their liberty and property without due process of law, and deny them the equal protection of the laws, in violation of the Philippine Autonomy Act of Congress of August 29, 1916, c. 416, sec. 3, 39 Stat. 546.

An amendment to the petition set up the rights of the petitioners under the treaty now in force between the United States and China, alleging that under it the petitioners are entitled to the same rights, privileges and immunities as the citizens and subjects of Great Britain and Spain, and that the treaty has the force and effect of a law of Congress, which this law violates.

An answer was filed by the Fiscal, which is a general denial of the averments of the petition as to the effect of the law. He avers that the law is valid and necessary and is only the exercise of proper legislative power, because the government of the Philippine Islands depends upon the taxes and imposts which it may collect in order to carry out its functions; and the determination of whether the mercantile operations of the merchants are or are not subject to taxation, as well as the fixing of its amount, can not and ought not to be left to the mercy of those who are to bear it; that, due to the inability of the officials of the Internal Revenue to revise and check up properly the correctness of the books of account which the Chinese merchants keep in their own language, the public treasury loses every year very large sums.

Evidence was taken on the issues made. A majority of the Supreme Court held that, if the Act were construed and enforced literally, it would probably be invalid, but, by giving it an interpretation different from the usual meaning of the words employed, it could stand. Two of the justices dissented, on the ground that the

court had exceeded its powers and by legislation made it a different Act.

There are two tax laws from which a substantial part of the revenue of the Islands is derived. There is a sales tax of $1\frac{1}{2}$ per cent. on the gross sales of businesses and occupations for which a quarterly return is required. Administrative Code, §§ 1453, etc., Act 3065. There is also an income tax. The annual revenue accruing from the sales tax is roughly ten million pesos, and that from the income tax about two millions.

Another statute is the so-called Code of Commerce, brought over from the Spanish Code, the 33d Article of which provides that all merchants shall keep a book of inventories and balances, a day book, a ledger, a copy book of telegrams, letters, etc., and such other books as may be required by special laws. Under the provisions of that code and the internal revenue law, the collector of internal revenue is authorized to require the keeping of daily records of sales, and makes regulations prescribing the manner in which the proper books, invoices and other papers should be kept, and entries made therein, by the persons subject to the sales tax. R. 1164, Act No. 2339, §§ 5, 6; Administrative Code, section 1424(j).

Chinese merchants are said to have been in the Philippines even before the arrival of the Spaniards, in 1520. The Chinese written language is an ancient language with a literature and with characters quite different from those used in European languages. There are many different native dialects in the Philippines. Forty-three is said to be the number; but there are less than a dozen of these which may be regarded as important—the Tagalog, the Visayan, with two distinct main dialects, the Ilocano, the Bical, the Pampangan, the Ibanag, the Pangasananian and the Moro. Perhaps from 7 to 10 per cent. of the Filipinos speak Spanish. A great many (how large the percentage one can not tell) of the younger people in the

Islands speak English. It is a polyglot situation, and presents many difficulties in government. Comparatively few of the Chinese speak English or Spanish or the native dialects with any facility at all, and less are able to write or to read either. But, with capacity and persistence in trade, by signs and by a patois they communicate with the Filipinos and others with whom they do business, making their calculations with the abacus, an instrument for mechanical calculation, and keeping their books in Chinese characters in ink, applied by a brush to strong paper, securely bound. They have a scientific system of double entry bookkeeping.

There are 85,000 merchants in the Philippines to whom the bookkeeping law applies. Of these, 71,000 are Filipinos who may use their own dialects; 1,500 are Americans, or British or Spanish subjects; 500 are of other foreign nationalities, most of whom know the Spanish or English language. The remainder, some 12,000 in number, are Chinese. The aggregate commercial business transacted by these is about 60 per cent. of the total business done by all the merchants in the Islands. The total amount of their sales in 1923 was more than 320 millions of pesos, distributed among 3,335 wholesale merchants, of whom 50 did a business of a million pesos each, 150 of half a million each, 400 of one hundred thousand each, and 2,735 of forty thousand each. There were 8,445 retail merchants whose annual incomes on the average would not exceed 500 pesos each. In 1913, certain revenue statistics were reported by the then collector of internal revenue to the Court of First Instance in the case of *Young v. Rafferty*, 33 Philippine Reports, 556, in which the validity of an order by the collector requiring the keeping of certain books by tax payers in Spanish and English was at issue. The figures given above are based on this report. The report showed that Chinese merchants paid about 60 per cent. of the taxes; but this is

now in dispute and evidence was introduced by the present collector to show that the proportion of taxes paid by them in 1918 and 1922 was much less, and that examination of the books of four hundred Chinese tax payers showed a very considerable loss probably due to evasion and fraud.

The evidence of the president of the largest company in the Philippine Islands, an American who has been twenty-one years in business in the Philippines, as to the business activities of the Chinese, was accepted by the court below as reliable. He says that the Chinese system of distribution covers the Philippine Islands through the medium of middlemen in the principal centers, and then by the small Chinese storekeepers throughout the Islands, extending even to the remotest barrios or small settlements. The Chinese are the principal distributing factors in the Philippines of imported goods and the principal gatherers of goods for exportation in the same remote places. He said that, if they were driven out of business, there would be no other system of distribution available throughout the Islands, for the reason that there are not Filipino merchants sufficiently numerous with resources and experience to provide a substitute.

The Chinese Consul General testified that not more than eight Chinese merchants in the Islands can read or write proficiently in any other language than Chinese, and that the great majority of them could not comply with the Act. The merchants' establishments are made up of young Chinese persons who come from China, begin at the beginning and are promoted from time to time to become the head of the business. The books are always kept in the Chinese language, and each Chinese establishment is completely separated from the native mode of living.

Apparently there has always been some complaint in respect of the avoidance of taxes by the Chinese, because

of the difficulty of determining what their sales tax should be. There has always been a sales tax in the Philippines. It is a method of taxation to which the people are used. Dr. Pardo de Tavera, the Philippine Librarian and Historian, testified in this case that efforts to enforce such a law as this in the Spanish times against the Chinese, failed and became a dead letter. Governor General Harrison made a general recommendation looking to a law requiring the Chinese to keep books in other than Chinese language so that their business might be investigated, saying that, until it was done, taxes would be evaded. Since the passage of the law in 1921, as already said, its enforcement has been postponed. Governor General Wood has sought to have the law repealed or changed in such a way that exceptions might be made to it, or that the books of the Chinese should be kept on stamped paper with the pages registered, for the purpose of making it difficult for the Chinese tax payer to change the records of his business. Protests from the Chinese Government, from members of the Insular Committee of the House of Representatives, from Chambers of Commerce in the United States and elsewhere, were brought to the attention of the Philippine Legislature, and the repeal or modification of the law came up for discussion, but all proposed changes were defeated. The great weight of the evidence sustains the view that the enforcement by criminal punishment of an inhibition against the keeping of any Chinese books of account by Chinese merchants in the Islands would seriously embarrass all of them and would drive out of business a great number.

Nor is there any doubt that the Act, as a fiscal measure, was chiefly directed against the Chinese merchants. The discussion over its repeal in the Philippine Legislature leaves no doubt on this point. So far as the other merchants in the Islands are concerned, its results would be

negligible and would operate without especial burden on other classes of foreign residents. The Supreme Court in its opinion in this case refers to the Act as popularly known as the Chinese Bookkeeping Act.

Evidence was introduced on behalf of the defendants to show the difficulty of securing competent Chinese bookkeepers who could act as inspectors of Chinese books for the tax collecting authorities, and, while the failure of the government to employ a sufficient number was charged to the fact that sufficient salaries were not paid to secure them, it is undoubtedly true that a lack of proper and reliable Chinese accountants presents a real difficulty in the examination of Chinese merchants' books.

The majority of the Philippine court, in its opinion, after quoting a number of authorities showing the duty of a court, in determining whether a law is unconstitutional or not, first to give every intendment possible to its validity, and second to reach a reasonable construction by which it may be preserved, said:

"We come to the last question suggested, a construction of Act No. 2972 which allows the court legally to approve it.

"A literal application of the law would make it unlawful for any Chinese merchant to keep his account books in any language other than English, Spanish or a local dialect. The petitioners say the law is susceptible of that interpretation. But such interpretation might, and probably would, cause us to hold the law unconstitutional.

"A second interpretation is that the Chinese merchant, while permitted to keep his books of account in Chinese, must also keep another set of books in either English, Spanish or a native dialect. The respondents claim the law is susceptible of such construction. It occurs to us, however, that this construction might prove as unsatis-

factory as the first. Fraud is possible in any language. An approximation to governmental convenience and an approximation to equality in taxation is the most which may be expected.

“A third construction which is permissible in view of the history of the legislation and the wording of the statute, is, that the law only intended to require the keeping of such books as were necessary in order to facilitate governmental inspection for tax purposes. It has not escaped our notice that the law does not specify what books shall be kept. It is stated by competent witnesses that a cash book, a journal, and a ledger are indispensable books of account for an efficient system of accounting, and that, in the smaller shops, even simpler entries showing merely the daily records of sales and record of purchases of merchandise would be sufficient. The keeping of records of sales, and possibly further records of purchases, in English, Spanish or a native dialect, and the filling out of the necessary forms would serve the purpose of the Government while not being oppressive. Actually, notations in English, Spanish or a dialect of all sales in sales books, and of data in other specified forms are insisted upon by the Bureau of Internal Revenue, although as appears from Exhibit 2, it is doubtful if all Chinese merchants have complied with these regulations. The faithful observance of such rules by the Chinese is not far removed from the offer of coöperation oft made for them by the petitioners of the ‘translation of the account books’ oft mentioned and explained by the respondents.

“The law, in speaking of any person, company, partnership or corporation, makes use of the expression ‘its account books.’ Does the phrase ‘its account books’ mean that all the account books of the person, company, partnership or corporation must be kept exclusively in English, Spanish or any local dialect? The petitioners

argue that the law has this meaning. Or does the phrase 'its account books' mean that the persons, company, partnership or corporation shall keep duplicate sets of account books, one set in Chinese and the other a translation into English, Spanish or any local dialect? Counsel for the respondents urge this construction of the law upon the court. Or does the phrase 'its account books' mean that the person, company, partnership or corporation must keep such account books as are necessary for taxation purposes? This latter interpretation occurs to us as a reasonable one and as best safeguarding the rights of the accused."

The court in effect concludes that what the Legislature meant to do was to require the keeping of such account books in English, Spanish or the Filipino dialects as would be reasonably adapted to the needs of the taxing officers in preventing and detecting evasion of taxes, and that this might be determined from the statutes and regulations then in force. What the court really does is to change the law from one which, by its plain terms, forbids the Chinese merchants to keep their account books in any language except English, Spanish or the Filipino dialects, and thus forbids them to keep account books in the Chinese, into a law requiring them to keep certain undefined books in the permitted languages. This is to change a penal prohibitive law to a mandatory law of great indefiniteness, to conform to what the Court assumes was, or ought to have been, the purpose of the Legislature, and which in the change would avoid a conflict with constitutional restriction.

It would seem to us, from the history of the legislation and the efforts for its repeal or amendment, that the Philippine Legislature knew the meaning of the words it used, and intended that the Act as passed should be prohibitory and should forbid the Chinese merchants from keeping the account books of their business in Chinese.

Had the Legislature intended only what the Supreme Court has construed it to mean, why should it not have amended it accordingly? Apparently the Legislature thought the danger to the revenue was in the secrecy of the Chinese books, and additional books in the permitted languages would not solve the difficulty.

We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.

One of the strongest reasons for not making this law a nose of wax to be changed from that which the plain language imports, is the fact that it is a highly penal statute authorizing sentence of one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, we are creating by construction a vague requirement, and one objectionable in a criminal statute. We are likely thus to trespass on the provision of the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him; and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law. *Connally v. Construction Company*, 269 U. S. 385; *United States v. Cohen Grocery Company*, 255 U. S. 81; *International Harvester Co. v. Kentucky*, 234 U. S. 216; *United States v. Reese*, 92 U. S. 214, 219.

The main objection to the construction given to the Act by the court below is that, in making the Act indefinitely mandatory instead of broadly prohibitory, it creates a

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whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.”

And again the Chief Justice said:

“To limit this statute in the manner now asked for would be to make a new law, not to enforce the old one. This is no part of our duty.”

The same principle was laid down, and this language approved by this Court, in the *Trade Mark Cases*, 100 U. S. 82, in which, to save the validity of a general statute providing for trade marks, the Court was asked to construe the statute to apply only to trade marks in interstate commerce. It was held this could not be done. Mr. Justice, Miller, speaking for the Court, at p. 98, said:

“It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning

than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.”

The case of *Butts v. Merchants and Miners Transportation Company*, 230 U. S. 126, concerned the application of the Civil Rights Act of March 1, 1875, to vessels of the United States engaged in the coastwise trade. In the *Civil Rights Cases*, 109 U. S. 3, it was held that the Civil Rights Act of 1875, to protect all citizens in their civil and legal rights, and in accordance with the terms of which a defendant was indicted for denying the privileges and accommodations of a theater in a State to a person on account of her color, was unconstitutional because power to enact and enforce such legislation in a State was in the state legislature only. The declaration in the *Butts Case* was brought to recover penalties for violation of the Act against a corporation engaged in the transportation of passengers and freight between Boston, Mass., and Norfolk, Va., and the discrimination occurred on the high seas and in the jurisdiction of the United States, and not within any State. It was contended that the Federal Civil Rights Act could, therefore, apply in such a case. The Court pointed out the all-inclusive words of the Act of Congress and held that they could not be cut down to include only what was strictly within the federal jurisdiction. The Court said:

“Only by reason of the general words indicative of the intended uniformity can it be said that there was a purpose to embrace American vessels upon the high seas, the District of Columbia and the Territories. But how can the manifest purpose to establish an uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction? How can the use of the general terms denoting an intention to enact a law which should be appli-

cable alike in all places within that jurisdiction be said to indicate a purpose to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part? Besides, it is not to be forgotten that the intended law is both penal and criminal." Citing the case of *United States v. Reese*, and the *Trade Mark Cases*, *supra*, as well as *United States v. Harris*, 106 U. S. 629, 642; *Baldwin v. Franks*, 120 U. S. 678, 685; *James v. Bowman*, 190 U. S. 127, 140; *United States v. Ju Toy*, 198 U. S. 253, 262; *Illinois Central Railroad Co. v. McKendree*, 203 U. S. 514, 529-530; *Karem v. United States*, 121 Fed. 250, 259.

The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity. What it is proposed to do here is much more radical, for it is to ignore and hold for naught a plain prohibition of the keeping of account books in Chinese and insert in the act an affirmative requirement that account books, not definitely determined which are adapted to the needs of the taxing officials, be kept in the permitted languages. This is quite beyond the judicial power.

The suggestion has been made in argument that we should accept the construction put upon a statute of the Philippine Islands by their Supreme Court, as we would the construction of a state court in passing upon the federal constitutionality of a state statute. The analogy is not complete. The Philippines are within the exclusive jurisdiction of the United States Government, with complete power of legislation in Congress over them; and when the interpretation of a Philippine statute comes before us for review, we may, if there be need therefor, re-examine it for ourselves as the court of last resort on

such a question. It is very true that, with respect to questions turning on questions of local law, or those properly affected by custom inherited from the centuries of Spanish control, we defer much to the judgment of the Philippine or Porto Rican courts. *Cami v. Central Victoria, Ltd.*, 268 U. S. 469; *Diaz v. Gonzales*, 261 U. S. 102. But on questions of statutory construction, as of the Philippine Code of Procedure adopted by the United States Philippine Commission, this Court may exercise an independent judgment. In *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385, involving the effect of § 285 of that Code, this Court said, at p. 390:

“It is also urged that, since the construction of § 285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. *Phoenix Ry. Co. v. Landis*, 231 U. S. 578. But that disposition may not be yielded to, where the lower court has clearly erred. *Carrington v. United States*, 208 U. S. 1.”

The question of applying American constitutional limitations to a Philippine or Porto Rican statute dealing with the rights of persons living under the government established by the United States, is not a local one, especially when the persons affected are subjects of another sovereignty with which the United States has made a treaty promising to make every effort to protect their rights. The fundamental law we administer in the Philippine bill of rights was a marked change from that which prevailed in the Islands before we took them over, and is to be enforced in the light of the construction by this Court of such limitations as it has recognized them since the foundation of our own government. In its application here, we must determine for ourselves the necessary meaning of a statute officially enacted in English, and its conformity with fundamental limitations.

We can not give any other meaning to the Bookkeeping Act than that which its plain language imports, making it a crime for any one in the Philippine Islands engaged in business to keep his account books in Chinese. This brings us to the question whether the law thus construed to mean what it says is invalid.

The Philippine Bill of Rights, already referred to, provides that:

“No law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.”

In *Serra v. Mortiga*, 204 U. S. 470, at 474, this Court said:

“It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands, 32 Stat. 691, 692, that guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment, the twice in jeopardy clause of the Fifth Amendment, and the substantial guarantees of the Sixth Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. *Kepner v. United States*, 195 U. S. 100.

“For the purpose, therefore, of passing on the errors assigned we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the bill of rights expressed in the amendments to the Constitution of the United States.”

In view of the history of the Islands and of the conditions there prevailing, we think the law to be invalid, because it deprives Chinese persons—situated as they are,

with their extensive and important business long established—of their liberty and property without due process of law, and denies them the equal protection of the laws.

Of course, the Philippine Government may make every reasonable requirement of its taxpayers to keep proper records of their business transactions in English, or Spanish, or Filipino dialect, by which an adequate measure of what is due from them in meeting the cost of government can be had. How detailed those records should be, we need not now discuss, for it is not before us. But we are clearly of opinion that it is not within the police power of the Philippine Legislature, because it would be oppressive and arbitrary, to prohibit all Chinese merchants from maintaining a set of books in the Chinese language, and in the Chinese characters, and thus prevent them from keeping advised of the status of their business and directing its conduct. As the petitioner Yu Cong Eng well said in his examination, the Chinese books of those merchants who know only Chinese and do not know English and Spanish, (and they constitute a very large majority of all of them in the Islands,) are their eyes in respect of their business. Without them, such merchants would be a prey to all kinds of fraud and without possibility of adopting any safe policy. It would greatly and disastrously curtail their liberty of action, and be oppressive and damaging in the preservation of their property. We agree with the Philippine Supreme Court in thinking that the statute, construed as we think it must be construed, is invalid.

In *Lawton v. Steele*, 152 U. S. 133, 137, the Court said:

“To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive

upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Holden v. Hardy*, 169 U. S. 366, 398, the Court said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

In the case of *Meyer v. Nebraska*, 262 U. S. 390, this Court considered the validity of state legislation making it unlawful to teach a foreign language to children, adopted on the theory that the State had the right to protect children likely to become citizens from study of a particular language, in which they might read and learn doctrine inimical to the Constitution of the United States and to the Nation, and forbidding the teachers of the language from pursuing their occupation on this account, and held it invalid. The Court said:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with under the guise of pro-

tecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."

The same principle is laid down in *Pierce v. Society of Sisters*, 268 U. S. 510, in *Truax v. Raich*, 239 U. S. 33, and in *Adams v. Tanner*, 244 U. S. 590, in which this Court has held legislative attempts arbitrarily and oppressively to interfere with the liberty of the individual in the pursuit of lawful occupations to involve a lack of due process.

In *Adams v. Tanner*, *supra*, an Act to restrict the maintenance of employment agencies, by forbidding the collection of fees from those seeking work, to avoid the extortion to which such workers were often subjected, was held unconstitutional. The Court said, at p. 594:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

In *Truax v. Raich*, *supra*, the people of the State of Arizona adopted an Act, entitled "An Act to protect the

citizens of the United States in their employment against non-citizens of the United States," and provided that an employer of more than five workers at any one time in that State should not employ less than eighty per cent. qualified electors or native born citizens, and that any employer who did so should be subject upon conviction to the payment of a fine and to imprisonment. It was held that such a law denied aliens an opportunity of earning a livelihood and deprived them of their liberty without due process of law, and denied them the equal protection of the laws. As against the Chinese merchants of the Philippines, we think the present law, which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws.

We hold the law in question to be invalid.

Judgment reversed.

ALEJANDRINO *v.* QUEZON *ET AL.*

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 309. Submitted May 4, 1926.—Decided June 7, 1926.

1. The Jurisdictional Act of September 6, 1916, repealed the provision of the Philippine Autonomy Act giving this Court jurisdiction to review by writ of error the final judgments of the Supreme Court of the Philippine Islands in cases involving the Constitution, or any statute, treaty, title, or privilege of the United States or where the value in controversy exceeds \$25,000, and substituted a review of such judgments by certiorari. P. 529.
2. The questions whether a member of the Philippine Senate appointed by the Governor General under the Autonomy Act, could be suspended by the elected members, and whether, if their action were invalid, the Supreme Court of the Islands, in this suit against

those members, had jurisdiction to require them, by mandamus or injunction, to re-admit him as an active member, became moot in this case, owing to the expiration of the period of suspension; and no other question being involved save the incidental one of the petitioner's right to recover unpaid salary during the period of suspension, and that being an issue concerning which the present petition fails to furnish sufficient information to enable the court in any event to afford a remedy, and one, furthermore, which would properly be tried in a separate proceeding against some executive officer or officers charged with the ministerial duty of paying such salary,—the cause as a whole must be treated as moot; and, following the established practice of this Court, the judgment below, dismissing the petition for want of jurisdiction, is vacated, and the cause remanded with directions to dismiss the petition, without costs. P. 532.

CERTIORARI to a judgment of the Supreme Court of the Philippines dismissing, for want of jurisdiction, an original proceeding, for injunction and mandamus, brought by an appointed member of the Senate of the Islands, against its twenty-two elected members, including its President, and its Secretary, its Sergeant at Arms and its Paymaster, in which the petitioner challenged the validity of a resolution of the Senate suspending him from the prerogatives, privileges, and emoluments of his office during one year from January 1st, 1924, and sought to have it set aside and recognition of his rights as Senator enforced. The judgment below was entered on September 22, 1924.

Mr. Claro M. Recto for petitioner.

No appearance for respondents.

MR. CHIEF JUSTICE TAFT prepared the opinion of the Court.¹

This cause was brought here by certiorari under § 5 of the Act of September 6, 1916, to amend the Judicial Code,

¹The opinion was announced by MR. JUSTICE HOLMES, the CHIEF JUSTICE being absent.

c. 448, 39 Stat. 726. That Act repealed § 248 of the Judicial Code, re-enacted by § 27 of the so-called Philippine Autonomy Act, c. 416, 39 Stat. 545, 555, which gave jurisdiction to this Court to examine by writ of error the final judgments and decrees of the Supreme Court of the Islands in all cases in which the Constitution or any statute, treaty, title or privilege of the United States, was involved, or in cases in which the value in controversy exceeded \$25,000; and a review of such judgments by writ of certiorari was substituted. The certiorari here was granted because a statute of the United States, to wit, the Autonomy Act, was involved.

This proceeding was an original action in the Supreme Court of the Philippines, brought by José Alejandrino, a Senator appointed by the Governor General, seeking a mandamus and an injunction against the twenty-two elected members of the Senate, including its President, its Secretary, its Sergeant at Arms, and its Paymaster. The occasion for the proceeding was a resolution of the Senate, passed February 5, 1924, and reading as follows:

“Resolved: That the Honorable José Alejandrino, Senator from the Twelfth District, be, and he is hereby, declared guilty of disorderly conduct and flagrant violation of the privileges of the Senate for having treacherously assaulted the Honorable Vicente de Vera, Senator for the Sixth District, on the occasion of certain phrases being uttered by the latter in the course of the debate regarding the credentials of said Mr. Alejandrino.

“Resolved further: That the Honorable José Alejandrino be, and he is hereby, deprived of all of his prerogatives, privileges and emoluments as such Senator during one year from the first of January, nineteen hundred and twenty-four;

“And resolved, lastly: That the said Honorable José Alejandrino being a Senator appointed by the Governor General of these Islands, a copy of this resolution be furnished said Governor-General for his information.”

The petitioner charged that this resolution was unconstitutional and of no effect and asked a preliminary injunction against the respondents enjoining them from executing the resolution, a judicial declaration that it was null and void, and a final order of mandamus against the respondents, ordering them to recognize the rights of the petitioner and his office as Senator, and all of his prerogatives, privileges and emoluments, and prohibiting them from carrying the order of suspension into effect. The respondents made a special appearance through the Attorney General and objected on demurrer to the court's jurisdiction. The court held that it was without jurisdiction, sustained the demurrer, and, as it did not appear that the petition could be amended so as to state a cause of action, it was dismissed without costs.

José Alejandrino was appointed under the Philippine Autonomy Act, by the Governor-General, a Senator to represent the Twelfth District—a district composed of non-Christian tribes in the northern part of Luzon and the Moros in the Department of Mindanao and Sulu. At the time he took his seat in the Senate, another Senator, Vicente de Vera, made a speech on the credentials of Senator Alejandrino in which he said some things which Alejandrino resented. At night, and after the session of the Senate concluded, and away from the Senate chamber, Alejandrino assaulted de Vera because of his remarks made in the Senate. The resolution complained of was because of this assault.

By § 12 of the Autonomy Act, the general legislative powers in the Philippines, with certain exceptions, are vested in a Legislature consisting of two Houses—the Senate and the House of Representatives. The Senate is composed of twenty-four members from twelve Senate districts. Twenty-two of them are elected; and one district, the Twelfth, already referred to, has two Senators,

appointed by the Governor General. By § 17, a Senator appointed by the Governor General holds office until removed by the Governor General. Section 18 provides that the Senate and House respectively shall be the sole judges of the elections, returns and qualifications of their elective members, and each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel an elective member. The Senators and Representatives shall receive an annual compensation for their services to be ascertained by law and paid out of the Treasury of the Philippine Islands. Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

It is argued that, as the only power of expulsion given to the Senate is in respect of its elected members, no power is conferred on the Senate to expel a member appointed by the Governor General. It is further argued that the power to suspend is only a less power than the power to expel and of the same character, and therefore that the Senate had no power to suspend an appointed Senator, and therefore that the Senate exceeded its authority in attempting to do so in this resolution, and its action was null.

We do not think that we can consider this question, for the reason that the period of suspension fixed in the resolution has expired, and, so far as we are advised, Alejandrino is now exercising his functions as a member of the Senate. It is therefore in this Court a moot question whether lawfully he could be suspended in the way in which he was. Equally so is the still more important question whether the Supreme Court of the Philippines

had any jurisdiction by extraordinary writ of mandamus or injunction to require the Senate—a part of the Island Legislature, and a separate branch of the Government—to rescind its resolution and to re-admit Alejandrino to the Senate as an active member.

It may be suggested, as an objection to our vacating the action of the court below, and directing the dismissal of the petition as having become a moot case, that, while the lapse of time has made unnecessary and futile a writ of mandamus to restore Senator Alejandrino to the Island Senate, there still remains a right on his part to the recovery of his emoluments, which were withheld during his suspension, and that we ought to retain the case for the purpose of determining whether he may not have a mandamus for this purpose. We are not advised from his petition what the emoluments of his office during that period would be, except his salary. We infer from the averment of his petition that, as the suspension was in part retroactive, he was not paid what was due him during the month of January, 1924. It is difficult for the Court to deal with this feature of the case, which is really only a mere incident to the main question made in the petition and considered in the able and extended brief of counsel for the petitioner, and the only brief before us. That brief is not in any part of it directed to the subject of emoluments, nor does it refer us to any statute or to the rules of the Senate by which the method of paying Senators' salaries is provided, or in a definite way describe the duties of the officer or officers or committee charged with the ministerial function of paying them. The petition, in describing the defendants, avers that certain of them, being Senators, "are besides members of the Committee on Accounts of the Senate who approve the payment of emoluments that Senators are entitled to receive." Section 7 of the petition is as follows:

"That the defendants, in the respective capacities in which they are sued, attempt to comply with, execute and

carry into effect, or to cause to be complied with, executed and carried into effect, the suspension of the plaintiff depriving him, during the period of one year, of the exercise of his office and of all of his prerogatives, privileges and emoluments as Senator, as said defendant Senators and their President do not recognize the plaintiff's right to exercise such office and prevent him from exercising same, and cause all the officers, employes and other subordinates of the Senate not to recognize the plaintiff as Senator and to prevent him from exercising his office and enjoying his prerogatives, privileges and emoluments, and the President of the Senate, moreover, gives the necessary orders for the carrying into effect of said order of suspension, and the other defendants Faustino Aguilar and Bernabe Bustamente execute and comply with the orders and restrictions of the Senate and its President in order that the plaintiff may not be recognized as Senator and may not exercise his prerogatives and privileges as such Senator in the Senate building, and the defendant Francisco Dayaw, Official Paymaster of the Senate, requires him to refund his emoluments received corresponding to the period that has already elapsed from January 1st of this year and refuses to pay the emoluments to which the plaintiff is entitled."

We must assume, in view of the injunction of Congress in the Autonomy Act, that Senators shall receive an annual compensation to be fixed by law, that there is some official or board charged with the executive and ministerial duty of paying the senatorial salaries against whom a Senator entitled might procure a mandamus to compel payment. But the averments of the petition do not set out with sufficient clearness who that official or set of officials may be. Were that set out, the remedy of the Senator would seem to be by mandamus to compel such official in the discharge of his ministerial duty to pay him the salary due, and the presence of the Senate

as a party would be unnecessary. Should that official rely upon the resolution of the Senate as a reason for refusing to comply with his duty to pay Senators, the validity of such a defense and the validity of the resolution might become a judicial question affecting the personal right of the complaining Senator, properly to be disposed of in such action, but not requiring the presence of the Senate as a party for its adjudication. The right of the petitioner to his salary does not therefore involve the very serious issue raised in this petition as to the power of the Philippine Supreme Court to compel by mandamus one of the two legislative bodies constituting the legislative branch of the Government to rescind a resolution adopted by it in asserted lawful discipline of one of its members, for disorder and breach of privilege. We think, now that the main question as to the validity of the suspension has become moot, the incidental issue as to the remedy which the suspended Senator may have in recovery of his emoluments, if illegally withheld, should properly be tried in a separate proceeding against an executive officer or officers as described. As we are not able to derive from the petition sufficient information upon which properly to afford such a remedy, we must treat the whole cause as moot and act accordingly. This action on our part of course is without prejudice to a suit by Senator Alejandrino against the proper executive officer or committee by way of mandamus or otherwise to obtain payment of the salary which may have been unlawfully withheld from him.

The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this Court, vacate the judgment below and remand

the cause with directions to dismiss the petition without costs to either party. *Public Utility Commissioners v. Compania General De Tabacos De Filipinas*, 249 U. S. 425; *Brownlow v. Schwartz*, 261 U. S. 216, and cases cited.

Judgment vacated with directions to dismiss petition without costs to either party.

GOLTRA *v.* WEEKS, SECRETARY OF WAR, ET AL.

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

No. 718. Argued April 27, 28, 1926.—Decided June 7, 1926.

1. A suit by one who had obtained lawful possession of a fleet of boats belonging to the United States, under a lease or charter for a term of years executed by the Chief of Engineers by direction of the Secretary of War, to enjoin the latter official and an army officer from wrongfully and forcibly taking possession of the boats in pursuance of an alleged conspiracy between them, and to require the defendants to restore some of the boats already so taken, is not a suit against the United States, and the United States is not a necessary party. *Philadelphia Co. v. Stimson*, 223 U. S. 605, followed. *Wells v. Roper*, 246 U. S. 335, distinguished. P. 544.
2. A stipulation in a lease authorizing the lessor to terminate the lease and retake the property if, in his judgment, the lessee is not complying with his obligations under the contract, is valid, and, in the absence of bad faith, the lessor's judgment on the question of compliance is conclusive. P. 547.
3. In a suit by a lessee to enjoin threatened retaking of leased property, where it appeared, on motion for a preliminary injunction, that the defendant had actually taken the property from the plaintiff's possession, but also, upon a full showing, that he had a clear right to retake it under the lease, *held* that plaintiff was not entitled to a temporary injunction restoring the possession *pendente lite*, even though the retaking had been accomplished through a wrongful show of force and was timed to avoid an injunction. P. 548.

7 Fed. (2d) 838, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of temporary injunction rendered by the District Court, in a suit by Goltra to enjoin the Secretary of War and an army officer from seizing from his possession certain boats and barges, which had been leased to him by the Chief of Engineers, acting for the United States by direction of the Secretary. The bill also prayed restoration of part of the boats, already taken; and the remainder were taken before the hearing. The decree commanded restoration of plaintiff's possession and enjoined further interference during the suit. See also *Ex parte United States*, 263 U. S. 389.

Mr. Joseph T. Davis, with whom *Mr. Douglas W. Robert* was on the brief, for petitioner.

The District Court, as a court of equity, had jurisdiction and authority to restrain the respondents, even though they were officers of the United States, from interference with property of the petitioner in an arbitrary, unwarranted and illegal manner; and such relief cannot be defeated upon the ground that the suit is one against the United States. *Colorado v. Toll*, 268 U. S. 228; *Osborn v. The Bank*, 9 Wheat. 738; *Noble v. Union River R. R. Co.*, 147 U. S. 165; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Lane v. Watts*, 234 U. S. 525; *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

Where the Government has entered into a commercial enterprise for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity. *Bank of United States v. Planter's Bank*, 9 Wheat. 904; *Bank of Kentucky v. Wister*, 2 Pet. 318; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Louisville R. R. v. Letson*, 2 How. 302; *South Carolina v. United States*, 199 U. S. 43; § 201 (e), Transportation Act, 1920.

The contract of lease and option to purchase is not a contract with the Government of the United States in

its sovereign capacity. The District Court had discretionary jurisdiction to grant the temporary injunction, and with this discretion the Court of Appeals should not have interfered. *Denver & Rio Grande R. R. v. United States*, 124 Fed. 146; *Stearns Rogers Mfg. Co. v. Brown*, 114 Fed. 939.

The decision of the court below deprives the petitioner of his property without due process of law. Clause eight of the contract is not a forfeiture provision granting to the Secretary of War, who is not designated therein, the power to terminate the contract, at his discretion, in an unwarranted and arbitrary manner, and thereby seize the property of the petitioner. *Shipping Board Cases*, 258 U. S. 549; 6 R. C. L. 906, § 291; 3 Story, Eq. Juris; ch. XXXVII, 14th ed., 1918, § 1728; *Phil. W. & B. R. Co. v. Howard*, 13 How. 307; *Hartman v. C. B. & Q. R. R. Co.*, 192 Mo. App. 271; *United States v. U. S. Engineering Co.*, 234 U. S. 236; *Dist. of Columbia v. Camden Iron Wks.* 181 U. S. 455; *Cheney v. Libby*, 134 U. S. 69; *United States v. Peck*, 102 U. S. 64; *United States Harness Co. v. Graham*, 288 Fed. 929.

Mr. Lon. O. Hocker, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell*, *Assistant Attorney General Letts*, and *Mr. J. Frank Staley*, Special Assistant to the Attorney General, were on the briefs, for respondents.

MR. CHIEF JUSTICE TAFT prepared the opinion of the Court.*

This was a suit in equity brought in the United States District Court for the Eastern District of Missouri, and reaches here from the Circuit Court of Appeals for the

* MR. JUSTICE HOLMES announced the opinion, the CHIEF JUSTICE being absent.

Eighth Circuit by certiorari. The general purpose of the bill filed by Edward F. Goltra, petitioner here, was to enjoin the seizure of a fleet of towboats and barges on the Mississippi River which had been held by him as lessee. It charged that the Secretary of War, the Chief of Engineers, and Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, were engaged in a conspiracy unlawfully to deprive him of the boats. He sought to enjoin the threatened seizure of them and to have those of them which had already been taken restored to his possession.

The lease to Goltra was made May 28, 1919, by General Black, Chief of Engineers, as the lessor, by direction of the Secretary of War, acting for the United States. It leased nineteen barges nearing completion, and three or four towboats not yet constructed, for a term of five years from the date the first towboat or barge was delivered to the lessee. The lessee covenanted to operate as a common carrier the whole fleet, on the Mississippi River and its tributaries, for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and at not less than the prevailing rail tariffs without the consent of the Secretary of War. The lessee was to pay all operating expenses of the fleet, and to maintain during the term each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor. The salvage earned by any of the fleet was to be for the benefit of the United States, after deducting expenses. The net earnings above operating expenses and maintenance for each ton of cargo were to be turned over by the lessee to the Secretary of War every ninety days, for deposit to his credit in the Treasury, until the net earnings equalled the full amount of the cost of the several vessels, plus interest on the cost of 4 per cent. per annum; and

then for deposit in St. Louis banks, to be held for the fulfillment of the terms of the lease. The lessee was to keep accurate detailed accounts of all tonnage moved and all moneys received and his operating expenses, subject to the inspection of the lessor or his representatives, and the overhead expenses were to be subject to the approval of the lessor, and any items objected to were to be referred to the Secretary of War, whose decision was to be final. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board was to appraise the value of the fleet and the lessee was given the option of purchasing the fleet by the fund from the net earnings and by fifteen promissory notes running for fifteen years, the title of the property to remain in the United States until the payment of the whole of the purchase price of the property.

Section 8 of the lease, the important provision in this case, reads as follows:

“The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.”

There was a supplemental agreement in 1921, approved by the Secretary of War, made by Lansing H. Beach, the Chief of Engineers, who had then succeeded Chief of Engineers Black. This made provision for the construction of additional facilities for the use of the fleet and brought them within the terms of the original contract.

The bill set out that there was delay in the construction and delivery of the fleet, and that both parties after

the war found difficulty in performing their undertakings; that, after the making of the lease, the plaintiff had secured a good many contracts for the shipment of commodities of different kinds—of oil from New Orleans to Illinois, coal from Kentucky to St. Louis, manganese from New Orleans to St. Louis; that the rate which he arranged for was 80 per cent. of the prevailing rail rate; that, when he applied to the Secretary of War, he could not obtain permission to transport some of his commodities at a proper rate; that conditions were imposed requiring the consent of officers in charge of the Mississippi Warrior, another enterprise of the Government, to Goltra's rate, and that by reason thereof it was impossible for him to operate as a common carrier; that by the acts of the Secretary of War the plaintiff was wrongfully prevented by the lessor from carrying out the terms and conditions of the contract; that John W. Weeks and T. Q. Ashburn, named as defendants, acting in combination, wrongfully undertook to declare the contracts terminated, and, on March 3, 1923, demanded from the plaintiff the immediate possession of the boats without warrant of law, and wrongfully and unlawfully threatened to take them by force, caused some of the towboats and barges to be actually seized, and were threatening to take them all, and that unless restrained would do so; that the plaintiff had no adequate remedy at law for the redress of the wrongs complained of. He therefore asked a temporary restraining order to be granted immediately, and a restoration of the fleet to him, and a rule on the defendants to show cause why a temporary injunction should not issue. A rule to show cause was issued, March 25, 1923, on defendant.

It appeared that the whole fleet had been taken over by Colonel Ashburn under an order of the Secretary of War. The taking over was on Sunday, and there was a purpose on the part of Colonel Ashburn, anticipating an

injunction, to remove such of the fleet as were in St. Louis, across the river, to be out of the jurisdiction of the Missouri District Court. All of the defendants filed returns to the rule setting out defenses. A hearing was had on the motion for a temporary injunction, evidence was taken, and the District Court found that the fleet had been improperly seized and should be restored to the plaintiffs, and the defendants be enjoined from any attempt to resume possession until a final hearing of the case.

The defendants then sought a writ of prohibition out of this Court to prevent the further consideration of the cause by the District Court. *Ex parte United States*, 263 U. S. 389. The leave to file a petition for prohibition was denied, on the ground that the remedy by appeal from the District Court was adequate.

The evidence shows that, in March, 1921, Goltra applied to have his rates as a common carrier fixed at 80 per cent. of the prevailing rail rates, and he was allowed from that time on until March, 1922, to make those rates. In March, 1922, the Secretary of War notified him that he could not approve any operation on the lower Mississippi entering into competition with the Government Mississippi Warrior line, and that he could not approve an 80 per cent. rate there. In April, 1922, Goltra objected to the limitation, saying that he had obligated himself to transport coal from Kentucky and manganese and oil from New Orleans at this rate. Thereupon the Secretary of War advised him that the rate on the lower Mississippi must be raised from 80 per cent. to 100 per cent. of the rail tariffs, for the future, thus allowing him to complete the contracts of transportation already entered into, of which he had written. By letter of May 25, 1922, he was allowed a rate not less than 80 per cent. of the rail rates for many different commodities. The Secretary assured him that, if he decided to operate his boats on

the upper Mississippi, he was authorized to carry all commodities at not less than 80 per cent., and that the officers of the Warrior Service had been instructed to coöperate with him to the fullest extent in making his fleet a success.

After a year, on March 13, 1923, the Secretary of War, in view of the little use he had made of the fleet, sent the following notice to Goltra:

“Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

“I therefore declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice, and who is instructed and authorized to receive and receipt for the property herein mentioned.”

April 27, 1923, the Chief of Engineers sent a similar letter to Goltra. Goltra acknowledged receipt of the Secretary's letter, but protested against the action.

The Circuit Court of Appeals reversed the action of the District Court in restoring the fleet to Goltra and enjoining the defendants, and held that the motion to dismiss and to quash the temporary restraining order should have been granted, on the ground that the United States was a necessary party and could not be sued in such an action.

We can not agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. Neither they nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government. The point is fully covered by *Philadelphia Company v. Stimson*, 223 U. S. 605. In that case, the complainant owned an island in the Ohio River around which the duly authorized officers of Pennsylvania had located a harbor line which by statute was declared to be forever firm and stable. The Secretary of War changed the harbor lines in such a way as to cross the complainant's land within the state harbor line which had never been, as complainant alleged, part of the navigable waters of the United States. The bill averred that the Secretary of War proposed to institute criminal prosecutions with heavy penalties against complainant for his proposed erection of buildings on his own land. It was objected on demurrer that this was a suit against the United States and must be dismissed for lack of its presence as a party. This Court declined to yield to the contention as a ground

for dismissing the bill. The ruling is so comprehensive and refers to so many authorities and is so apt that we quote the language at pages 619 and 620:

“If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little v. Barreme*, 2 Cranch, 170; *United States v. Lee*, 106 U. S. 196, 220, 221; *Belknap v. Schild*, 161 U. S. 10, 18; *Tindal v. Wesley*, 167 U. S. 204; *Scranton v. Wheeler*, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer can not claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868; *Davis v. Gray*, 16 Wall. 203; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *Scott v. Donald*, 165 U. S. 107, 112; *Smyth v. Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146; *Herndon v. C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins v. Clemson College*, 221 U. S. 636, 643-645. And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

“The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.”

It is sought to avoid the application of this to the present case by reference to the later case of *Wells v. Roper*, 246 U. S. 335. We think it clearly distinguishable. Wells had a contract with the Postmaster General acting for the United States, by which Roper agreed for four years to furnish, for use in collecting and delivering the mail, automobiles and chauffeurs at a stipulated compensation. One provision of the contract was that any or all of the equipments contracted for might be discontinued at any time upon ninety days' notice by the Postmaster General. Later, Congress authorized that official in his discretion to use an appropriation to buy and maintain automobiles for operating an experimental combined screen wagon and city collection and delivery service, and, in order to do this, he deemed it necessary to discontinue the service of the plaintiff, and gave the latter reasonable notice of the cancellation of the contract. The suit was a bill in equity to enjoin the Postmaster General from annulling the contract and interfering between the United States and the plaintiff in the performance and execution of the contract. The bill was dismissed on the ground that it was a suit against the United States. That which the bill sought to restrain was not a trespass upon the property of the plaintiff. The automobiles of the plaintiff were not to be taken away from him by the government officer. What the officer was doing was merely exercising the authority entrusted to him by law for the benefit of the Government in annulling a contract which involved no change of possession or title to property. To enjoin the officer's action was in effect enforcement by specific performance of a contract against the United States. It was an affirmative remedy sought against the Government which, though in form merely restrictive of an officer, was really mandatory against the sovereign. The difference between an injunction against the illegal seizure of property lawfully possessed and against the cancellation of a contract which involved no change of possession is manifest.

As the United States was not a necessary party to the bill, the action of the Circuit Court of Appeals, in dismissing the bill and quashing the injunction for lack of its presence as such, can not be sustained.

Coming now to the merits, however, we think that the District Court erred in granting the temporary injunction, because, on the facts disclosed, the lease was finally terminated by the decision of the Secretary of War and the Chief of Engineers, communicated to Goltra under § 8 of the contract. It is very clear that, under that section, Goltra agreed that the lease should be terminated and that the plant and barges should be returned to the lessor, if the lessor decided that in his judgment there had been noncompliance with the terms and conditions of the lease. It appears from the evidence that during the season from July 15, 1922, when Goltra got the boats, they were not in use but were tied up except for the transportation of two comparatively small cargoes. The bill itself admits that Goltra did not fulfill his covenant to operate as a common carrier. He says he was prevented from doing so by the Secretary's refusal to give him the rates he wished. The contract expressly forbade rates exceeding the prevailing rail rates and forbade rates less than the rail rates except by consent of the Secretary.

The stipulation that the lessor, the Chief of Engineers, could terminate the lease if in his judgment Goltra was not complying with the obligations of the contract, did not require for its exercise that the Chief of Engineers, or the Secretary, should hold a court and have a hearing to determine the question of compliance. Goltra was given a notice, March 4th, of the termination. He answered, March 8th, but he tendered no facts upon which either the Secretary or the Chief of Engineers could base any different conclusion from that already reached from the failure of Goltra to fulfill his obligations. Both the

Secretary and the Chief of Engineers were fully advised of what Goltra did and did not do under the contract.

The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. Here, nothing of the kind is shown. Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a vital issue under the contract is left to the decision of a government officer. *Kihlberg v. United States*, 97 U. S. 398; *Sweeny v. United States*, 109 U. S. 618; *United States v. Gleason*, 175 U. S. 588; *United States v. Mason & Hanger Co.*, 260 U. S. 323; *United States v. Henley*, 182 Fed. 776; *Martinsburg R. R. Co. v. March*, 114 U. S. 549.

Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect of compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered. Some of them present a convincing analogy to the case. In *Magee v. Scott &c. Lumber Co.*, 78 Minn. 11, the defendant made a contract with a Duluth tug owner to tow 7,000,000 feet of saw logs to its mill at Duluth from the north shore of Lake Superior. The contract contained a provision that, in case the services should not be satisfactory, the defendant reserved the privilege of terminating the contract at any time. The defendant terminated

the contract, because of plaintiff's delay. The evidence being clear that the decision was honest, the court directed a verdict and the action was sustained by the Supreme Court.

Much has been said on behalf of the Government with reference to the special power of a government officer to act in such a case, and without judicial assistance forcibly to repossess himself of government property, which we might find it difficult to agree with but which it is unnecessary for us to consider. Our conclusion is based on the law as it is administered between private persons. Colonel Ashburn took possession without notification to Goltra other than that which had been communicated to him by the Secretary of War terminating the contract, and it is clear from the evidence that Colonel Ashburn was anxious to take possession of the property before a writ of injunction could be sued out by Goltra, and that he sought to take the fleet out of the jurisdiction of the court where he feared the injunction. He was not directed to make the seizure by the Secretary of War against the opposition of Goltra, but in such case he was directed to resort to legal proceedings. He stands upon the statement that he took possession without violence and therefore was rightly in possession when the order of the court was served. He took possession, whether he took it violently or not. Concede that he did it with a show of force which was coercive. Concede that it was a seizure without process, and wrong. But even so, an injunction looks only to the future. At the hearing it was made plain that Goltra was not entitled to the possession, and the court—one of equity—would not go through the idle form of restoring the property to Goltra by way of correcting the Colonel's wrong, and then requiring a redelivery to the lessor.

As it is, the court has taken over the fleet and given it to Goltra under bond, and the only issue that remains is whether the injunction and the restoration should be

maintained or the injunction be dissolved and the fleet returned to the lessor.

On an appeal from a temporary injunction it often happens that, where there is a balance of convenience and doubt as to the issue, the *status quo* under the restraining order and the restoration should be maintained until a final hearing; but in this case, in the court hearing it, the issue was fully treated as if on final hearing. The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor.

The claim that the petitioner has been deprived of his property without due process of law has no substance as a reason for sustaining the temporary injunction appealed from. He has had, and is having, due process in this very proceeding, and, on that issue, the decision must go against him whether the taking possession of the boats by Colonel Ashburn was warranted or not.

If Colonel Ashburn committed a breach of the peace or illegally injured any person in his taking possession, he is responsible to proper authority and to the person injured; but that does not affect the rights of the lessor under this lease or the vindication of them in this review.

The reversal of the injunction of the District Court by the Circuit Court of Appeals is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Affirmed.

The separate opinion of MR. JUSTICE McREYNOLDS.

Theoretically, everybody in this land is subject to the law. But of what value is the theory if performances like those revealed by this record go unrebuked?

An army officer, having inflated himself into judge and executioner, decided that a fleet of towboats and barges lying in the Mississippi River at St. Louis ought no longer to remain in the custody of a private citizen who held possession of them under a solemn lease and contract of sale from the United States and who, in order to make them operative, had expended upon them forty thousand dollars of his own money. Then, waiting until a Sunday arrived, he proceeded to grab the vessels by force and endeavored to run them beyond the jurisdiction of the court.

Action like that is familiar under autocracies, but the prevalent idea has been that we live under a better system.

The trial court, after taking an ample indemnifying bond, issued a temporary injunction requiring that possession of the vessels be restored and remain as before the seizure until the rights of all parties could be properly considered and determined. The Circuit Court of Appeals reversed this interlocutory order, and from its decree the cause came here by certiorari.

As a fitting climax to the high-handed measures pursued by the officer, special counsel for the United States appeared at our bar and gravely announced—"Where the executive power has pronounced its finding or judgment within its proper sphere of action, a judicial judgment is not necessary to the enforcement of the executive one, for the reason that all the compulsive power of the government is in the executive department and may be exercised by it in execution of its own processes and judgment, just as it is exercised by it in the execution of judicial process and judgment."

It is easy enough for us to smile at such stuff, but, unfortunately, the evil effects are not dissipated by gentle gestures. There should be condemnation forceful enough to prevent repetition so long as men have eyes to read.

In the Circuit Court of Appeals Judge Sanborn presented a well-considered dissenting opinion and pointed out that the only judicable question before that court was whether or not the order for the injunction and the record disclosed an unlawful, improvident or abusive use of the sound discretion which the trial judge was required to exercise. 7 Fed. (2d) 838, 851; and see *Ex parte United States*, 263 U. S. 389. He could find no such abuse, and neither can I. The trial court did no more than the circumstances permitted. We should approve its action with commendation of the impelling courage and good sense.

MORSE DRYDOCK & REPAIR COMPANY *v.*
STEAMSHIP NORTHERN STAR, ETC., ET AL.

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

No. 326. Argued May 6, 7, 1926.—Decided June 7, 1926.

1. Subsection R of § 30 of the Ship Mortgage Act of June 5, 1920, providing that nothing therein shall be construed to confer a lien for repairs when the furnisher by exercise of reasonable diligence could have ascertained that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs was without authority to bind the vessel therefor, does not attempt to forbid a lien for repairs simply because the owner has stipulated with a mortgagee not to give any paramount security on the ship; the most that such a stipulation can do is to postpone the claim of the party chargeable with notice of it to that of the mortgagee. P. 553.
2. Under the Ship Mortgage Act of June 5, 1920, a maritime lien for repairs ordered by the owner takes precedence over a mortgage of the ship which was executed, and recorded in the office of the Collector, before the repairs were made, and a certified copy of which was kept with the ship's papers since before that time, but which was not endorsed upon the ship's papers by the Collector,

the Act requiring such an endorsement in order that the mortgage may be valid against persons not having actual notice. P. 555. 7 Fed. (2d) 505, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (295 Fed. 366) sustaining the prior claim of an intervening mortgage, in a suit to enforce a maritime lien for repairs against a vessel.

Mr. Arthur H. Stetson for petitioner.

Mr. Frank A. Bernero, with whom *Mr. Gerson C. Young* was on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner libelled the Northern Star alleging a lien for repairs furnished in New York, the home port of the vessel. The intervenor, Luber, set up a mortgage from the owner, the American Star Line, Inc., for over a million dollars, and the question here is which is entitled to priority. Both the District Court and the Circuit Court of Appeals decided in favor of the mortgage. 295 Fed. 366. 7 Fed. (2d) 505. A writ of certiorari was granted by this Court. 268 U. S. 683.

The mortgage, originally given to the United States when the ship was purchased, was executed and recorded on August 11, 1920, and a certified copy was left and kept with the ship's papers from September 23, 1920, but it was not endorsed upon the ship's papers until June 27, 1921. The repairs were made between November 14 and November 27, 1920, at the owner's request. One of the covenants of the mortgage was not to suffer or permit to be continued any lien that might have priority over the mortgage, and in any event within fifteen days after the same became due to satisfy it. Another covenant, probably shaped before the then recent Ship Mortgage Act,

1920, June 5, 1920, c. 250, § 30, 41 Stat. 988, 1000, required the mortgagor to carry a certified copy of the mortgage with the ship's papers, and to take other appropriate steps to give notice that the owner had no right to permit to be imposed on the vessel any lien superior to the mortgage. On these facts we feel no doubt that the petitioner got a lien upon the ship, as was assumed by the Circuit Court of Appeals. Ship Mortgage Act, Subsection P, 41 Stat. 1005.

The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel. Subsection R, it is true, after providing that certain officers shall be included among those presumed to have authority from the owner to create a lien for supplies, goes on that "nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." But even if this language be construed as dealing with anything more than the authority of a third person to represent the owner so as to create a lien, still when supplies are ordered by the owner the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any paramount security on the ship. The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee.

The petitioner's lien was valid and on the other hand there is equally little doubt that the mortgage was valid as soon as it was executed and recorded, before the endorsement upon the ship's papers. This view seems to

us plainly to be taken in Subsections C and D of the Act. So the question more precisely stated is whether the above-mentioned covenants postponed the lien to the mortgage security, as they would seem to do on the facts of the case but for the language of the statute that we shall quote.

The statute, after requiring the instrument to be recorded in the office of the Collector of Customs of the port of documentation, in order to be valid against persons not having actual notice, (Subsection C,) provides in Subsection D, (a) that "A valid mortgage which . . . , shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if—(1) the mortgage is indorsed upon the vessel's documents in accordance with the provision of this section," with other conditions, (b) upon compliance with which the mortgage is called a 'preferred mortgage.' Then follows in (c) a statement of what shall be indorsed. By (d) the indorsement is to be made by the collector of customs of the port of documentation or by the collector of any port in which the vessel is found if so directed by the former, and no clearance is to be issued to the vessel until such indorsement is made. Subsection M gives priority to a preferred mortgage over all claims against the vessel "except (1) preferred maritime liens and (2) expenses and fees allowed and costs taxed, by the court." By (a) of the subsection "'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section." Obviously the statute taken literally may work harshly if by any oversight or otherwise the collector does not do his duty, and excellent reasons could be found for charging the petitioner with notice of a document that both was recorded and was kept with the ship's papers.

But the words of the statute seem to us too clear to be escaped. The mortgage is made preferred only upon compliance with all the conditions specified, one of which is indorsement, and the maritime lien is preferred if it arises before the recording and indorsement of the mortgage. We see no room for construction, and there is nothing for the courts to do but to bow their heads and obey.

Decree reversed.

The separate opinion of MR. JUSTICE McREYNOLDS.

The repairs for which petitioner claims a lien were made at the vessel's home port, and there is nothing whatever to show any effort to bind her for their payment by special agreement. Under such circumstances the general maritime law gives no lien. If the repair company acquired one it arose from the provisions of the Act of 1920, and not otherwise. While Subsection P, § 30 of that Act declares generally that any person furnishing repairs shall have a lien on the vessel without allegation or proof that credit was extended to her, Subsection R of the same section expressly provides that "nothing in this *section* shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

When the petitioner furnished the repairs at the home port there was on the public record in the Collector's office at that same port a duly-authenticated bill of sale and a purchase money mortgage (a copy of the latter was also on board), which disclosed an express agreement by the owner "not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have pri-

ority over this mortgage of the vessel." The petitioner had easy access to these instruments and, by exercising slight diligence, might have ascertained their contents. They deprived the owner of both right and authority, within the true intent of the statute, to create the lien now claimed by the repair company. The purpose of this enactment was to protect honest furnishers who exercise diligence, and not to offer a wide-opened door for crooked transactions.

The trial judge held that under the circumstances the petitioner acquired no lien. I agree with him, and even venture to think that the argument in support of his conclusion cannot be vaporized by mere negation.

PANAMA RAILROAD COMPANY v. VASQUEZ,
ADMINISTRATOR, ETC.

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

No. 260. Argued January 13, 1926.—Decided June 7, 1926.

1. The clause in Jud. Code, §§ 24, 256, relating to causes arising under the maritime law and "saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it," is not limited to rights recognized by the maritime law as existing in 1789 when the clause was first adopted, but includes rights brought into that law by subsequent legislation, if of a kind to be readily enforced in actions *in personam* in the course of the common law. P. 560.
2. State courts have jurisdiction concurrently with federal courts in actions brought by seamen under § 20 of the Seamen's Act, as amended by the Merchant Marine Act of 1920, to recover damages for personal injuries. P. 561.
3. In providing that "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located," the Act regulates venue and does not deal with jurisdiction as between state and federal courts. *Id.*

239 N. Y. 590, affirmed.

CERTIORARI to a judgment of the Supreme Court of New York, entered on affirmance by the Court of Appeals, awarding damages against the Railroad Company, in an action for negligence resulting in the death of plaintiff's intestate while employed as a seaman on defendant's ship.

Mr. Richard Reid Rogers for petitioner.

The action is maritime in its nature, and there now exists under the laws of New York no concurrent jurisdiction in the state courts to recover damages for the death of a seaman occurring in maritime territory; the jurisdiction of the United States courts, therefore, under the Constitution, the statutory law and the decisions of this Court, is exclusive. *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638; *The Moses Taylor*, 4 Wall. 411; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Clafin v. Houseman*, 93 U. S. 130; *Stevenson v. Fain*, 195 U. S. 167; *Farrell v. Waterman S. S. Co.*, 291 Fed. 604; *Butler v. Boston Steamboat Co.*, 130 U. S. 527; *Sou. Pac. Co. v. Jensen*, 244 U. S. 205; *The Hine v. Trevor*, 4 Wall. 555; *Taylor v. Carryl*, 20 How. 583; *Moran v. Sturges*, 154 U. S. 256; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Waring v. Clarke*, 4 How. 450; *The Harrisburg*, 119 U. S. 204; *The Alaska*, 130 U. S. 201; *La Bourgogne*, 210 U. S. 95; *Western Fuel Co. v. Garcia*, 257 U. S. 233; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109; *The Hamilton*, 207 U. S. 398;

Even if the first proposition be not true, Congress, legislating within its constitutional powers, has now for the first time created a liability upon the part of a shipowner for the death of a seaman in navigable waters occurring within the geographical limits of a State, and has in the Act creating this liability provided a special remedy for its enforcement—that is to say, an action in the United States court of the district wherein the defendant resides or has a principal place of business; which remedy, to wit, an

action in a federal court, is the only one by which the new right thus created can be enforced.

Mr. Martin A. Schenck, with whom *Mr. Frederick R. Graves* was on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action by the personal representative of a deceased seaman against the owner of the ship whereon he was serving at the time of his death to recover damages for the death on the ground that it was caused by the owner's negligence in providing an unfit lighting appliance to be used by him in his work. The right of action was based on § 20 of the Seamen's Act of 1915, c. 153, 38 Stat. 1164, as amended by § 33 of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988. A judgment for the plaintiff was affirmed by the highest court of the State; and the defendant brings the case here.

The sole question presented is whether state courts may entertain such actions, the defendant's contention being that they are cognizable only in the federal district courts.

Amended § 20,* as heretofore construed, changes the prior maritime law of the United States by giving to seamen injured through the negligence of their employers,

* "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

and to their personal representatives where the injuries result in death, the rights given to railway employees and their personal representatives by the Employers' Liability Act of 1908 and its amendments. *Panama R. R. Co. v. Johnson*, 264 U. S. 375. And the procedural provisions therein have been construed—when read in connection with §§ 24 (third) and 256 (third) of the Judicial Code, and in the light of constitutional rules respecting admiralty and maritime jurisdiction—to mean that the new substantive rights may be asserted and enforced either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury; but always taking the changed maritime law as the basis and measure of the rights asserted. *Panama R. R. Co. v. Johnson*, *supra*.

The sections of the Judicial Code just cited, while investing the federal district courts with jurisdiction “exclusive of the courts of the several States” of all “civil causes of admiralty and maritime jurisdiction,” contain an excepting clause expressly “saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it.” This clause is a continuation of a like clause in the Judiciary Act of 1789 and always has been construed as permitting substantive rights under the maritime law to recover money for service rendered, or as damages for tortious injuries, to be asserted and enforced in actions *in personam* according to the course of the common law. *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 384; *Panama R. R. Co. v. Johnson*, *supra*, pp. 388, 390. And it uniformly has been regarded as permitting such actions to be brought in either the federal courts or the state courts, as the possessor of the right may elect. *Leon v. Galceran*, 11 Wall. 185, 188; *Schoonmaker v. Gilmore*, 102 U. S. 118; *Chappell v.*

Bradshaw, 128 U. S. 132, 134; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123.

In so saying, we must be understood as fully recognizing what often has been held in other cases—that the saving clause does not include suits *in rem* or other forms of proceeding unknown to the common law. *The Moses Taylor*, 4 Wall. 411, 431; *The Hine v. Trevor*, 4 Wall. 555, 571; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 218. But an action *in personam* to recover damages for tort is one of the most familiar of the common-law remedies; and it is such a remedy at law that is contemplated by amended § 20 of the Seamen's Act and invoked in this case.

The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions *in personam* according to the course of the common law. This is the view that was taken in *Steamboat Company v. Chase*, 16 Wall. 522, 533.

The defendant also points to the provision in amended § 20 saying, "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located," and argues therefrom that Congress has manifested a purpose to restrict the enforcement of the newly given rights to the federal district courts. The provision is not aptly worded to express that purpose, and taken alone is confusing. We think it falls short of that certainty which naturally would be manifested in making an intended departure from the long-prevailing policy evidenced by

the saving clause in the Judiciary Act of 1789 and in the two sections of the Judicial Code, and that the more reasonable view is that it is intended to regulate venue and not to deal with jurisdiction as between federal and state courts. *Panama R. R. Co. v. Johnson, supra*, pp. 384, 391; *Re East River Co.*, 266 U. S. 355, 368; *Engel v. Davenport, ante*, p. 33.

We well might have rested our decision here on the conclusion reached in *Engel v. Davenport*, where we said, "It is clear that the state courts have jurisdiction, concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law." But out of deference to the elaborate presentation of the question in this case we have stated and dealt with the several points advanced as making for a different conclusion.

Judgment affirmed.

BERIZZI BROTHERS COMPANY *v.* STEAMSHIP
PESARO.

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

No. 334. Argued May 7, 1926.—Decided June 7, 1926.

A ship owned and possessed by a friendly foreign government, and operated by it in the carriage of merchandise for hire, in the interest and service of the nation, is a public ship and is immune from arrest under process based on a libel *in rem* by a private suitor; and the District Court has no jurisdiction of the case under Jud. Code, § 24, cl. 3, granting that court jurisdiction of "all civil causes of admiralty and maritime jurisdiction." P. 570.

Affirmed.

APPEAL from a decree of the District Court in admiralty dismissing a libel *in rem* against a ship owned, possessed, and operated for trade purposes by the Italian Government, for want of jurisdiction. See 277 Fed. 473.

Mr. Oscar R. Houston, with whom Messrs. D. Roger Englar and Ezra G. Benedict Fox were on the brief, for appellant.

The distinction between the operations of a government in its sovereign capacity while carrying on national objects, and its operations in its commercial capacity, for profit, has been recognized by the courts from the earliest times. *The Exchange*, 7 Cr. 116; *United States v. Wilder*, 3 Sumn. 308; *Briggs v. Light Boats*, 11 Allen 157; *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Long v. The Tampico*, 16 Fed. 491; *In re Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216; *The Carlo Poma*, 255 U. S. 219; *Ex parte Hussein Lufti Bey*, 256 U. S. 616; *Ex parte City of New York, No. 1*, 256 U. S. 490; *Ex parte City of New York, No. 2*, 256 U. S. 503; *The Western Maid*, 257 U. S. 419; *The Sao Vicente*, 260 U. S. 151; *The Gul Djemal*, 264 U. S. 90; *Ex parte Transportes Maritimos*, 264 U. S. 105. This distinction, apparent in all the above admiralty cases, exists also in other branches of the law. *Bank of United States v. Planters Bank*, 9 Wheat. 904; *South Carolina v. United States*, 199 U. S. 437; *Los Angeles v. Los Angeles Gas Corp.*, 251 U. S. 32; *Horowitz v. United States*, 267 U. S. 458; *Rindge Co. v. Los Angeles*, 262 U. S. 700; *Bank of Kentucky v. Wistar*, 3 Pet. 431; *Penn. v. Bridge Co.*, 13 How. 518; *Curran v. Arkansas*, 15 How. 304; *Vilas v. City of Manila*, 220 U. S. 345. Furthermore, in admiralty actions this distinction between commercial and sovereign functions is all the easier to make and apply, and is in reality fundamental; for in this country, under our theory of actions *in rem*, the ownership of the vessel is in reality immaterial, it being a well established "principle of the maritime law that the ship, by whomsoever owned and navigated, is considered as herself the wrongdoer liable for the tort." *The John G. Stevens*, 170 U. S. 113.

That the immunity allowed property of a foreign government is to be determined by the immunity which this government demands for itself in regard to similar property, is shown by *The Santissima Trinidad*, 7 Wheat. 283; *Bank of Augusta v. Earle*, 13 Pet. 519; *Russian Soviet Republic v. Cibrario*, 235 N. Y. 255.

The policy of the United States, as shown in the Acts of Congress, has been to subject government owned merchant ships to the same laws, regulations, and liabilities as privately owned ships. *The Lake Monroe*, 250 U. S. 246; *Nahmeh v. United States*, 267 U. S. 122; *Shewan & Sons v. United States*, 266 U. S. 108; *The Attualita*, 238 Fed. 909; *Workman v. City of New York*, 179 U. S. 552; *United States v. Wilder*, 3 Sumn. 308. Under the Italian law no immunity is afforded to merchant ships. It would certainly seem an anomaly to grant to the *Pesaro* an immunity in our courts which she would not have in her own country and which a similar ship, owned and operated by the United States, would not enjoy either in the United States or in Italy.

A remedy *in rem* in admiralty against the property of a sovereign may quite properly be recognized even though a suit *in personam* would not lie against the same sovereign. *United States v. Wilder*, 3 Sumn. 308; *The Davis*, 10 Wall. 15; *The Santissima Trinidad*, 7 Wheat. 283; *The Appam*, 243 U. S. 124; *The Siren*, 7 Wall. 152; *United States v. The Thekla*, 266 U. S. 328; *Workman v. City of New York*, 179 U. S. 552.

It must be remembered that the conception of a maritime lien in England is quite different from the conception in this country. In England it is considered to be a *jus ad rem* while in America it is held to be a *jus in re*. See *The Young Mechanic*, 2 Curtis 404. The difference is fundamental and is well illustrated by the reasoning of the court of appeal in *The Parlement Belge* (1880) 5 Prob. 197, the leading case in England upon the general

question of sovereign immunity in admiralty. In fact, that case is the very foundation of all the later English decisions upon the subject. This difference has been noted and accepted by our courts. *Ramsdell Co. v. C. G. T.*, 182 U. S. 406; *The Eugene F. Moran*, 212 U. S. 466. In England, the vessel is not liable for torts committed while in charge of a compulsory pilot, *The Maria*, 1 W. Rob. 95, whereas in this country the vessel is held responsible. *The China*, 7 Wall. 53, and others. The English theory, is that a right *in rem* is only a power in the creditor to have the debtor's *res* sold in order to have the claim paid out of the proceeds. The ship is merely security for the owner's liability. On the other hand, in this country a right *in rem* is considered as a *jus in re*, rather than a *jus ad rem*. *The Young Mechanic*, 2 Curtis 404; *The John G. Stevens*, 170 U. S. 113. See also *Brig Malek Adhel*, 2 How. 210.

Mr. Homer L. Loomis for appellee.

The question is whether ch. 20 of the Act of September 24, 1789, 1 Stat. 76, as now found in the Judicial Code, § 24, cl. 3, conferring admiralty and maritime jurisdiction on the District Courts of the United States includes, in its grant of power, jurisdiction to proceed *in rem* against a vessel of the type of the *Pesaro*; whether the *Pesaro*, under that grant of jurisdiction, was subject to a maritime lien. *The Pesaro*, 255 U. S. 216; *The Carlo Poma*, 255 U. S. 219. This is materially different from the question whether the *Pesaro*, when in the port of New York, was subject to the local jurisdiction. *Tucker v. Alexandroff*, 183 U. S. 424.

At the time of the adoption of the Act of September 24, 1789, it was a principle of law accepted among all civilized nations that sovereignty was not subject to suit, and it was recognized and agreed by the founders that grants of jurisdictional power embodied in the Federal Constitution

should, in their construction, be limited accordingly. Vattel, Bk. I, § 4; Bk. IV, § 108; The Federalist, No. 81; 3 Elliott's Debates, 2d ed. 533, 555; *Hans v. Louisiana*, 134 U. S. 1; *Chisholm v. Georgia*, 2 Dall. 419; *Ex parte State of New York, No. 1*, 256 U. S. 490. The principle of the non-suability of a sovereign power was also then considered as extending to the sovereign's property. *Moitez v. The South Carolina*, 17 Fed. Cas. 574; *The Exchange*, 7 Cr. 116.

The grant of the admiralty and maritime jurisdiction in 1789 has ever since been narrowly construed and never extended by implication to cover a sovereign or his property. It has been construed as excluding jurisdiction over suits brought, in the absence of consent, against sovereigns *in personam*. *Blamberg Bros. v. United States*, 260 U. S. 452; *The Isonomia*, 285 Fed. 516; *Ex parte State of New York, No. 1*, 256 U. S. 490; *Ex parte Maddrazzo*, 7 Pet. 627. It has been construed as excluding jurisdiction over suits brought, in the absence of consent, against the property of sovereigns, viz., (1) property of the United States, *The Othello*, 18 Fed. Cas. 901; *The Thomas A. Scott*, 90 Fed. 746; *The Western Maid*, 257 U. S. 419; (2) property of the States of the Union, *Ex parte State of New York, No. 2*, 256 U. S. 503; (3) property of municipal corporations, *The Fidelity*, 8 Fed. Cas. 1189; *The Seneca*, 21 Fed. Cas. 1080; *The Protector*, 20 Fed. 207; *The John McCracken*, 145 Fed. 705; (4) property of foreign sovereigns, *The Exchange*, 7 Cr. 116; *The Pizarro*, 19 Fed. Cas. 786; *The Pampa*, 245 Fed. 137; *The Maipo*, 252 Fed. 627; *The Maipo*, 259 Fed. 367; *The Carlo Poma*, 259 Fed. 369, reversed 255 U. S. 219; *The Imperator*, 1924 A. M. C. 596; *Nevada, ex Rogday*, 1926 A. M. C. 531.

The jurisdiction *in rem* granted by the Act, even as against the property of private persons, has been construed most strictly. *The Western Maid*, 257 U. S. 419;

The Ira M. Hedges, 218 U. S. 264; *The John McCracken*, 145 Fed. 705; *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490; *The Yankee Blade*, 19 How. 82. And as against the property of sovereigns it will not be implied. *The John G. Stevens*, 170 U. S. 113; *The Western Maid*, 257 U. S. 419; *The Jupiter* (C. A.) (1924), P. 236; *United States v. Herron*, 20 Wall. 251.

The legislative history of the United States confirms the exclusion from the admiralty and maritime jurisdiction of any remedies *in rem* against the public property of a sovereign power. *United States v. Morgan*, 99 Fed. 570; *United States Shipping Co. v. United States*, 146 Fed. 914; *The Lake Monroe*, 250 U. S. 246, 258 Fed. 77; *The Florence H.*, 248 Fed. 1012; *Blamberg Bros. v. United States*, 260 U. S. 452; *Shewan & Sons v. United States*, 266 U. S. 108; *Nahmeh v. United States*, 267 U. S. 122; *The Isonomia*, 285 Fed. 516. It follows that the *Pesaro*, a public merchant ship of a foreign sovereign, is exempt from the process *in rem* of the District Court. *The Othello*, 18 Fed. Cas. 901; *Goodwin v. United States*, 17 Wall. 515; *The Attualita*, 238 Fed. 909; *Ex parte Muir*, 254 U. S. 522; *Klein v. New Orleans*, 99 U. S. 419; *The Tervaete* (C. A.) (1922), P. 259.

When a *res* is merely being employed to render public service in the possession of a private person, pursuant to some contract with the sovereign, no such difficulty exists. *Goodwin v. United States*, 17 Wall. 515; *New Orleans-Belize S. S. Co. v. United States*, 239 U. S. 202; *Ackerlind v. United States*, 240 U. S. 531; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Morgan v. United States*, 14 Wall. 531. To hold mere public service not a proper test of immunity can obviously cause no hardship. On the other hand, to upset the determinative character, for purposes of rights *in rem*, of possession and ownership, is to desert old land-marks that have proved entirely safe and trustworthy guides in the past and follow a lead that, because

of the very vagueness and indefiniteness of the term "public service," apart from the substantial considerations above discussed, may take us into endless confusion. Distinguishing *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Long v. The Tampico*, 16 Fed. 491; *United States v. Wilder*, 3 Sumn. 308; *The Johnson Lighterage Co., No. 24*, 231 Fed. 365.

The *Pesaro* was necessarily employed in the pursuit of public purposes or national objects; just as is any of the merchant vessels owned and operated as such by the United States. National objects embrace many ends other than those of war and peace. To promote the general welfare is universally regarded as a national object, and is specifically mentioned in the preamble of the Constitution as one of the six great national aims that the founders saw in drafting that instrument. Cf. Vattel, Bk. I, §§ 86-87. The national character of the objects that a public, government-owned, merchant marine is calculated to procure was recognized by Congress in enacting the law providing therefor, as those objects are set forth in the preamble of that Act. *Title Guarantee & Trust Co. v. Crane Co.*, 219 U. S. 24; *United States v. Ansonia Brass Co.*, 218 U. S. 452; *Tucker v. Alexandroff*, 183 U. S. 424. Those cases distinguishing between the public and private activities of municipalities are not here in point. A real sovereign, a state, a nation, is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective.

The government-owned merchant ships of the United States have been recognized to be public property engaged in public business and requiring to be immune from admiralty process *in rem*. *The Lake Monroe*, 250 U. S. 246; 258 Fed. 77; *Blamberg Bros. v. United States*, 260 U. S. 452; *Shewan & Sons v. United States*, 266 U. S. 108; *The Nahmeh*, 267 U. S. 122; *The Florence H.*, 248 Fed. 1012; *The Isonomia*, 285 Fed. 516. The govern-

ment-owned merchant ships of foreign powers have been held to be public ships and immune from the process *in rem* of our admiralty courts. *The Maipo*, 252 Fed. 627; 259 Fed. 367; *The Carlo Poma*, 259 Fed. 369, reversed 255 U. S. 219; *The Emperor*, 1924 A. M. C. 596; *The Pietro Gori* (D. C. E. D. N. Y., 1924) unreported. Government-owned merchant ships have been held to be public ships and not subject to admiralty process *in rem* in the other leading commercial nations of the world. 1. In England, *The Parlement Belge*, L. R. 5 P. D. 197; *Young v. The Scotia*, (1903), A. C. 501; *The Jassy* (1906), P. 270; *The Gagara* (C. A.) (1919), P. 95; *The Porto Alexandre* (C. A.) (1920), P. 30; *The Tervæte*, (C. A.) (1922), P. 259; *The Jupiter*, (C. A.) (1924), P. 236. The general American practice was that followed formerly in England. *The Marquis of Huntley*, 3 Hagg. Adm. 246, as interpreted and approved of in *The Parlement Belge*, 5 P. D. 197. 2. In Germany, *Von Hellfeld v. Russian Gov.*, 5 Am. J. Int. L., 490; *Salling v. U. S. Shipping Board*, *Hanseatische Gerichtszeitung* (Hauptblatt) (1921), 85. 3. In France, *Lambiege & Pujol v. Spanish Gov.*, (1849) Dalloz I, 5; *The Englewood*, Clunet (1920), 621. The letter of the Italian lawyers attached to the stipulation of facts, when carefully read, will be seen not to establish a contrary practice for Italy.

Courts other than those of admiralty have construed their various jurisdictions as likewise excluding any power to issue process against the persons of sovereigns or to attach their property.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a libel *in rem* against the steamship "Pesaro" on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for

carriage to the port of New York. The usual process issued, on which the vessel was arrested; and subsequently she was released, a bond being given for her return, or the payment of the libellant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925, became effective.

The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this Court before. Several efforts to present it have been made

in recent years, but always in circumstances which did not require its consideration. The nearest approach to it in this Court's decisions is found in *The Exchange*, 7 Cranch 116, where the opinion was delivered by Chief Justice Marshall. There a libel was brought by citizens of this country against an armed vessel in the possession of French naval officers, the libellants' claim being that they were the true owners, that the vessel had been wrongfully taken from them and then converted into an armed vessel, and that they were entitled to have it restored to them through a proceeding in admiralty. Diplomatic correspondence resulted in the presentation by a law officer of this government of a formal suggestion in the suit to the effect that at the time of the arrest under the libel the vessel was claimed and possessed by the French Government as a war ship, was temporarily within our waters for a lawful purpose, and therefore was immune from the process whereon she was arrested. In the opinion the Chief Justice attributed to every nation an exclusive and absolute jurisdiction within its own territory subject to no limitation not having its consent, observed that the consent might be either express or implied, and then said (p. 136):

“The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

“This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

“A nation would justly be considered as violating its faith, although that faith might not be expressly plighted,

which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”

After discussing the status of a sovereign, his ministers and his troops when they or any of them enter the territory of another sovereign, he proceeded (p. 141):

“If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the court, for distinguishing their case from that of vessels which enter by express assent.

“In all the cases of exemption which have been reviewed, much has been implied, but the obligation of

what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?"

And then, after suggesting that there is a wide difference between the status of private individuals who enter foreign territory, or send their private ships there for purposes of trade, and the status of public war vessels when in foreign waters, he further said (p. 145):

"It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed, as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction."

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The subsequent course of decision in other courts gives strong support to our conclusion.

In *Briggs v. Light Boats*, 11 Allen 157, there was involved a proceeding against three vessels to subject them to a lien and to satisfy it through their seizure and sale. The boats had been recently acquired by the United States and were destined for use as floating lights to aid navigation. Whether their ownership and intended use rendered them immune from such a proceeding and seizure was the principal question. In answering it in the affirmative the state court, speaking through Mr. Justice Gray, afterwards a member of this Court, said (p. 163): "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. . . . They were, in the precise and emphatic language of the plea to the jurisdiction, held

and owned by the United States for public uses." And again (p. 165): "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted."

In *The Parlement Belge*, L. R. 5 P. D. 197, the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel *in rem* in the admiralty court of Great Britain. The Court of Appeal gave a negative answer and put its ruling on two grounds, one being that the vessel was public property of a foreign government in use for national purposes. After reviewing many cases bearing on the question, including *The Exchange*, the court said:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Sometimes it is said of that decision that it was put on the ground that a libel *in rem* under the British admiralty practice is not a proceeding solely against property, but one directly or indirectly impleading the owner—in that instance the Belgian Government. But this latter was given as an additional and independent ground, as is expressly stated in the opinion at page 217.

The ruling in that case has been consistently followed and applied in England from 1880, when it was made, to the present day. *Young v. The Scotia*, 1903 A. C. 501; *The Jassy*, L. R. 1906 P. D. 270; *The Gagara*, L. R. 1919, P. D. 95; *The Porto Alexandre*, L. R. 1920, P. D. 30; *The Jupiter*, L. R. 1924, P. D. 236.

In the lower federal courts there has been some diversity of opinion on the question, but the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that warships have. Among the cases so holding is *The Maipo*, 252 Fed. 627, and 259 Fed. 367. The principal case announcing the other view is *The Pesaro*, 277 Fed. 473. That was a preliminary decision in the present case, but it is not the one now under review, which came later and was the other way.

We conclude that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of "all civil causes of admiralty and maritime jurisdiction" must be construed, in keeping with the last paragraph before quoted from *The Exchange*, as not intended to include a libel *in rem* against a public ship, such as the "Pesaro," of a friendly foreign government. It results from this that the court below rightly dismissed the libel for want of jurisdiction.

Decree affirmed.

Syllabus.

LAKE SUPERIOR CONSOLIDATED IRON MINES
ET. AL *v.* LORD ET AL.

BURROWS ET AL. *v.* LORD ET AL.

ROYAL MINERAL ASSOCIATION ET AL. *v.* LORD
ET AL.

BOEING ET AL. *v.* LORD ET AL.

WHITESIDE ET AL. *v.* LORD ET AL.

MERRIMAC MINING COMPANY *v.* LORD ET AL.

BARDWELL ET AL. *v.* SARGENT LAND CO. ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Nos. 336, 355, 388, 389, 390, 391, and 471. Argued December 8, 9,
1925.—Decided June 7, 1926.

1. The obligation of an outstanding contract is not impaired, contrary to Const. Art. I, § 10, by a later state statute taxing the proceeds of the contract. P. 581.
2. Minnesota Laws of 1923, c. 226, directing levy and collection of a tax of 6 per cent. on royalties received for permission to explore, mine, take out and remove ore from land in the State, may be reasonably interpreted as laying a tax upon interests in mineral lands from which permission has been given to extract ores upon payment of royalty, the amount of the exaction being determined by reference to the sum actually received for the use of such interests, *Von Baumbach v. Sargent Land Co.*, 242 U. S. 305, and does not violate the requirement of the state constitution that "taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes," or the due process clause of the Fourteenth Amendment. P. 581.
3. As the tax is laid upon land, neither the owner's residence nor the place fixed for payment of the royalty is important. P. 582.
4. Ore lands being a distinct class of property, the tax is consistent with the equal protection clause of the Fourteenth Amendment, without being extended to other classes, such as quarries and forests. P. 582.

5. The state Legislature may exercise wide discretion in selecting the subjects of taxation so long as it refrains from clear and hostile discrimination against particular persons or classes. P. 582.
Affirmed.

APPEALS from decrees of the District Court dismissing the bills in suits against the Tax Commission of the State of Minnesota to enjoin them from enforcing a tax on royalties from ore lands.

Messrs. George W. Morgan, Nathan L. Miller, Kenneth B. Halstead, Frank D. Adams, and Elmer F. Blu for the appellants in No. 336, submitted.

Mr. Charles E. Hughes, with whom *Messrs. John W. Beaumont, George W. Weadock, Martin J. Cavanaugh, and Archibald Broomfield* were on the brief, for appellants in No. 355.

Mr. W. D. Bailey, with whom *Messrs. J. L. Washburn, Oscar Mitchell, and J. W. Hunt* were on the briefs, for appellants in Nos. 388, 389, 390, and 391.

Messrs. John R. Van Derlip and John G. Milburn, with whom *Messrs. Fred B. Snyder and Edward C. Gale* were on the brief, for appellants in No. 471.

Mr. Patrick J. Ryan, with whom *Messrs. Clifford L. Hilton and G. A. Youngquist* were on the brief, for appellees.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

By their several bills in the United States District Court, appellants alleged the invalidity of Chapter 226, Laws of Minnesota, approved April 11, 1923, because of conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid and, by decrees en-

tered January 15, 1925, dismissed the bills. These appeals followed.

The challenged Act (fourteen sections), effective from its passage, provides—

“Sec. 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this State, a tax of six (6) per cent.

“Sec. 2. For all purposes of this Act the word ‘royalty’ shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word ‘person’ shall be construed to include individuals, co-partnerships, associations, companies and corporations.”

Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: “A person subletting land for the use of which he received royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.” And Section 8: “The situs of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore, mine, take out and remove ore on which the royalty is paid.”

Article IX, Section 1, Constitution of Minnesota: “The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes . . .”

Extensive areas in northeastern Minnesota contain beds of rich iron ore and derive their chief value therefrom. Titles to these lands are held by many resident and non-resident individuals and corporations. For many years these owners have followed the common practice of making long-term leases (ordinarily fifty years) to parties who agree to mine the ore and pay the lessor, or his successors, at some designated place, a specified amount (\$.125 to \$1.25), or royalty, for each ton removed. Some lessees have made subleases, reserving to themselves something above what they are obligated to pay.

Great bodies of ore are now subject to such leases, or conveyances of similar import, and every year millions of tons are mined thereunder, most of which goes out of the State. The consequent royalties are very large—sixteen million dollars during 1923.

In 1921, the Minnesota Legislature adopted the Occupation Tax Act—Chapter 223. It prescribes a charge upon those who engage in mining, amounting to six per centum of the value of the ore extracted and removed, after deducting costs of operation and royalties. *Oliver Iron Mining Co. et al. v. Lord*, 262 U. S. 172, sustained this Act. The Legislature evidently intended that Chapter 226, Laws of 1923, should supplement Chapter 223, Laws of 1921, and thus secure payment to the State of six per centum upon the value of all extracted ores, less the expense of raising them. If the owner operates, he must pay this six per centum, under the Occupation Tax Act; if a lessee mines, the Act requires him to pay the same amount, less royalty. The Act of 1923 lays a charge of six per centum upon the royalty. See *State v. Armson*, 207 N. W. 727, 731.

Appellants—corporate and individual—receive royalties from iron mines, under lease or similar contracts, at designated places, sometimes within and sometimes without the State. Some of them reside within the State, and

some without. Some own the fee; some are lessees who have executed subleases. They maintain that the tax prescribed by Chapter 226 of 1923 is not laid uniformly upon the same class of subjects, as required by the State Constitution; that its enforcement would deprive them of the equal protection of the laws and of property without due process of law, contrary to the Fourteenth Amendment; and that it impairs the obligation of their contracts and thereby violates Article I, Section 10, federal Constitution.

Titles to all the lands and leases were obtained subject to the State's power to tax. If the statute now in controversy is within that power, it cannot impair the obligation of appellants' contracts; if beyond, it is, of course, invalid. Accordingly, there is no occasion further to discuss the application of Article I, Section 10.

The only provision of the Minnesota Constitution which undertakes to limit the power of taxation, is in Article IX, Section 1. "Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes." The state courts have said nothing to the contrary, and it seems to us sufficiently plain that this provision goes no further than the Fourteenth Amendment. Consequently, if the legislation under review does not offend that Amendment there is no conflict with the State Constitution.

In *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, we considered mining leases like those now before us and pointed out that under the Minnesota decisions their avails are regarded as rents and profits of the land, "the compensation which the occupier pays the landlord for the species of occupation which the contract between them allows." Ultimate construction of Chapter 226 is for the state courts, but, in the absence of that, we think the enactment may be reasonably interpreted as laying a tax upon interests in mineral lands from which permission

has been given to extract ores upon payment of royalty. The amount of the exaction is determined by reference to the sum actually received for the use of such interests.

As the tax is laid upon land, neither the owner's residence nor the place fixed for payment of the royalty is important.

The remaining question is whether the Legislature may treat ore lands as a distinct class of property and impose upon them a tax not extended to quarries, forests, etc., without depriving their owners of the equal protection of the laws guaranteed by the Fourteenth Amendment. And this question must be answered in the affirmative, under the principles announced in *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, where we sustained a tax confined to anthracite coal against the objection of arbitrary classification in that bituminous coal was not included. The State Legislature may exercise wide discretion in selecting the subjects of taxation (*Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 179) so long as it refrains from clear and hostile discrimination against particular persons or classes. *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237. Certainly, ores differ as much from other products of the land as anthracite coal does from the bituminous variety, and ore gives character to appellants' holdings. Lands chiefly valuable for ore are depreciated by its extraction, and probably will yield less and less under an *ad valorem* tax as the mining continues. The situation is very different where the principal value depends on other uses which do not deplete. The selection of the business of mining only, for imposition of the occupation tax, was not arbitrary and, certainly, we cannot say that the classification by the legislation now assailed was without any reasonable basis.

There is nothing to show purpose by the State officers to insist upon a construction or application of the statute which will deprive appellants of their constitutional

rights; and, considering the true construction of the Act, no ground appears which would justify an injunction to prevent them from proceeding with its orderly enforcement.

Affirmed.

FROST & FROST TRUCKING CO. v. RAILROAD
COMMISSION OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 828. Argued April 21, 22, 1926.—Decided June 7, 1926.

1. Assuming that the use of its highways by private carriers for hire is a privilege which the State may deny, it can not constitutionally affix to that privilege the unconstitutional condition precedent that the carrier shall assume against his will the burdens and duties of a common carrier. P. 592.
 2. Under the Auto Stage and Truck Transportation Act of California, as amended in 1919, and as construed and applied by the state supreme court in this case, private carriers by automobile for hire can not operate over the state highways between fixed termini without having first secured from the Railroad Commission a certificate of public convenience and necessity, and therein they not merely become subject to regulations appropriate to private carriers but submit themselves to the condition of becoming common carriers and of being regulated as such by the Commission. *Held* violative of the due process clause of the Fourteenth Amendment. P. 591.
- 70 Cal. Dec. 457, reversed.

ERROR to a judgment of the Supreme Court of California which sustained an order of the Railroad Commission directing the plaintiffs in error to suspend operations under a single private contract for the transportation of fruit over public highways, between fixed termini, unless and until they should secure from the Commission a certificate that public convenience and necessity required the resumption or continuance thereof.

Mr. Max Thelen, with whom *Messrs. H. H. Sanborn, Delancey C. Smith, Frank R. Devlin, Douglas Brookman*, and *Edwin C. Blanchard* were on the brief, for plaintiffs in error.

The Supreme Court of California conceded the well established rule that "the State has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier," but the same result is to be accomplished by indirection through a condition to the effect that, if the private operator uses the public highways, it can be only "upon the condition that you in turn shall dedicate the property used by you in such business to the public use of public transportation."

The decision in this case, 70 Cal. Dec. 457, expressly concedes that the Act cannot properly be construed to be a statute regulating the use of the highways. There is no general rule to the effect that the State can prevent the use of its highways by private carriers. *Davis v. Mayor of New York*, 14 N. Y. 506; *Macomber v. Nichols*, 34 Mich. 212. To protect the public in the use of the highways, there was established, as an exception to the general rule, the proposition that, as to common carriers, the State might prevent the use of the public highways or, if it was willing that they should be used by such common carriers, it might establish such reasonable conditions as might be in the public interest. This exception has never been extended to private carriers using the highways in the pursuit of their private business. One of the fundamental errors in the decision is that it undertakes to treat the exception as though it were, in fact, the general rule. Both the rule and the exception were accurately stated in *Buck v. Kuykendall*, 267 U. S. 307. This Court in that case very carefully limited the exception to cases of common carriers.

The effect of this decision, of course, is to hold that in the State of California it is no longer possible for any

private citizen to operate as a private carrier under a private contract over the public highways between fixed termini or over a regular route. See *Michigan Pub. Util. Comm. v. Duke*, 266 U. S. 570; *Producers Trans. Co. v. Railroad Comm.*, 251 U. S. 228; *Wolf Packing Co. v. Industrial Court*, 262 U. S. 522; *Davis v. Metcalf*, 131 Wash. 141; *State v. Nelson*, 65 Utah 457. See also *Hissem v. Guran & Meyers*, 112 Oh. St. 59.

The Act denies the equal protection of the laws in violation of the Fourteenth Amendment. The only possible difference between two trucks may be that one is operated in the private business of the operator in the transportation of his own goods, while the other is operated in the private business of the operator in the transportation of the neighbors' goods for pay. In each case, the highway is being used for the private business of the operator. There is no "natural, inherent or constitutional distinction" or ground of classification between these two operations, and if the Frosts are compelled to discontinue the operation of their private business, while at the same time the other truck operator is permitted to continue his private business over the public highways, we have a clear case of a denial of the equal protection of the laws. *Atchison, T. & S. F. R. R. v. Matthews*, 174 U. S. 96; *Sou. Ry. Co. v. Green*, 216 U. S. 400; *Atchison, T. & S. F. Ry. v. Vosburg*, 238 U. S. 56; *Truax v. Corrigan*, 257 U. S. 312; *Airway Elec. App. Corp. v. Day*, 266 U. S. 71; *Franchise Mot. Frt. Ass'n. v. Seavey*, 69 Cal. Dec. 473.

Mr. Carl I. Wheat for defendant in error.

There is no question here of arbitrary discrimination against plaintiffs in error, for they have not as yet applied for a certificate to cover operations of the nature proposed by them, and the sole ruling of the Railroad Commission was that they should not so operate unless and until they had secured such a certificate. If, upon

proper application, the Railroad Commission had arbitrarily denied them the certificate in question, a totally different problem would be presented to this Court. Nor are we in this case concerned with any of the other provisions of the statute. Some may and some may not be applicable to such carriers. The sole question here is whether or not a State may require of one who desires to use its public highways as the chief and paramount *situs* of his private haulage business to come to some state agency and obtain a certificate so to do. While the public highways of the State are open and free to all persons for traverse and communication at all times, nevertheless, the State may properly impose reasonable conditions and regulations upon any particular individuals who desire to use such publicly constructed and maintained highways as the chief *situs* of their business of transporting persons or property thereover as a business for hire, whether such use be in the nature of common carriage or otherwise. While this is unquestionably a case of first impression, we believe that the reasoning of the state court is sustainable upon grounds both of law and logic.

Plaintiffs in error present for consideration the following purported dilemma. Say they, in effect: (1) If they apply for a certificate under this statute and, after due notice, hearing, opportunity to present testimony, and formal findings, it is denied, they are deprived of the right (which they claim to be inviolate) of transporting property in their trucks over the public highways for hire under private contracts; whereas, (2) if they apply for a certificate and it is granted, they will be subjected to regulations which, say they, would, in effect, force them into the business of common carriage. Both of these results they urge to be unconstitutional. This second proposition we believe has already been met. There has been no attempt here, either by Legislature or Commission, to make these persons unwillingly assume the status

of common carriers. Most of the cases cited for plaintiffs go off on the point that there has been an attempt to do this; and throughout their brief there appear statements which seem to suggest that this was attempted here. We submit that the most cursory reading of the decision of the state court discloses that nothing could be farther from the fact. The regulation sought to be imposed upon them is not as common carriers, but as carriers for hire by private contract. Under this statute all private carriers may continue to exist as private carriers.

Plaintiffs have been at great pains to analyze certain provisions of the California Act which they claim can logically be applied only to common carriers. We submit that the applicability of these provisions is not now before this Court for consideration or determination. The portion of this statute here involved, is that which requires every "transportation company" to secure a certificate of public convenience and necessity before operating trucks for hire over the public highways. If there be a logical or inherent distinction in kind the classification is sustainable. There is a difference in kind between the man who, as a mere incident to his business, transports his own property over the highways, and the man who makes of those highways the main instrumentality of his hauling business. No person can be said to have a vested right to make use of the public highways as the *situs* of his business. That is a privilege to which "no one is entitled as of right." See decisions cited in the decision of the court below, particularly *Packard v. Banton*, 264 U. S. 140, 144.

In the interest of the public at large, which at enormous expense builds and maintains these highways, it has been found essential to impose regulations upon those who use them. First came the licensing of automobiles and their operators, and the enactment of general safety and weight provisions. These Acts have been broadly

sustained in every State. But as the use of the automobile developed—as the life of whole communities was transformed by this new mode of locomotion which has made its way into every hamlet—as the network of broad, well-built highways rapidly extended itself from town to town and far out into the farming areas,—there grew up a new and potent form of business,—the transportation of persons and property by automobile. The first result of this development was that most of the short-line steam and electric railroads of the country went into bankruptcy. The second was that an insistent demand arose for some regulation. In California this demand was so strong that the California Supreme Court, upon petition by the short-line railroads of the State, ordered the Commission to assume jurisdiction over automotive carriers under a provision of the state Constitution adopted a quarter of a century before automobiles were invented. The next year, again at the behest of the short-line railroads, the Legislature passed a comprehensive statute providing for the regulation of “transportation companies” by automobile, including in that term all common carriers of persons or property between fixed termini or over regular routes. Realizing that its former Act was inadequate in scope, and to bring under reasonable regulation the increasing number of persons who had not held themselves out as common carriers but who nevertheless were using the public highways as the main *situs*,—indeed as the only *situs* of their business of hauling for hire,—the legislature amended the statute which had formerly covered common carriers alone to bring such private carriers under regulation. And this was done in aid of the commonweal—in order that all who use these public highways as a business for hire between fixed termini or over regular routes might be subjected to a proper public control, not for the purpose of suppressing competition but for the purpose of

upholding the public interest in proper and continuous service, and the proper exercise of the special privilege of using the public highways as a place of business.

This whole claim of "private contract" rights is illusory. In the present instance there was but one such contract; but in the *Holmes Case*, 70 Cal. Dec. 752, there were twenty-three, and we suppose that under plaintiff's theory there might well be a thousand.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case involves the constitutional validity of the Auto Stage and Truck Transportation Act of California, c. 213, Statutes of California, 1917, p. 330, as construed and applied to plaintiffs in error by the state supreme court. The specific challenge is that, as so construed and applied, it takes their property for public use without just compensation, deprives them of their property without due process of law, and denies them the equal protection of the laws, in violation of the Fourteenth Amendment to the federal Constitution. The act provides for the supervision and regulation of transportation for compensation over public highways by automobiles, auto trucks, etc., by the railroad commission. The term "transportation company" is defined to mean a common carrier for compensation over any public highway between fixed termini or over a regular route. By § 3, no corporation or person is permitted to operate any automobile, auto truck, etc., "for the transportation of persons or property as a common carrier for compensation on any public highway in this state between any fixed termini . . . unless a permit has first been secured as herein provided." Permits are issued upon application by the incorporated city or town, city and county, or county within or through which the applicant intends to operate. By § 4, the railroad commission is empowered to supervise

and regulate such transportation companies and to fix their rates, fares, charges, classifications, rules and regulations, and, generally, to regulate them in all matters affecting their relationship with the traveling and shipping public. Section 5 requires, in addition to the permit, that the applicant must obtain from the railroad commission a certificate declaring that public convenience and necessity require the exercise of such right or privilege; and it provides that the commission may attach to the exercise of the rights granted such terms and conditions as in its judgment the public convenience and necessity may require. Operation under a permit without such certificate is prohibited. In 1919, the act was amended, Statutes 1919, c. 280, p. 457, so as to bring under the regulative control of the commission automotive carriers of persons or property operating under private contracts of carriage; and the term "transportation company" was enlarged so as to include such a carrier. It was further provided that no such transportation company shall operate for compensation over the highways without first having secured from the commission a certificate of public convenience and necessity so to do.

Plaintiffs in error were engaged under a single private contract in transporting, for stipulated compensation, citrus fruit over the public highways between fixed termini. They were brought before the commission charged with violating the act, for the reason that they had not secured from the commission a certificate of public convenience and necessity. The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof. The commission's order was upheld by the State supreme court. 70 Cal. Dec. 457.

On behalf of plaintiffs in error the contention is that, in its application to private carriers, the act has the effect of transforming them into public carriers by legislative fiat. Upon the other side it is said that the sole purpose of the legislation "is to impress upon such private carriers certain regulations so long as they desire to use the publicly built and owned highways as the chief situs of their business of hauling goods for compensation," and that "they are not and cannot be, forced, directly or indirectly, to become common carriers."

It is unnecessary to inquire which view is correct, since the act has been authoritatively construed by the state supreme court. That court, while saying that the state was without power, by mere legislative fiat or even by constitutional enactment, to transmute a private carrier into a public carrier, declared that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose. In the light of this general statement of principle, it was held that the effect of the transportation act is to offer a special privilege of using the public highways to the private carrier for compensation upon condition that he shall dedicate his property to the quasi-public use of public transportation; that the private carrier is not obliged to submit himself to the condition, but, if he does not, he is not entitled to the privilege of using the highways.

It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect,

is the view of the court below plainly expressed. 70 Cal. Dec. pp. 464-465, 466.

Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers. In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. The certificate of public convenience, required by § 5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to a private carrier *qua* private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist.

That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Commission v. Duke*, 266 U. S. 570, 577-578. See also, *Hissem v. Guran*, 112 O. S. 59; *State v. Nelson*, 65 Utah 457, 462. The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to

withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend.

There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not

unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

The prior decisions of this court amply justify this conclusion. In *Paul v. Virginia*, 8 Wall. 168, 181, the rule was stated to be that the state, having the power to exclude foreign corporations from its limits, may admit them upon such terms and conditions as the state may think proper to impose. But in *Insurance Company v. Morse*, 20 Wall. 445, 456, it was said that this sweeping language must be understood with reference to the facts of that case; and that it could not be extended to include conditions repugnant to the Constitution and laws of the United States. In *Barron v. Burnside*, 121 U. S. 186, 197, this limitation was expressly reaffirmed. Mr. Justice Blatchford, speaking for the court, said (p. 200):

“The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. *La Fayette Ins. Co. v. French*, 18 How. 404, 407; *Ducat v. Chicago*, 10 Wall. 410, 415; *Ins. Co. v. Morse*, 20 Wall. 445, 456; *St. Clair v. Cox*, 106 U. S. 350, 356; *Phila. Fire Assn. v. New York*, 119 U. S. 110, 120.”

In *Southern Pacific Company v. Denton*, 146 U. S. 202, 207, there was under consideration a Texas statute re-

quiring a foreign corporation desiring to do business in the state, to agree that it would not remove any suit from a court of the state into the circuit court of the United States. This court held the statute invalid, saying:

“But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions.”

After the *Denton Case*, came *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246. That decision purported to follow the case of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, and to differentiate *Barron v. Burnside*, *supra*; and it was thought to have materially modified the rule laid down in the *Morse*, *Burnside* and *Denton* cases. But however this may be, both the *Prewitt* and *Doyle* cases have been quite recently overruled, and the views of the minority therein expressed declared to be now the law of this court. *Terral v. Burke Constr. Co.*, 257 U. S. 529, 533. In the light of this declaration, these dissenting views become pertinent and controlling. In the *Doyle Case*, Mr. Justice Bradley, speaking for the minority, said (pp. 543, 544):

“Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a

State is unwise enough to legislate the one, it has no constitutional power to legislate the other.

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In the *Prewitt Case*, Mr. Justice Day, dissenting, said (pp. 267-269):

"In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution.

While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the sur-

render of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

“In the cases decided in this court subsequently to *Barron v. Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution.”

In *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 34-48, upon a full review of the prior decisions, the principle set forth in the foregoing quotations was again reaffirmed. That case involved the validity of a Kansas statute which provided that a corporation of another state, though engaged in interstate business, must, as a condition of doing local business, pay to the state certain graduated percentages of its capital stock. It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process of law clause; that, thus, it was violative of the constitutional rights of the company; and that the right of the company to continue to do business in Kansas was not and could not be affected by the condition. The general principle was again announced in the following words (pp. 47-48):

“The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit

of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution."

Since that decision, the same principle has been reiterated many times and never departed from. *Pullman Co. v. Kansas*, 216 U. S. 56, 63; *International Textbook Co. v. Pigg*, 217 U. S. 91; *Herndon v. Chi., Rock Island & Pac. Ry.*, 218 U. S. 135, 158; *Harrison v. St. L. & San Francisco R. R.*, 232 U. S. 318, 332; *Looney v. Crane Co.*, 245 U. S. 178, 187; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 142-143; *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114; *Public Utility Commrs. v. Ynchausti & Co.*, 251 U. S. 401, 404; *Terrall v. Burke Constr. Co.*, *supra*; *Burnes Natl. Bank v. Duncan*, 265 U. S. 17, 24; *Fidelity and Deposit Co. of Maryland v. Tafoya et al.*, 270 U. S. 426.

And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it. In *Western Union Tel. Co. v. Foster*, *supra*, two telegraph companies were engaged in transmitting the quotations of the New York Stock Exchange among the states. This was held to be interstate commerce, and an order of the Public Service Commission of Massachusetts, requiring the companies to remove a discrimination, was held to infringe their constitutional rights. One of the grounds upon which the order was defended was that it rested upon the power of the state over the streets which it was necessary for the telegraph to cross. That contention was answered broadly (p. 114):

"But if we assume that the plaintiffs in error under their present charters could be excluded from the streets,

the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. *Pullman Co. v. Kansas*, 216 U. S. 56. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified 'under that somewhat ambiguous term of police powers.'"

And, in almost the last expression of this court upon the subject, *Burnes Natl. Bank v. Duncan*, *supra*, the rule is none the less broadly but more succinctly stated to be (p. 24):

"The States cannot use their most characteristic powers to reach unconstitutional results. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. *Pullman Co. v. Kansas*, 216 U. S. 56. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114."

We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed. *Western Union Tel. Co. v. Kansas*, *supra*, p. 48.

The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be

understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly.

Judgment reversed.

MR. JUSTICE HOLMES, dissenting.

The question is whether a State may require all corporations or persons, with immaterial exceptions, who operate automobiles, &c., for the transportation of persons or property over a regular route and between fixed termini on the public highways of the State, for compensation, to obtain a certificate from the railroad commission that public necessity and convenience require such operation. A fee has to be paid for this certificate and transportation companies are made subject to the power of the railroad commission to regulate their rates, accounts and service. The provisions on this last point are immaterial here, as the case arises upon an order of the commission under § 5 that the plaintiffs in error desist from transportation of property as above unless and until they obtain the certificate required, and by the terms of the statute every section and clause in it is independent of the validity of all the rest. § 10. Whatever the Supreme Court of California may have intimated, the only point that it decided, because that was the only question before it, was that the order of the commission should stand.

This portion of the act is to be considered with reference to the reasons that may have induced the legislature to pass it, for if a warrant can be found in such reasons they must be presumed to have been the ground. I agree, of course, with the cases cited by my brother Sutherland, to which may be added *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U. S. 350, 358, that even generally

lawful acts or conditions may become unlawful when done or imposed to accomplish an unlawful end. But that is only the converse of the proposition that acts in other circumstances unlawful may be justified by the purpose for which they are done. This applies to acts of the legislature as well as to the doings of private parties. The only valuable significance of the much abused phrase police power is this power of the State to limit what otherwise would be rights having a pecuniary value, when a predominant public interest requires the restraint. The power of the State is limited in its turn by the constitutional guaranties of private rights, and it often is a delicate matter to decide which interest preponderates and how far the State may go without making compensation. The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts. Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242, and *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393.

The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a State speaking through its legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as, I presume, most States or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. I see nothing in this act that would

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require private carriers to become common carriers, but if there were such a requirement, it, like the provisions concerning rates and accounts, would not be before us now, since, as I have said, the statute makes every section independent and declares that if valid it shall stand even if all the others fall. As to what is before us, I see no great difference between requiring a certificate and requiring a bond as in *Packard v. Banton*, 264 U. S. 140, and although, as I have said, I do not get much help from general propositions in a case of this sort, I cannot forbear quoting what seems to me applicable here. Distinguishing between activities that may be engaged in as a matter of right and those like the use of the streets that are carried on by government permission, it is said: "In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." 264 U. S. 145. I think that the judgment should be affirmed.

MR. JUSTICE BRANDEIS concurs in this opinion.

The separate opinion of MR. JUSTICE McREYNOLDS.

Our primary concern is with the decree below—not with the reasons there advanced to support it. I suppose, if that court had simply approved the action of the Railroad Commission and had said nothing more, there would be little, if any, difficulty here in finding adequate ground for affirmance.

The questions involved relate solely to matters of intrastate commerce. No complication arises by reason of the power of Congress to regulate interstate commerce. Having built and paid for the roads, California certainly has the general power of control. Plaintiffs in error are without constitutional right to appropriate highways to their own private business as carriers for hire. And if, in so

many words, the Legislature had said that no intrastate carriers for hire except public ones shall be permitted to operate over the state roads it would have violated no federal law. So far as the rights of plaintiffs in error are affected, nothing more serious than that has been done.

The States are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution.

I think the decree of the court below should be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v.
UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 280. Argued April 28, 1926.—Decided June 7, 1926.

1. The Act of July 28, 1916, authorized the Interstate Commerce Commission to determine on a space basis the compensation to be paid railroads for transportation of mails in railway post-office cars and for the service connected therewith, and to allow land-grant roads only 80% of this compensation although part of the space in such cars by which such compensation is gauged is not occupied for mail matter but is used for the distribution of mail on the trains. P. 606.
 2. The obligation of land-grant railroads, as expressed in granting acts passed in 1852 and 1853, to transport the mails at all times "under the direction of the Post-Office Department, at such price as Congress may direct," looked to the future and includes the furnishing of space in railway post-office cars for distribution purposes as required in this case by the Department pursuant to the Act of July 28, 1916. P. 607.
- 59 Ct. Cls. 524; 60 *id.* 183; affirmed.

APPEAL from a judgment of the Court of Claims dismissing on demurrer a petition of the Railroad seeking

additional compensation on account of space in railway post-office cars used by post-office employees in distributing mails.

Mr. Frederick H. Wood, with whom *Mr. Thomas W. Gregory* was on the briefs, for appellant.

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.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant operates and, since June, 1917, has operated, a system of railroads which includes a number of land-grant lines in Missouri and other states. These lines received land grants in aid of their construction and are bound to carry the United States mails, under the provisions of land-grant acts, passed in 1852 and 1853, § 6, c. 45, 10 Stat. 8, 10; § 6, c. 59, 10 Stat. 155, 156, both of which provide that the United States mails shall be transported on the railroads receiving the grants at all times "under the direction of the Post-Office Department, at such price as Congress may by law direct."

By the Act of July 28, 1916, § 5, c. 261, 39 Stat. 412, 425-431, the Interstate Commerce Commission was directed "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of . . . mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, . . ."

In respect of land-grant lines, the act provides:

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in

whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

The act confers upon the Postmaster General the power to state railroad mail routes and authorizes mail service thereon of four classes, the first two of which are: (1) full railway post-office car service, (2) apartment railway post-office car service. For the first class, service is to be "by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains." For the second class, the service is the same "by apartments less than forty feet in length," etc. The service is to include the carriage of mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as the Postmaster General shall direct to be carried. All cars and parts of cars used for the service are to be of such construction, style, length, and character, and furnished in such manner as the Postmaster General shall require, and are to be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. The railroad companies are required to furnish all necessary facilities for caring for and handling the mails while in their custody. The act further provides that all railway common carriers are required to transport such mail matter as may be offered for transportation, etc., and shall be entitled to receive fair and reasonable compensation "for such transportation and for the service connected therewith."

The Interstate Commerce Commission, after a hearing, made an exhaustive report and determined that mail should be carried upon the basis of space, instead of weight. Upon that basis, the Commission fixed rates for

all services required to be performed by the act and declared that the land-grant railroads were entitled to eighty per cent. thereof under the law. It was urged before the Commission on behalf of these railroads that this provision of the law "should not apply to the distributing space in R. P. O. and apartment cars, because the service of carrying distributing facilities cannot properly be construed as transportation of the mails as defined in the law." But the Commission held otherwise. *Railway-Mail Pay*, 56 I. C. C. 1, 77. Thereupon, appellant filed its petition in the court below alleging the facts and praying judgment against the United States for \$189,880.54 as compensation for the use of the distributing space upon the same ground as that urged before the Commission. The amount of the demand was arrived at by separating the car space said to be used for mail distributing purposes from the space devoted to storage purposes, and adding twenty per cent. to that portion of the eighty per cent. allowance which was claimed to be assignable to the distributing space. The Court of Claims sustained a demurrer to the petition and entered judgment of dismissal. 59 C. Cls. 524; 60 C. Cls. 183.

That the Commission is authorized by the act of 1916 to fix rates for the transportation of the mails, that the rates fixed by the Commission are reasonable, and that Congress has plenary power to determine the price at which the land-grant roads shall transport the mail, are propositions which are not here in dispute. The contention is that this power does not enable Congress to fix the pay of the land-grant roads for furnishing distributing space and facilities; but that these items under the requirement of the land-grant acts are separable from and in addition to transportation, and should be paid for at the same rates accorded other railroads.

Unmistakably, the act of 1916 authorized the Commission to do precisely what it did, namely, to determine the

fair and reasonable rates and compensation to be paid, upon a space-basis, for the transportation of mail matter "and the service connected therewith"; and, thereupon, to allow the land-grant roads eighty per cent. of those rates and compensation for like transportation "and all service . . . in connection therewith." It would do manifest violence to these plain words to say that Congress intended, in the one case, that the Commission should fix the compensation to be paid railroads generally for transportation, including service connected therewith, but did not intend, in the other case, although it used almost the same words, that eighty per cent. of that compensation, and no more, should be allowed the land-grant roads for like transportation and service.

But, it is urged that thus to construe the act of 1916 is to enlarge the authority of Congress under the land-grant acts so as to permit that body to require the land-grant roads, without compensation, to perform service in addition to that embraced within the word "transportation." It is said that railway postal cars originated after the passage of the land-grant acts. But it does not follow that such cars are not fairly within the meaning of those acts as essentially incident to transportation. The provision reaches into the future; and, while its meaning does not change, its application may well embrace new conditions and new instrumentalities which come within the scope of the terms employed. This is in accordance with the universal law of language. In a sense, words do not change their meaning; but the application of words grows and expands with the growth and expansion of society. Compare *South Carolina v. United States*, 199 U. S. 437, 448-449.

To transport any article involves, as a necessary incident, furnishing facilities for its transportation; and the character and extent of these facilities will depend upon the nature of the thing transported. Facilities appropri-

ately employed in the transportation of lumber, for example, would be wholly inappropriate in the transportation of live stock. The mail includes a variety of things gathered from and carried to innumerable places. Letters and parcels must be received, more or less piecemeal, and then assorted and put in convenient form for delivery at the places to which they are addressed; and, if the mails are to go forward with dispatch, this involves assortment and preparation for delivery in transit; and this, in turn, necessarily requires that facilities to that end must be provided.

Nor can we ignore the provision of the land-grant acts that the mails are to be transported "under the direction of the Postoffice Department." The authority is a continuing one and not to be limited to such methods of direction as were customary at the dates of the acts. The mail was to be transported "at all times" under this direction. The power of the Postoffice Department to direct the transportation is of the same quality as the power of Congress to fix the price, and includes not only the authority to say when the transportation shall take place and between what points, but to impose such conditions as are necessarily incident to the transportation, having regard to the peculiar nature of the things to be transported. We fully agree with the court below that the land-grant acts are not to be so narrowly construed as to render their operation impracticable. "When they declare that the mails shall be transported under the direction of the Post Office Department we think they imply more than the mere placing of the mails in bulk in a car to be carried between given termini. The bulk changes by additions to it and subtractions from it. The making of these additions and subtractions as the different stations are reached involves space additional to that occupied by the bulk itself. What is to be transported is not mere weight bulk or freight but the 'mails' and the act must be construed to give effect to its purpose."

We fairly may assume, in the absence of any evidence to the contrary, that, in fixing the allowance to be paid to the land-grant roads at eighty per cent. of the fair and reasonable compensation to be paid railroads generally, Congress has given due weight to all the circumstances—not only to the kind and character of the service, but to the fact that the companies are required to furnish all facilities incidental thereto. In any event, it was for Congress to say what reduction should be made from the amount of full compensation in consideration of the land grants; and its action in that respect is not open to judicial review.

Judgment affirmed.

JAYBIRD MINING COMPANY v. WEIR, COUNTY
TREASURER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 293. Argued April 29, 1926.—Decided June 7, 1926.

1. Where mining land owned by incompetent Quapaw Indians under a patent subject to a restriction against alienation, was leased on their behalf with the approval of the Secretary of the Interior, under the Act of June 7, 1897, to a mining company in consideration of a royalty or percentage of the gross proceeds to be derived from sale of ores mined, a state *ad valorem* tax assessed to the lessee on ores mined and in the bins on the land, before sale and when the royalties or equitable interests of the Indians had not been paid or segregated, is void, as an attempt to tax an agency of the Federal Government. P. 612.
 2. Judgment of state court *held* reviewable by writ of error, and certiorari denied. P. 614.
- 104 Okla. 271, reversed.

ERROR to a judgment of the Supreme Court of Oklahoma which reversed a judgment for the Mining Company in a suit to recover a tax, paid under protest.

Mr. A. Scott Thompson, with whom *Messrs. A. C. Wallace, Vern E. Thompson*, and *Ray McNaughton* were on the brief, for plaintiff in error.

Mr. John H. Venable, with whom *Messrs. A. L. Commons* and *Wm. H. Thomas* were on the brief, for defendant in error.

The United States Government has nothing to do with the organization of the mining company involved in this case. All the interest it has is to collect the royalties after the lead and zinc ore has been sold or its value ascertained—not in kind but in money. And, on failure of the mining company to comply with its lease, the Government may bring suit for the Indian for the royalty; and, for a failure to operate the mine in the manner provided, it may forfeit the lease. The State can tax even the operation of the mining company, where it is operating on land other than restricted Indian land, and the Government could as easily say you are placing a burden on an instrumentality.

No tangible property is ever exempt from taxation without some constitutional or statutory provision specifically exempting it; never by implication. *McCulloch v. Maryland*, 4 Wheat. 116. What we are attempting in this case is to require a visible, tangible and very valuable class of property, found with the great mass of the property of the State, to bear its just burden of *ad valorem* taxation along with other property in the State of the same class, and all other tangible property. *Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, and *Gillespie v. Oklahoma*, 259 U. S. 501, distinguished. No such case has been passed on by this Court where there was specific tangible property involved. Cf. *Shaffer v. Carter*, 252 U. S. 37; *In re Skelton Lead & Zinc Co.'s Gross Production Tax of 1919*, 81 Okla. 134.

Ore extracted from rock or dirt after it is brought from the mine is the personal property of the person or corpora-

tion who has extracted it. *Forbes v. Gracey*, 94 U. S. 762; *Kans. Nat'l. Gas Co. v. Haskell*, 172 Fed. 545; *Thomson v. Union Pac. Ry. Co.*, 9 Wall. 579. We have no doubt that Congress could authorize the creation of a corporation to mine for lead and zinc ores on restricted Indian lands, and specifically exempt any and all its property from state taxation, and might authorize the leasing of the land to corporations and thus exempt all the property of such a corporation, including the products of its mines; but we believe that, if such extreme regulation had been intended by the Acts of Congress, under which the petitioner holds its leases, the intention would have been expressed. *Van Allen v. Assessors*, 3 Wall. 573; *Bradley v. People*, 4 Wall. 459. There is a clear distinction between the means employed by the Government and the property of agents of the Government in the performance of contracts with the Government. *Thomson v. Union Pac. Ry. Co.*, 9 Wall. 579; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Thomas v. Gay*, 169 U. S. 264; *Union Pac. Ry. Co. v. Peniston*, 18 Wall. 5; *Central Pac. R. R. Co. v. California*, 162 U. S. 91; *Elder v. Wood*, 208 U. S. 226; *Forbes v. Gracey*, 94 U. S. 762; *Utah & N. W. Ry. Co. v. Fisher*, 116 U. S. 28; *Marocipa & Pac. Ry. Co. v. Arizona*, 156 U. S. 347; *Wagoner v. Evans*, 194 U. S. 588; *Montana Catholic Missions v. Missoula County Assessor*, 200 U. S. 118; *Choctaw, O. & G. R. R. Co. v. Harrison*, 235 U. S. 292; *Gillespie v. Oklahoma*, 257 U. S. 501.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The mining company sued in the District Court of Ottawa County to recover a tax of \$2,319.80 paid under protest. The County Treasurer demurred to the petition asserting that it failed to state a cause of action. The demurrer was overruled, and judgment was given for the plaintiff. On appeal to the highest court of the State the

judgment was reversed. 104 Okla. 271. The case is here on writ of error. § 237, Judicial Code.

Briefly the facts are these. September 26, 1896, pursuant to the Act of March 2, 1895, c. 188, 28 Stat. 876, 907, there was issued to Hum-bah-wat-tah Quapaw, a Quapaw Indian, a patent for an allotment of 40 acres of land in Ottawa County. The patent contained restrictions against alienation for twenty-five years, and by the Act of March 3, 1921, c. 119, 41 Stat. 1225, 1248, that period was extended for an additional twenty-five years. The land is owned by the heirs of the allottee. The company has a mining lease on the restricted land on terms which provide for the payment of royalties or a percentage of the gross proceeds derived from the sale of ores mined. The amount sued for is an *ad valorem* tax assessed by the county officials under § 9814, Compiled Statutes of 1921, on lead and zinc ores mined by the company in 1920, and which were in its bins on the land January 1, 1921. This tax is in addition to a gross production tax paid to the State Auditor. It was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated. Prior to the production of the ores taxed, the Secretary of the Interior determined the Indian owners to be incapable of managing their property and assumed control of it in their behalf. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. Since that time, the royalties have been paid directly to the Secretary.

The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the Acts referred to. It is the duty and established policy of the government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. *United States v. Noble*, 237 U. S. 74; *Goodrum v. Buffalo*, 162 Fed. 817. The lessee is an

agency or instrumentality employed by the government for the development and use of the restricted land and to mine ores therefrom for the benefit of its Indian wards. *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292. It is elementary that the federal government in all its activities is independent of state control. This rule is broadly applied. And, without congressional consent, no federal agency or instrumentality can be taxed by state authority. "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316." *Johnson v. Maryland*, 254 U. S. 51, 55. And see *Farmers Bank v. Minnesota*, 232 U. S. 516; *Choctaw & Gulf R. R. v. Harrison*, *supra*; *Gillespie v. Oklahoma*, 257 U. S. 501, 505.

This court has considered a number of cases quite like the one now before us. In *Choctaw & Gulf R. R. v. Harrison*, *supra*, there was an agreement by the United States that coal lands belonging in common to the members of the Choctaw and Chickasaw tribes should be mined, and that the royalties should be used for the Indians. The State imposed a tax equal to two per centum on the gross receipts from the total production of coal from the mine. It was held that it was an occupation or privilege tax, and that one having a mining lease made in furtherance of the governmental purpose could not be subjected to that burden. In *Indian Oil Co. v. Oklahoma*, 240 U. S. 522, it was held that oil leases of land made by the Osage tribe were under the protection of the federal government, and that the State could not tax such leases either directly or as represented by the capital stock of the corporation owning them. It was said (p. 530): "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or

by taking the stock as an evidence or measure of their value, . . ." In *Howard v. The Oil Companies*, 247 U. S. 503, this court affirmed, *per curiam*, the judgment of the United States District Court for the Western District of Oklahoma enjoining the enforcement of a tax imposed by the State on the gross value of the production of oil and gas, less the royalty interest, under leases upon Osage lands made for the benefit of the Indians. In *Large Oil Co. v. Howard*, 248 U. S. 549, this court reversed, *per curiam*, the judgment of the supreme court of Oklahoma (63 Okla. 143) sustaining a tax on gross value of production of petroleum and gas, less the royalty interest, where the owner of the property sought to be taxed was engaged under the authority of the Secretary of the Interior in the production of oil and gas in what formerly constituted the tribal lands of the Osage Nation. And in *Gillespie v. Oklahoma, supra*, it was held that the net income derived by a lessee from the sale of his share of the oil and gas received under leases of restricted Creek and Osage lands could not be taxed by the State. In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians.

In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The *ad valorem* tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the federal government within the principle of the cases cited.

From abundance of caution the company presented a petition for a writ of certiorari; but, as a writ of error lies, the petition will be denied. *Gillespie v. Oklahoma, supra*, 506.

Judgment reversed.

MR. JUSTICE McREYNOLDS is of opinion that the effect of the assailed tax upon the instrumentality of the United States is remote and tax is valid under the doctrine in *Central Pac. R. R. v. California*, 162 U. S. 91, 119.

MR. JUSTICE BRANDEIS, dissenting.

The property taxed is lead and zinc ore in bins. The land from which the ore was extracted belongs to a Quapaw allottee under the Act of March 2, 1895, c. 188, 28 Stat. 876, 907. Restrictions on alienation of the land will not expire until 1946. Act of March 3, 1921, c. 119, § 26, 41 Stat. 1225, 1248. But the allottee may lease the land for mining and business purposes for ten years unless he is incompetent, in which case the power to lease is vested in the Secretary of the Interior. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. The ore in question had been detached from the soil and is personal property. It is owned wholly by the Mining Company, a private Oklahoma corporation organized for profit. The ore is assessed under the general laws of the State which lays an *ad valorem* property tax on all property, real or personal, not exempt by law from taxation. Payment of the tax will not affect the financial return to the Indian under the lease. No state legislation exempts this property. There is no specific or general provision in any act of Congress which purports to do so. If an exemption exists, it arises directly from the Federal Constitution. Does ownership by an incompetent Indian of the land from which the ore was taken or ownership of the ore by an instrumentality of the Government create an exemption?

Is the ore exempt because it has been extracted out of restricted lands? The Quapaw might have conducted the mining operations himself. If he had been competent he might, without the approval of the Secretary of the Inte-

rior have leased the land to others for mining purposes for a period of ten years. If he had operated the mine himself, I see no ground on which it could be held that his ore in the bins would not have been taxable to him, like any other unrestricted property to which he had absolute title.¹ The fact that he was incompetent does not render such property exempt from taxation.² Such incompetency results simply in the imposition of restrictions upon the alienation of his realty, exempting that from taxation. *The Kansas Indians*, 5 Wall. 737. But such restrictions cannot by implication be deemed to extend to personalty, even though the product of the realty, so as to exempt them from taxation. Compare *McCurdy v. United States*, 246 U. S. 263; *United States v. Gray*, 284 Fed. 103; *United States v. Ransom*, 284 Fed. 108. Any exemption that attached to the land is limited thereto and does not extend to the ore extracted therefrom. *Forbes v. Gracey*, 94 U. S. 762, 765-766. Compare *South Utah Mines v. Beaver County*, 262 U. S. 325.

Is the ore exempt because it is the property of an agency employed by the Government for the benefit of the Indian, its ward? We are not dealing here with property owned by the United States as in *Van Brocklin v. Tennessee*, 117 U. S. 151, or *Lee v. Osceola, etc., Improvement District*, 268 U. S. 643; nor with an agency all of whose property was acquired and is used solely for the purpose of serving the Government as in *Clallam County v. United States*, 263 U. S. 341. We are dealing with a private "corporation having its own purposes as well as those of the United States and interested in profit

¹ *Pennock v. Commissioners*, 103 U. S. 44; *Goudy v. Meath*, 203 U. S. 146.

² *Keokuk v. Ulam*, 4 Okla. 5. The exemption granted the personalty of the Indians in *United States v. Rickerts*, 188 U. S. 432, and in *United States v. Pearson*, 231 Fed. 270, rested upon the express ground that title to the property was held by the United States in trust for the Indians.

on its own account," *ibid*, p. 345. And we are dealing with a property tax, as distinguished from an occupation tax. *Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison*, 235 U. S. 292; *Oklahoma v. Texas*, 266 U. S. 298, 301. Whether, under the circumstances, Congress had power to exempt the ore from the general property tax, we need not consider. It has not done so in terms; and I see no reason for assuming that it intended to do so. Compare *Mid-Northern Oil Co. v. Montana*, 268 U. S. 45, 49; *Thompson v. Kentucky*, 209 U. S. 340; *Swarts v. Hamer*, 194 U. S. 441.

In 1873 this Court said: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent." *Railroad Co. v. Peniston*, 18 Wall. 5, 33. The rule there applied with respect to a railroad incorporated under a federal charter has since been followed as to other federal instrumentalities also. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Central Pacific Railroad Co. v. California*, 162 U. S. 91; *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375; *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Choctaw, Oklahoma & Gulf Ry. Co. v. Mackey*, 256 U. S. 531, 537. Compare *Thompson v. Pacific Railroad*, 9 Wall. 579; *National Bank v. Commonwealth*, 9 Wall. 353, 362. It has been specifically applied to agencies, such as this mining company, whose employment was in aid of the Government's policy of protecting and developing the properties of its Indian wards. *Thomas v. Gay*, 169 U. S. 264; *Wagoner v. Evans*, 170 U. S. 588; *Catholic Missions v. Missoula County*, 200 U. S. 118. Those decisions seem to me controlling in the case at bar.

The rule that the property of a privately owned government agency is not exempt from state taxation rests fundamentally upon the principle that such a tax has only a remote relation to the capacity of such agencies

efficiently to serve the Government.³ Such a tax, as distinguished from an occupation or privilege tax, does not impose a charge upon the privilege of acting as a government agent and thereby enable a State to control the power of the Federal Government to employ agents and the power of persons to accept such employment. The tax is levied as a charge by the State for rendering services relating to the protection of the property, which services are rendered alike to agents of the Government and of private persons. Such a tax cannot be deemed to be capable of deterring the entry of persons as agents into the employ of the Government. Conceivably an operating company might pay a higher royalty or bonus if it were assured that it would enjoy immunity from taxation for the small quantity of the year's output of the mine which might be in the ore bins on the day as of which property is assessed. Conceivably also, the cattle owner in *Thomas v. Gay, supra*, might have paid higher for the grazing rights if the cattle while on the reservation were immune from taxation. But, in either case, the effect of the immunity, if any, upon the Indian's financial return would be remote and indirect. If we are to regard realities we should treat it as negligible.

³ "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers." *Railroad Co. v. Peniston*, 18 Wall. 5, 36. See T. R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *Harvard Law Rev.* 321, 327; J. H. Cohen and K. Dayton, "Federal Taxation of State Activities and State Taxation of Federal Activities," 34 *Yale Law Journ.* 807.

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BRANDEIS, J., dissenting.

The difference in the legal effect of acts which are remote causes and of those which are proximate pervades the law. The power of a State to tax property and its lack of power to tax the occupation in which it is used exist in other connections. In *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375, 382, where the State had levied a tax upon property conveyed by the United States to the Shipbuilding Company on the condition that it construct a dry dock there for the use of the United States and that, if such dry dock were not kept in repair, the property should revert to the United States, this Court said: "But, furthermore, 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."

I suspect that my brethren would agree with me in sustaining this tax on ore in the bins but for *Gillespie v. Oklahoma*, 257 U. S. 501. The question there involved was different. Any language in the opinion which may seem apposite to the case at bar, should be disregarded as inconsistent with the earlier decisions. It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen. The attitude of the Court in this respect has been especially helpful when called upon to adjust the respective powers of the States and the Nation in the field of taxation.⁴

⁴ See *Sonneborn Bros. v. Cureton*, 262 U. S. 506, qualifying *Texas Co. v. Brown*, 258 U. S. 466; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Standard Oil Co. v. Graves*, 249 U. S. 389; also *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226, qualifying *Maine v.*

HAMMER *v.* UNITED STATES.

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

No. 317. Argued May 5, 1926.—Decided June 7, 1926.

1. False testimony before a referee in bankruptcy may constitute the offense of perjury under § 125 of the Criminal Code, and also that of knowingly making a false oath in a bankruptcy proceeding. Bankruptcy Act, § 29b. P. 625.
 2. When the facts alleged as perjury in an indictment for subornation include all the elements of perjury as well as false swearing in bankruptcy, it is a charge of subornation of perjury. *Id.*
 3. On a trial for subornation of perjury the falsity of the testimony charged as perjury can not be proved by the unsupported testimony of the alleged subornee. P. 626.
- 6 Fed. (2d) 786, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a sentence for subornation of perjury committed before a referee in bankruptcy.

Mr. Robert H. Elder, with whom *Mr. Otho S. Bowling* was on the brief, for petitioner.

The taking of a false oath in bankruptcy is not perjury, but a different offense. There cannot be subornation of

Grand Trunk Ry. Co., 142 U. S. 217; *Leloup v. Port of Mobile*, 127 U. S. 640, 647, qualifying *Osborne v. Mobile*, 16 Wall. 479; *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, qualifying *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Mercantile Bank v. New York*, 121 U. S. 138, 147, qualifying *Boyer v. Boyer*, 113 U. S. 689; *Railway Co. v. McShane*, 22 Wall. 444, qualifying *Railway Co. v. Prescott*, 16 Wall. 603. Compare *First Nat'l Bank of Guthrie Center v. Anderson*, 269 U. S. 341, 348, explaining *Merchants' National Bank v. Richmond*, 256 U. S. 635; *Texas Transportation & Terminal Co. v. New Orleans*, 264 U. S. 150, and *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 296, limiting *Fecklin v. Shelby County Taxing District*, 145 U. S. 1; *Baltimore & Ohio Southwestern R. R. Co. v. Settle*, 260 U. S. 166, 173, qualifying *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403.

perjury without perjury. From this it follows that the indictment does not state a crime, since it appears on its face that the false oath stated to have been suborned was taken in bankruptcy. The evidence does not prove subornation of perjury, but of a false oath in bankruptcy. *Epstein v. United States*, 196 Fed. 354; *United States v. Wilcox*, 4 Blatch. 393; *Rex v. Hinton*, 3 Mod. 122; *People v. Teal*, 196 N. Y. 372; Hawkins, Pleas of the Crown, bk. I, ch. 69, § 10; 1 Russell, Law of Crimes, 7th ed., 527, 528-529; 2 Bishop New Crim. Law, § 1197a, § 1014. Congress not unfrequently has defined instances where false oaths are punishable, but not as perjury.

The perjury statute was in effect as R. S. 5392 when the Bankruptcy Act was enacted. Thus we have an earlier general act, followed by a later special act, each act comprising a definition of an offense and prescribing a penalty for it. The later special act removes such offenses as are covered by it from the operation of the earlier general act. *United States v. Tynen*, 11 Wall. 88; Lewis' Sutherland on Statutory Construction, pp. 480-481. Then, too, the later act (Bankruptcy Act) fixed the lesser penalty, and "in construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty." *United States v. Yuginovich*, 256 U. S. 450. It may not be speaking with precision to refer to the Bankruptcy Act as having *pro tanto* "repealed" the perjury statute, because at the time the later statute was enacted the perjury statute did not cover false oaths in bankruptcy proceedings, for the good reason that there were no bankruptcy proceedings—there had not been a bankruptcy act in effect since 1878, 20 Stat. 99, repealing Bankruptcy Act of 1867. But the same principle of interpretation applies. It indicates a legislative purpose to create a new offense, and not to create a new species of the existing crime of perjury. Looking at the section as

a whole, we see that the purpose was to create a scheme, complete in itself, without requiring reference to any other statute, for the punishment of every kind of misconduct in bankruptcy. The scheme was to create three offenses.

See *Wechsler v. United States*, 158 Fed. 579; *Kahn v. United States*, 214 Fed. 54; *Schonfeld v. United States*, 277 Fed. 934; *Epstein v. United States*, 271 Fed. 282; *Ulmer v. United States*, 219 Fed. 641; *Epstein v. United States*, 196 Fed. 354.

If a false oath in bankruptcy can be prosecuted as perjury, then the rules of evidence governing perjury prosecutions apply. One of these rules is that the falsity of the oath cannot be proved by the uncorroborated testimony of a single witness. *Quong Ting v. United States*, 140 U. S. 417; *Second Nat'l Bank v. Weston*, 172 N. Y. 250; *People v. Davis*, 269 Ill. 256; 4 Wigmore on Evidence, §§ 2040-2041; *United States v. Wood*, 14 Pet. 430; *Hashagen v. United States*, 169 Fed. 396; *Clayton v. United States*, 284 Fed. 537; *People v. Doody*, 172 N. Y. 165; *State v. Wilhelm*, 114 Kan. 349; *People v. McClintock*, 191 Mich. 589; *State v. Burns*, 120 S. C. 523; *Schwartz v. Commonwealth*, 27 Gratt. (Va.) 1025; *Commonwealth v. Smith*, 93 Mass. 243; *Commonwealth v. Douglass*, 46 Mass. 241; *Stone v. State*, 118 Ga. 705; *Bell v. State*, 5 Ga. App. 701; *State v. Waddle*, 100 Ia. 57; *State v. Fahey*, 3 Pennew. 295; *State v. Renswick*, 85 Minn. 19; *State v. Richardson*, 248 Mo. 563; *Regina v. Highes*, 1 Car. & K. 519; *People v. Glass*, 191 App. Div. 483.

The conviction could not be sustained under the Bankruptcy Act, because the rule of evidence argued applies to false swearing under that act as well as to false swearing under the perjury statute. *Regina v. Browning*, 3 Cox. C. C. 437; *Aguierre v. State*, 31 Tex. Cr. 517; *Commonwealth v. Davis*, 92 Ky. 460.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

False swearing in bankruptcy proceedings is perjury. *Wechsler v. United States*, 158 Fed. 579; *Epstein v. United States*, 196 Fed. 354; *Ulmer v. United States*, 219 Fed. 641; *Schonfeld v. United States*, 277 Fed. 934; *Glickstein v. United States*, 222 U. S. 139; *Cameron v. United States*, 231 U. S. 710; *Hashagen v. United States*, 169 Fed. 396; *Daniels v. United States*, 196 Fed. 459; *Gordon v. United States*, 5 Fed. (2d) 943; *Bauman v. Feist*, 107 Fed. 83; *Edelstein v. United States*, 149 Fed. 636, certiorari denied 205 U. S. 543; *Troeder v. Lorsch*, 150 Fed. 710, 713; *In re Chamberlain*, 180 Fed. 304, 309; *In re Gaylord*, 112 Fed. 668; *Baskin v. United States*, 209 Fed. 740.

Even if false swearing in bankruptcy proceedings is not perjury, the judgment of conviction may be sustained under § 332 of the Criminal Code and § 29 (b) of the Bankruptcy Act. *Williams v. United States*, 168 U. S. 382; *United States v. Stafoff*, 260 U. S. 477; *Vedin v. United States*, 257 Fed. 550.

The evidence was sufficient to sustain the judgment of conviction, and we believe both reason and authority are against application of the two witness rule in a case like the present where the perjurer himself testified on the trial of the petitioner that his previous testimony was false. *Boren v. United States*, 144 Fed. 801; *State v. Richardson*, 248 Mo. 563; *State v. Fahey*, 3 Pennewill 594; *People v. Evans*, 40 N. Y. 1, distinguished.

In addition to the foregoing cases, see *Commonwealth v. Douglass*, 46 Mass. 241; *Stone v. State*, 117 Ga. 705; *Bell v. State*, 5 Ga. App. 701; *State v. Wilhelm*, 114 Kan. 349; *State v. Renswick*, 85 Minn. 19; 4 Wigmore, Evidence, § 2040, *et seq.*

A majority of the cases in which the question has been fully considered support the view that the quantitative

theory of testimony is not a sound reason for the rule in perjury cases. We believe that the question is practically concluded in this Court by the decision in *United States v. Wood*, 14 Pet. 430. Moreover, if the quantitative theory of evidence is the true basis of the rule of evidence, the modern decisions which permit the falsity of an oath to be proved by circumstantial or documentary evidence should require that such evidence be equally strong and convincing as the direct testimony which would be regarded as sufficient proof. Yet many cases permitting proof by circumstantial or documentary evidence hold that the ordinary rule of evidence in perjury cases is not applicable in such a case, and permit conviction whenever the jury is satisfied beyond a reasonable doubt. *People v. Doody*, 172 N. Y. 165; *State v. Wilhelm*, 114 Kan. 349; *Walker v. State*, 19 Ga. App. 98; *State v. Cerfoglio*, 46 Nev. 332; *State v. Storey*, 148 Minn. 398; *Marvel v. State*, (Del.) 131 Atl. 317.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner was indicted on three counts in the Southern District of New York. A verdict of not guilty as to the first and third was directed by the court. The jury found him guilty on the second; and the court sentenced him to the penitentiary for a year and ten months. The judgment was affirmed on appeal. 6 F. (2d) 786.

The second count sets forth that Annie Hammer was adjudged a bankrupt on April 28, 1923, and that the proceeding was referred to one of the referees in bankruptcy in that district. The substance of the charge is that, October 25, 1923, petitioner suborned and induced Louis H. Trinz to take an oath before the referee and there falsely to testify that, prior to April 18, 1923, he had loaned \$500 to the bankrupt and that she had given him a note therefor.

The petitioner contends that the making of a false oath in bankruptcy is not perjury; and that, without perjury there cannot be subornation of perjury. Section 125 of the Criminal Code provides that whoever, having taken an oath before a competent officer in any case in which a law of the United States authorizes an oath to be administered that he will testify truly, shall state any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than \$2,000 and imprisoned for not more than five years. Section 29 b of the Bankruptcy Act, c. 541, 30 Stat. 544, 554, provides that a person shall be punished by imprisonment not to exceed two years upon conviction of the offense of having knowingly made a false oath in any proceeding in bankruptcy. Section 126 of the Criminal Code provides that whoever shall procure another to commit any perjury is guilty of subornation of perjury and punishable as provided in § 125.

It is plain that the offense charged includes perjury as defined by § 125. That section is in general terms and is broad enough to apply to persons sworn in bankruptcy proceedings. The facts alleged include all the elements of that offense as well as the making of a false oath in bankruptcy; and they show a violation of both sections. The indictment does not specify the section under which it is drawn, but the omission is immaterial. The offense charged is to be determined by the allegations. *Williams v. United States*, 168 U. S. 382, 389. And it follows that petitioner was accused of subornation of perjury. Cf. *Wechsler v. United States*, 158 Fed. 579; *Epstein v. United States*, 196 Fed. 354; *Kahn v. United States*, 214 Fed. 54; *Ulmer v. United States*, 219 Fed. 641; *Schonfeld v. United States*, 277 Fed. 934. We need not consider whether perjury committed in bankruptcy proceedings may be punished by more than the maximum fixed by § 29 b, as the sentence imposed on the petitioner is less

than that. Nor need we consider whether every false oath in bankruptcy is perjury under § 125.

Petitioner also contends that the evidence is not sufficient to sustain the judgment.

At the trial of petitioner, it was satisfactorily shown that Trinz was sworn in the bankruptcy proceeding and there gave the testimony alleged to have been false and suborned. Trinz was the only witness called to prove the falsity and subornation. He testified that he gave the testimony alleged in the indictment; that it was not true, and that petitioner suborned him. At the close of all the evidence the petitioner moved the court to direct a verdict in his favor on the ground that the uncorroborated testimony of Trinz was not sufficient to warrant a finding of guilt. The motion was denied. And, on the request of the prosecution, the court charged the jury that the law did not require any corroboration of that testimony; and that, if believed, it was sufficient.

The question of law presented is whether the unsupported oath of Trinz at the trial of petitioner is sufficient to justify a finding that the testimony given by him before the referee was false. The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal.* The rule has long prevailed, and no enactment in derogation of it has come to our attention.

* *United States v. Wood*, 14 Pet. 430, 437, et seq.; *United States v. Hall*, 44 Fed. 864, 868; *Allen v. United States*, 194 Fed. 664, 667-668; *Peterson v. State*, 74 Ala. 34; *Clower v. State*, 151 Ark. 359, 363; *People v. Follette* (Cal.), 240 Pac. 502, 511; *Thompson v. People*, 26 Colo. 496, 503; *State v. Campbell*, 93 Conn. 3, 12; *Marvel v. State* (Del.), 131 Atl. 317; *Cook v. United States*, 26 D. C. App. 427, 430; *Yarbrough v. State*, 79 Fla. 256, 264; *People v. Niles*, 295 Ill. 525, 532; *Hann v. State*, 185 Ind. 56, 60-61; *State v. Raymond*, 20 Ia. 582, 587; *State v. Wilhelm*, 114 Kan. 349, 353; *Day v. Commonwealth*, 195 Ky. 790, 793; *State v. Jean*, 42 La. Ann. 946, 949;

The absence of such legislation indicates that it is sound and has been found satisfactory in practice. On the issue of falsity the case presented is this. On the first occasion Trinz testified that he had loaned money to the bankrupt and that she had given him a note. At the trial he swore that his statement before the referee was not true. The contest is between the two oaths with nothing to support either of them. The question is not the same as that arising in a prosecution for perjury where the defendant's own acts, business transactions, documents or correspondence are brought forward to establish the falsity of his oath alleged as perjury. That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *United States v. Wood*, 14 Pet. 430, 443. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony.

Newbit v. Statuck, 35 Me. 315, 318; *Commonwealth v. Butland*, 119 Mass. 317, 324; *People v. Kennedy*, 221 Mich. 1, 4; *State v. Story*, 148 Minn. 398; *Johnson v. State*, 122 Miss. 16; *State v. Hardiman*, 277 Mo. 229, 233; *State v. Gibbs*, 10 Mont. 213, 219; *Gandy v. State*, 27 Neb. 707, 734; *State v. Cerfoglio*, 46 Nev. 332, 340; *People v. Evans*, 40 N. Y. 1, 5; *Territory v. Remuzon*, 3 N. M. 648; *State v. Hawkins*, 115 N. C. 620; *State v. Courtright*, 66 Ohio St. 35; *Wright v. State* (Okla.), 236 Pac. 633, 636; *Williams v. Commonwealth*, 91 Pa. St. 493, 501; *State v. Pratt*, 21 S. D. 305, 311; *Godby v. State*, 88 Tex. Crim. Rep. 360, 363; *State v. Sargood*, 80 Vt. 415, 421; *Schwartz v. Commonwealth*, 27 Grat. 1025; *State v. Rutledge*, 37 Wash. 523, 527. And see an act to consolidate and simplify the law relating to perjury and kindred offenses (1911) 1 & 2 Geo. V, c. 6, § 13.

As petitioner cannot be guilty of subornation unless Trinz committed perjury before the referee, the evidence must be sufficient to establish beyond reasonable doubt the falsity of his oath alleged as perjury. The question is not whether the uncorroborated testimony of Trinz is enough to sustain a finding that he was suborned by the petitioner. It is whether, as against the petitioner, his testimony at the trial is enough to sustain a finding that his oath before the referee was false. Clearly the case is not as strong for the prosecution as where a witness, presumed to be honest and by the government vouched for as worthy of belief, is called to testify to the falsity of the oath of defendant set forth as perjury in the indictment. Here the sole reliance of the government is the unsupported testimony of one for whose character it cannot vouch—a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited. *People v. Evans*, 40 N. Y. 1, 3.

To hold to the rule in perjury and to deny its application in subornation cases would lead to unreasonable results. Section 332 of the Criminal Code abolishes the distinction between principals and accessories and makes them all principals. One who induces another to commit perjury is guilty of subornation under § 126 and, by force of § 332, is also guilty of perjury. In substance subornation is the same as perjury. And one accused of perjury and another accused of subornation may be indicted and tried together. *Ruthenberg v. United States*, 245 U. S. 480; *Commonwealth v. Devine*, 155 Mass. 224. Obviously the same rule of evidence in respect of establishing the falsity of the matter alleged as perjury must apply to both. Evidence that is not sufficient to warrant a finding of that fact as against the one accused of perjury cannot reasonably be held to be enough as against the

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other who is accused of suborning the perjury. No such distinction can be maintained. The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases. *People v. Evans, supra*. Falsity is as essential in one as in the other. It is the *corpus delicti* in both.

The trial court should have directed the jury to return a verdict of not guilty on the ground that the uncorroborated testimony of Trinz at the trial was not sufficient as against petitioner to establish the falsity of the oath alleged as perjury. We need not consider whether his testimony was sufficient to establish the fact of subornation.

Judgment reversed.

ARKANSAS v. TENNESSEE.

No. 2, Original. Decree entered June 7, 1926.

Final decree, overruling exceptions of the State of Tennessee to the report of the boundary commission herein; accepting that report and establishing and declaring the boundary in conformity therewith; with provisions concerning costs. See *Arkansas v. Tennessee*, 269 U. S. 152.

Announced by MR. JUSTICE BUTLER.

The Court overrules the exceptions of the State of Tennessee to the report of the Boundary Commissioners, C. B. Bailey, Charles A. Barton, and Horace Van Deventer, appointed by interlocutory decree of June 10th, 1918, to run, locate and designate the boundary line between the States of Arkansas and Tennessee along that portion of the Mississippi River affected by the Centennial Cut-Off. The boundary line as established by the Commission is accepted, directed and established by the Court in con-

formity with the Report of the Boundary Commission, as follows:

" Beginning at the mouth of Old River at . . .	Station	1
Thence S. 73 W. 3,400' to	"	2
Thence west 1,000' to	"	3
Thence N. 80 W. 1,400' to	"	4
Thence west 2,000' to	"	5
Thence S. 80 W. 1,200' to	"	6

From station 6 U. S. B. M. Thresher bears S. 74-08 W. 1,195.

Thence from Station 6

N. 58 W. 2,500' to	Station	7
N. 47 W. 2,500' to	"	8
N. 13 W. 1,200 to	"	9
N. 16 east 9,300 to	"	10
N. 1 E. 3,015 to	"	11
N. 20-20 E. 1,400' to	"	12
N. 55-20 E. 5,000' to	"	13
N. 60 E. 8,000' to	"	14

From Station 14 Levee Mile Post 121-122 bears N. 60-55 W. 861'.

Thence from Station 14

N. 56-30 E. 900' to	Station	15
N. 18-15 E. 7,100' to	"	16
N. 22-45 E. 1,600' to	"	17
N. 29-45 E. 1,200' to	"	18
N. 40-45 E. 1,400' to	"	19
N. 47-45 E. 1,500' to	"	20
N. 57-45 E. 1,800' to	"	21
N. 72-45 E. 1,800' to	"	22
N. 89-06 E. 3,900' to	"	23

From Station 23 Levee Mile Post 117-118 bears N. 57-05 W. 1,541'.

Thence from Station 23

S. 76-30 E. 2,785' to	Station	24
S. 41-26 E. 4,751' to	"	25

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S. 19-26 E. 881' to.....	Station 26
South 1,430' to.....	" 27
S. 17 W. 4,000' to.....	" 28

From Station 28 the monument at the N. E. corner of the John Trigg 100-acre tract bears N. 78-30 W. 900 feet.

Thence from Station 28

S. 12 W. 4,000' to.....	Station 29
South 2,000' to.....	" 30
S. 15 E. 4,000' to.....	" 31
S. 40 E. 4,000' to.....	" 32 "A"
S. 45 W. 3,400' to.....	" 33 "A"

On the right bank of the Mississippi River.

Beginning on the left bank of the Mississippi River at Station 1 thence S. 5 E. 1,270', from which point U. S. B. M. 57-1 bears S. 60-07 E. 2,606 feet; thence continue on original line S. 5 E. 1,509' to Station 2.

S. 15 W. 3,000 to.....	Station 3
S. 37 W. 2,500 to.....	" 4
S. 42 W. 4,000 to.....	" 5
S. 37 W. 5,000 to.....	" 6
S. 32 W. 3,900 to.....	" 7
S. 25-30 W. 1,000 to.....	" 8

On the left bank of the river.

A total length of boundary line of 116,641 feet, or 22.09 miles."

The foregoing is here and now made the boundary line between the two States parties hereto and the same shall be treated and fixed as the boundary line in question and the same shall be marked accordingly.

The costs certified by the Commissioners are approved and will accordingly be paid.

All costs, including the costs of printing the Report of the Commissioners, with maps filed with said Report to be determined by the Clerk and the compensation to the

Commissioners to be fixed by the Court, shall be paid equally by the parties hereto—that is, each shall pay one-half, except the cost of printing the evidence and Supplemental Report of the Commissioners and exhibits, which will be paid by Tennessee.

It is so finally ordered, adjudged, and decreed by the Court.

SCOTT *v.* PAISLEY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 253. Argued April 19, 20, 1926.—Decided June 7, 1926.

1. Under § 6037 of the Georgia Code, 1910, the holder of a debt and of the legal title of land conveyed to him as security by the debtor, may, upon default in payment, reduce the debt to judgment, place of record a quitclaim reinvesting the debtor with the legal title to the land, and thereupon have the land levied on and sold in satisfaction of the judgment, free from the claims of persons who purchased the land from the debtor subject to the security deed. P. 634.
2. *Held*, that there is no principle entitling such purchasers to notice of the exercise of this statutory power by the creditor, and that in failing to provide such notice the statute does not deprive them of property without due process of law or deny them the equal protection of the laws. P. 635.

158 Ga. 876, affirmed.

ERROR to a judgment of the Supreme Court of Georgia, which affirmed a judgment dismissing the petition in a suit by Dorothy Scott, purchaser of land subject to a security deed, to set aside a sale made thereunder, and to redeem the legal title by payment of the debt.

Mr. Paul Donehoo, with whom *Messrs. Hooper Alexander and N. T. Anderson, Jr.*, were on the brief, for plaintiff in error.

Mr. Walter McElreath for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves a single question relating to the constitutional validity of § 6037 of the Georgia Code of 1910. This section, which is set forth in the margin,¹ provides, in substance, that, in cases where a deed has been executed conveying the legal title to land as security for the payment of a debt²—known in Georgia as a “security deed”—and the holder of the debt, upon default in payment, has reduced it to judgment, and the holder of the legal title to the land makes and places of record a quitclaim conveyance to the debtor, reinvesting him with the legal title to the land, it may thereupon be levied upon and sold in satisfaction of the judgment.

This suit was brought by Dorothy Scott in a Superior Court of Georgia. The case made by her petition was, in substance, this: In 1919 she purchased a tract of land, subject to a security deed which the previous owner had executed to secure a note for borrowed money. Thereafter, the note not being paid at maturity, the holder, the grantee in the security deed, brought suit, without notice to her, against the grantor in the security deed, and, after recovering judgment on the note, executed and placed of record a quitclaim deed to the defendant; whereupon the sheriff levied an execution on the land, and, after due advertisement, sold it at public sale in satisfaction of the

¹ “§ 6037. In cases where . . . a deed to secure a debt has been executed, and the . . . secured debt has been reduced to judgment by the . . . holder of said debt, the holder of the legal title . . . shall, without order of any court, make and execute to said defendant in f.i.f.a. . . . a quitclaim conveyance to such . . . property, and file and have the same recorded in the clerk’s office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment. . . .”

² See § 3306.

judgment. The petitioner, while not claiming that there was any defense to the note or any irregularity or *mala fides* in the proceeding, alleged that the sale was void as against her on the ground that § 6037 of the Code, as applied to a case where the grantor in a security deed conveys his interest in the land to a third person before a suit is brought to reduce the secured debt to judgment, is in conflict with the due process and equal protection clauses of the Fourteenth Amendment, in that it provides that the person thus acquiring the interest of the grantor, may be divested thereof through a proceeding to which he is not a party, without notice or opportunity to be heard and make defense. The petitioner prayed that the sale be held null and void as against her, and that she be declared the equitable owner of the land, with the right to redeem the legal title by payment of the note.

The petition was dismissed by the Superior Court, on demurrer; and this judgment was affirmed by the Supreme Court of the State, *per curiam*. 158 Ga. 876. The case is here on a writ of error under § 237 of the Judicial Code.

The case is in a narrow compass. That, under the Georgia decisions, a sale made under a prior security deed in conformity to the provisions of § 6037, divests a purchaser from the grantor of all rights in the land is conceded. The contention that this section is unconstitutional, as applied to such a purchaser, rests, in its last analysis, upon the claim that he is entitled, as a matter of right, in accordance with settled usage and established principles of law, to notice of a proceeding to sell the land under the prior security deed and opportunity to make defense therein. We cannot sustain this contention.

Here the holder of the secured debt was also the holder of the legal title to the property by which it was secured. In such case at least, § 6037 authorizes the holder of the secured debt, by following the procedure outlined by the

statute, to bring the property to sale in satisfaction of the debt. Its effect is no more than if it conferred upon the holder of the secured debt a statutory power of sale, which may be treated as equivalent, in so far as the constitutional question is concerned, to an express power of sale in a mortgage or trust deed.

Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale. The validity of such a contractual power of sale is unquestionable. In *Bell Mining Co. v. Butte Bank*, 156 U. S. 470, 477, this court said: "There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. *McIver v. Smith*, 118 N. C. 73, 75; *Atkinson v. College*, 54 W. Va. 32, 49; *Grove v. Loan Co.*, 17 N. Dak. 352, 358; *Hardwicke v. Hamilton*, 121 Mo. 465, 473; *Ostrander v. Hart*, (N. Y.) 30 N. E. 504. And see *Watkins v. Booth*, 55 Colo. 91, 94; and *Groff v. Morehouse*, 51 N. Y. 503, 505. In *Hardwicke v. Hamilton*, *supra*, 473, the court said that "the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar

subsequent or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust. All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith." And in *Watkins v. Booth, supra*, 94, the court said that it was the duty of the subsequent lienor "to keep advised as to proceedings in case of the former trust deed."

So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And § 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws.

The judgment is

Affirmed.

MASSACHUSETTS *v.* NEW YORK ET AL.

IN EQUITY.

No. 14, Original. Decree entered June 7, 1926.

Final decree defining the rights of the States of New York and Massachusetts respecting the land in controversy, and dismissing the bill, with provisions as to costs.

For the opinion in the case, see *ante*, p. 65.

Announced by MR. JUSTICE HOLMES.

This cause coming on to be heard on the bill of complaint, the answers of the several defendants, and upon the pleadings and proofs as well as upon the report of Wade H. Ellis, Esquire, the Special Master appointed by this Court to take proofs and make report to this Court in this cause, and the arguments of counsel thereupon

had; therefore for the purpose of carrying into effect the conclusions of this Court as stated in its opinion filed herein April 12, 1926,

IT IS NOW HERE ORDERED, ADJUDGED, AND DECREED, by this Court, *First*: That in and by the agreement duly entered into between the Commissioners of the State of New York and the Commissioners of the Commonwealth of Massachusetts relating to the so-called western lands and dated December 16th, 1786, which Agreement is called in this case and generally known as the Treaty of Hartford and which is recorded in the office of the Secretary of the Commonwealth of Massachusetts, Volume 1, Treaties and Contracts, page 83 and is also duly recorded in the Office of the Secretary of State of the State of New York, in Liber 22 of Deeds at page 38, which Treaty of Hartford is referred to in said Bill of Complaint and in the said Answers thereto, the State of New York did not cede nor grant unto the Commonwealth of Massachusetts any of the land then under the water of Lake Ontario, and that the right of preëmption of lands and territory granted to the Commonwealth of Massachusetts by the State of New York was not intended by the State of New York nor by the Commonwealth of Massachusetts to include any of the bed of Lake Ontario as it then existed, and the Commonwealth of Massachusetts in and by the terms in said Treaty did thereby cede and release to the State of New York all right and title of said Commonwealth of Massachusetts in and to the bed of Lake Ontario as part of the rights appertaining to the sovereignty of the State of New York over the said territory.

Second: That the Commonwealth of Massachusetts in and by its Legislative Act approved November 21st, 1788 in Chapter 23 of the Laws and Resolutions of the Session of 1788-1789, did duly grant and convey to Oliver Phelps and Nathaniel Gorham the lands and premises which are known in this case and generally known as the Phelps and

Gorham purchase, bounded by the north boundary line of the State of Pennsylvania, bounded on the east by the meridian line which formed the easterly boundary line of the land, the right of preemption to which was ceded to the Commonwealth of Massachusetts by the Treaty of Hartford; bounded on the west by a line which it was agreed and enacted as it approaches Lake Ontario running northwardly should be "12 miles distant from the most westward bounds of said Genesee River to the shore of Ontario Lake" and the north boundary of which, it was so agreed and enacted should run thence easterly along the shores of said Lake to the meridian forming said easterly boundary, and that it was the intention of the Commonwealth of Massachusetts and of said Oliver Phelps and Nathaniel Gorham; that in and by the said grant, there should be vested in said Oliver Phelps and Nathaniel Gorham title in and to all of the land between the northern boundary of Pennsylvania and the waters of Lake Ontario between the eastern and the western boundary lines of said grant, and that the expression used in said Legislative Act and grant "to the shore of Lake Ontario, thence eastwardly along the shores of said lake," was intended by the parties in said grant to mean to the edge of the water of Lake Ontario, and thence eastwardly along the water line of Lake Ontario, and that the Commonwealth of Massachusetts did not intend to and did not retain unto itself any land lying within said eastern and western boundaries of said Phelps and Gorham purchase bordering on waters of Lake Ontario and called the shore thereof, and that the Plaintiff, the Commonwealth of Massachusetts has no right, title and interest in or to any of the real estate or premises described in the Bill of Complaint.

Whereupon, it is now here ordered, adjudged, and decreed by this Court that the Bill of Complaint herein be, and the same hereby is, dismissed with costs to be paid by the Complainant.

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Decree.

It is further ordered by this Court that there be included as costs in this Court one-half of the cost of the typewritten copy of the testimony furnished to the Special Master, and the whole of the clerk's costs in this Court.

[Here followed further and concluding provisions, concerning the compensation and disbursements of the Special Master.]

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It is further stated by the Court that there is no
 doubt as to the fact that the defendant is the
 author of the libelous publication, and that he
 published it with the intent to injure the
 plaintiff's reputation, and to bring him into
 public contempt and derision. The defendant
 is therefore liable to the plaintiff for the
 damages sustained by him as a result of the
 publication of the libelous article.

The Court further holds that the defendant
 is liable to the plaintiff for the costs of the
 action, and for the expenses incurred by the
 plaintiff in the prosecution of the same.

The Court finally orders that the defendant
 pay to the plaintiff the sum of \$10,000 as
 damages, and the costs of the action, and
 that the defendant pay to the plaintiff the
 sum of \$5,000 as expenses.

The Court further orders that the defendant
 pay to the plaintiff the sum of \$1,000 as
 interest on the damages, and that the
 defendant pay to the plaintiff the sum of
 \$500 as interest on the expenses.

The Court finally orders that the defendant
 pay to the plaintiff the sum of \$1,000 as
 interest on the damages, and that the
 defendant pay to the plaintiff the sum of
 \$500 as interest on the expenses.

DECISIONS PER CURIAM, FROM APRIL 13, 1926,
TO AND INCLUDING JUNE 7, 1926, OTHER
THAN DECISIONS ON PETITIONS FOR WRITS
OF CERTIORARI.

No. 310. CARTER LYNCH, TRUSTEE IN BANKRUPTCY OF THE TENNESSEE RIVER COAL COMPANY, *v.* NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY ET AL. Error to the Supreme Court of the State of Tennessee. Motion to dismiss submitted April 12, 1926. Decided April 19, 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. Frank Spurlock and Fitzgerald Hall* for defendants in error, in support of the motion. *Mr. Charles C. Moore* for plaintiff in error, in opposition thereto.

No. 662. EMPIRE ENGINEERING COMPANY *v.* WHITE, GRATWICK AND MITCHELL, INC. Error to the Supreme Court of the State of New York. Motion to dismiss submitted April 12, 1926. Decided April 19, 1926. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *California Powder Works v. Davis & Co.*, 151 U. S. 389; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 469, 470; *Consolidated Turnpike Co. v. Norfolk & Ocean View R. R. Co.*, 228 U. S. 596, 599; *Yazoo & Mississippi Valley R. R. Co. v. Brewer*, 231 U. S. 245, 249; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69; *Bilby v. Stewart*, 246 U. S. 255, 257; *Farson, Son & Co. v. Bird*, 248 U. S. 268, 271. *Mr. Lawrence E. Coffey* for defendant in error, in support of the

motion. *Mr. Adelbert Moot and Helen Z. M. Rodgers* for plaintiff in error, in opposition thereto.

No. 674. *ISRAEL SELIGMAN v. FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, AND DAVID H. BLAIR, UNITED STATES COMMISSIONER, ETC.* Appeal from the District Court of the United States for the Southern District of New York. Submitted April 12, 1926. Decided April 19, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938. *Messrs. Charles Marvin and Roscoe C. Harper* for appellant. *Solicitor General Mitchell* for appellee.

Nos. 612 and 613. *JOSEPH B. MARSINO v. COMMONWEALTH OF MASSACHUSETTS.* Error to the Superior Court of Worcester County, State of Massachusetts. Argued April 13, 1926. Decided April 19, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co. v. Carrollton*, 252 U. S. 1, 5-6. *Mr. Asa P. French* for plaintiff in error. *Messrs. Charles B. Rugg, Jay R. Benton, and George R. Stobbs* for defendant in error.

No. 231. *CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. A. N. MURPHY AND T. O. MURPHY, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MURPHY & SON.* Error to the Supreme Court of the State of Oklahoma. Argued April 14, 1926. Decided April 19, 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,

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1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co. v. Carrollton*, 252 U. S. 1, 5-6. Mr. A. T. Boys, with whom Messrs. W. R. Bleakmore, W. F. Dickinson, M. L. Bell, Thomas P. Littlepage, John Barry, and W. F. Collins were on the brief for plaintiff in error. Messrs. W. C. Stevens, A. J. Morris, and Riford Bond, for defendants in error, submitted.

No. 262. STEVE SUPER AND BENJAMIN H. WILDER *v.* HUBERT WORK, SECRETARY OF THE INTERIOR, AS A MEMBER OF THE FEDERAL POWER COMMISSION, AND WILLIAM M. JARDINE, SECRETARY OF AGRICULTURE, ETC. Appeal from the Court of Appeals of the District of Columbia. Argued April 20, 21, 1926. Decided April 26, 1926. *Per Curiam*. Affirmed upon the authority of (1) *Barker v. Harvey*, 181 U. S. 481; *United States v. Title Insurance Company*, 265 U. S. 472; (2) *Lone Wolf v. Hitchcock*, 187 U. S. 553; *Conley v. Ballinger*, 216 U. S. 84, 90. Mr. Jennings C. Wise, for appellants. Mr. George P. Barse, with whom Solicitor General Mitchell and Assistant Attorney General Parmenter were on the brief, for appellees.

No. 266. EMELIE W. PEACOCK *v.* MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS. Appeal from the Circuit Court of Appeals for the Seventh Circuit. Argued April 23, 1926. Decided April 26, 1926. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Toop v. Ulysses Land Company*, 237 U. S. 580, 583; *United Security Company v. American Fruit Produce Company*, 238 U. S. 140, 142; *Sugarman v. United States*, 249 U. S. 182, 184; *Berkman v. United States*, 250 U. S. 114, 118; *Piedmont Power & Light Com-*

pany v. Town of Graham, 253 U. S. 193, 195. Mr. Herbert Pope, with whom Messrs. James F. Forstall and E. Barrett Prettyman were on the brief, for appellant. Solicitor General Mitchell, with whom Assistant Attorney General Willebrandt and Mr. Sewall Key were on the brief, for appellee.

No. —, original. EX PARTE WILLIAM G. EHRLICH. May 3, 1926. Motion for leave to file petition for writ of habeas corpus and to admit petitioner to bail denied. Messrs. William C. Prentiss and Joseph E. Morrison for petitioner.

No. —, original. EX PARTE CARL KOBER. May 3, 1926. Motion for leave to file petition for writ of habeas corpus and to admit petitioner to bail denied. Messrs. William C. Prentiss and Joseph E. Morrison for petitioner.

No. 269. ROY RISSLING *v.* CITY OF MILWAUKEE. Error to the Supreme Court of the State of Wisconsin. Argued April 26, 1926. Decided May 3, 1926. *Per Curiam*. Affirmed upon the authority of *Gundling v. Chicago*, 177 U. S. 183; *Barbier v. Connolly*, 113 U. S. 27; *Reinman v. City of Little Rock*, 237 U. S. 171. Mr. Leon B. Lamfrom for plaintiff in error. Messrs. John M. Niven and Leo. A. Mullaney for defendant in error.

No. 275. ISABELLA SAMUELS, FORMERLY ISABELLA OSBORNE, ET AL. *v.* JOE H. CHILDERS. Error to the Supreme Court of the State of Oklahoma. Submitted April 27, 1926. Decided May 3, 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. Mr. John Tomerlin and

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Edgar A. deMueles for plaintiffs in error. *Messrs. James D. Simms* and *James C. Denton* for defendant in error.

No. 281. *SHELLEY B. HUTCHINSON v. WILLIAM M. SPERRY AND EMILY SPERRY, HIS WIFE, FARMERS' LOAN & TRUST Co. OF NEW YORK, ET AL., ETC., ET AL.* Appeal from the Circuit Court of Appeals for the Third Circuit. Argued April 28, 1926. Decided May 3, 1926. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of sections 128 and 240 of the Judicial Code; *Farrrell v. O'Brien*, 199 U. S. 89, 100; *Goodrich v. Ferris*, 214 U. S. 71, 79. *Mr. William Mayo Atkinson* for appellant. *Messrs. Frederick Geller, Frederic J. Faulke, Robert H. McCarter, and Josiah Stryker* for appellees.

No. 287. *CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.* Error to the Supreme Court of the State of South Dakota. Argued April 29, 1926. Decided May 3, 1926. *Per Curiam*. Dismissed for the want of jurisdiction upon the authority of *McCain v. Des Moines*, 174 U. S. 128, 181; *Western Union Telegraph Company v. Ann Arbor R. R. Co.*, 178 U. S. 239, 243; *Spencer v. Duplan Silk Company*, 191 U. S. 526, 530; *Shulthis v. McDougal*, 225 U. S. 561, 569; *Hull v. Burr*, 234 U. S. 712, 720; *Norton v. Whitesides*, 239 U. S. 144, 147. *Mr. J. N. Davis*, with whom *Messrs. O. W. Dynes, E. L. Grantham, H. H. Field, and Frank K. Nebeker*, were on the brief, for plaintiff in error. *Mr. Raymond L. Dillman* for defendant in error.

No. —, original. *EX PARTE EDWARD F. BROWN.* Motion for leave to file petition for mandamus to the District Court of the United States for the district of Massachusetts. May 10, 1926. *Per Curiam*. Application for leave

to file petition for a writ of mandamus to compel Judge Peters of the District Court of the United States for the District of Massachusetts to allow a direct appeal to this court on a question of jurisdiction, the appeal having been applied for before the effective date of the Act of February 13, 1925, 43 Stat. 936, denied upon the authority of *Smith v. McKay*, 161 U. S. 355, 358. *Messrs. C. C. McChord and Conrad W. Crooker* for petitioner.

No. 455. *JAMES SCOTT v. MORRIS NATIONAL BANK, OF MORRIS*. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted May 3, 1926. Decided May 10, 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 Company v. Carrollton*, 252 U. S. 1, 5-6; (2) *Missouri v. Andriano*, 138 U. S. 496; *Rae v. Homestead Loan & Guaranty Company*, 176 U. S. 121; *Baker v. Baldwin*, 187 U. S. 61. *Messrs. Charles A. Dixon and E. J. McVann* for defendant in error in support of the motion. *Mr. Lewis C. Lawson* for plaintiff in error in opposition thereto.

No. 66. *JOHN C. ROSS v. STATE OF SOUTH DAKOTA*. Error to the Supreme Court of the State of South Dakota. Submitted May 3, 1926. Decided May 10, 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; (2) *Farrell v. O'Brien*, 199 U. S. 89, 100; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 583; *Piedmont Power & Light Co. v. Town of Graham*, 253 U. S. 193, 195; *Seaboard Air Line v. Padgett*, 236 U. S. 668, 671; (3) *Missouri v. Lewis*, 101 U. S. 22, 31. *Messrs. U. S. G.*

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Cherry and Holton Devenport for plaintiff in error. Messrs. *Byron S. Payne* and *E. D. Roberts* for defendant in error.

No. 302. C. A. P. TURNER COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued May 3, 1926. Decided May 10, 1926. *Per Curiam*. Affirmed upon the authority of *United States v. Smith*, 94 U. S. 214, 218; *Talbert v. United States*, 155 U. S. 45; *Stone v. United States*, 164 U. S. 380, 382; *United States v. Milliken Printing Co.*, 202 U. S. 173, 174; *Keokuk & Hamilton Bridge Co. v. United States*, 260 U. S. 125, 126. Mr. *Benton Baker*, for appellant. *Solicitor General Mitchell* and Mr. *A. C. Paul* for the United States.

No. 304. WILLIAM H. MAXWELL AND GLOBE INDEMNITY COMPANY *v.* UNITED STATES. Error to the United States Circuit Court of Appeals for the Fourth Circuit. Argued May 4, 1926. Decided May 10, 1926. *Per Curiam*. Affirmed upon the authority of *The Harriman*, 9 Wall. 161, 172; *Jones v. United States*, 96 U. S. 24, 29; *Jacksonville, Mayport, Pablo Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 527; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 543-544; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164; *Day v. United States*, 245 U. S. 159, 161. Messrs. *George A. King* and *Christie Benet*, with whom Mr. *F. A. W. Ireland* was on the brief, for plaintiffs in error. *Solicitor General Mitchell*, *Assistant to the Attorney General Donovan*, and Mr. *J. D. Ernest Meyer* for the United States.

No. 338. HAEUSSLER INVESTMENT COMPANY *v.* CHARLES W. BATES; and

No. 481. FRUIN BAMBRICK CONSTRUCTION COMPANY, THIRD STREET REALTY & INVESTMENT COMPANY, COMP-

TON HILL IMPROVEMENT COMPANY ET AL. *v.* CHARLES W. BATES. Error to the Supreme Court of the State of Missouri. Submitted May 6, 1926. Decided May 10, 1926. *Per Curiam*. Affirmed upon the authority of *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 69; *Hancock v. City of Muskogee*, 250 U. S. 454, 456; *Goldsmith v. Prendergast Construction Co.*, 252 U. S. 12; (2) *Valley Farms Co. v. Westchester County*, 261 U. S. 155. *Messrs. Lambert E. Walther, Joseph W. Lewis, John S. Leahy, Walter H. Saunders, and Charles M. Rice* for plaintiffs in error. *Mr. Charles W. Bates, pro se*.

No. 17, original. UNITED STATES *v.* MINNESOTA. May 24, 1926. Final decree entered. See 270 U. S. 181.

No. —, original. EX PARTE NORMAN T. WHITAKER. May 24, 1926. Motion for leave to file petition for writ of mandamus or certiorari herein is denied. *Mr. Norman T. Whitaker, pro se*.

No. —, original. EX PARTE HUGH H. NEWELL. May 24, 1926. Motion for leave to file petition for writ of habeas corpus is denied. *Mr. Hugh H. Newell, pro se*.

No. 554. NORMAN S. BOWLES *v.* W. I. BIDDLE, WARDEN. Appeal from the District Court of the United States for the District of Kansas. Motion to dismiss submitted June 1, 1926. Decided June 7, 1926. *Per Curiam*. Motion to dismiss the appeal as moot granted and the order denying the writ of habeas corpus vacated, with directions to the District Court of the United States for the District of Kansas to dismiss the petition. *Solicitor General Mitchell, Assistant Attorney General Luhring,*

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and *Mr. Harry S. Ridgely* for appellee, in support of the motion. *Mr. Norman S. Bowles, pro se*, in opposition thereto.

No. —, original. *JOHN LAPIQUE v. DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA*. June 7, 1926. Motion for leave to file petition for writ of mandamus and motion for writ of error denied. *Mr. John Lapique, pro se*.

No. 786. *TRANSPORTES MARITIMOS DO ESTADO v. L. MÜNDET & SONS, INC.* Appeal from the District Court of the United States for the Southern District of New York. Motion to dismiss submitted June 1, 1926. Decided June 7, 1926. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of section 238 of the Judicial Code as amended by the act of February 13, 1925, c. 229, secs. 1, 13, 43 Stat. 936, 938, 942. *Messrs. John A. McManus and Otis Beall Kent* for appellee, in support of the motion. *Mr. F. Dudley Kohler* for appellant, in opposition thereto.

No. —. *ROBINS DRY DOCK & REPAIR COMPANY v. MARION L. ROBINSON, AS ADMINISTRATRIX, ETC.* Error to the Supreme Court of the State of New York. On rule to show cause why the writ of error, allowed by a Justice of this Court, should not be dismissed. Submitted June 1, 1926. Decided June 7, 1926. *Per Curiam*. Dismissed upon the authority of *Stratton v. Stratton*, 239 U. S. 55; *Andrews v. Virginian Ry. Co.*, 248 U. S. 272; *Matthews v. Huwe*, 269 U. S. 262, 265-266; *Southern Electric Co. v. Stoddard, Superintendent*, 269 U. S. 186, 188-190.

No. 497. *JOE H. TIGER v. WILLIAM M. FEWELL ET AL.* Error to the Supreme Court of the State of Oklahoma.

Motion to dismiss submitted June 1, 1926. Decided June 7, 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. *Mr. William O. Beall* for defendants in error, in support of the motion. *Mr. William Neff* for plaintiff in error, in opposition thereto.

No. 3, Original. STATE OF NEW MEXICO *v.* STATE OF TEXAS. Order entered June 7, 1926. It is ordered that the report of the special master be, and it is hereby, received and a hearing on the report and any exceptions thereto is set for Monday, January 3, 1927.

No. 16, original. STATE OF WISCONSIN *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. Order entered June 7, 1926. Announced by MR. JUSTICE HOLMES.

It is ordered that this cause be referred to Charles Evans Hughes, Esquire, as the special master with directions and authority to take the evidence and to report the same to the Court with his findings of fact, conclusions of law, and recommendations for a decree—all subject to examination, consideration, approval, modification, or other disposal by the Court. The special master shall have authority (1) to employ competent stenographic and clerical assistants, (2) to fix the times and places of taking the evidence, and (3) to issue subpoenas to secure the attendance of witnesses and to administer oaths. When the special master's report of his findings of fact, conclusions of law, and recommendations for a decree is completed the clerk of the court shall cause the same to be printed; and when the same is presented to the Court in printed form the parties will be accorded a reasonable time, to be fixed by the Court, within which to present exceptions.

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The special master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportions as the Court hereafter may direct. If the parties to the related suit of *State of Michigan v. State of Illinois and Sanitary District of Chicago*, now pending in this Court, so elect and so notify the special master, they shall be permitted to participate in the taking of evidence and in the hearing before the special master in like manner and with like effect as if that suit had been consolidated with this cause by the Court's order; and the Court specially reserves to itself authority to order such a consolidation if it becomes proper to do so. If the appointment herein made of a special master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

PETITIONS FOR CERTIORARI GRANTED, FROM
APRIL 13, 1926, TO AND INCLUDING JUNE 7,
1926.

No. 953. UNITED STATES *v.* CHARLES A. LUDY. April 19, 1926. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Mr. Fred K. Dyar* for the United States. *Mr. Wayne Johnson* for respondent.

No. 957. UNITED STATES *v.* S. S. WHITE DENTAL MANUFACTURING COMPANY OF PENNSYLVANIA. April 19, 1926. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney*

General Galloway, and *Mr. Fred K. Dyar* for the United States. *Messrs. John Hampton Barnes* and *John F. McCarron* for respondent.

NO. 1012. CORNELIUS ANDERSON, SUING ON BEHALF OF HIMSELF AND ALL OTHER SEAMEN, ETC., *v.* SHIPOWNERS ASSOCIATION OF THE PACIFIC COAST ET AL. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. H. W. Hutton* for petitioner. *Mr. Frederick C. Peterson* for respondents.

NO. 1016. C. A. HUDSON AND R. R. BROGAN *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. B. B. McGinnis* for petitioners. *Solicitor General Mitchell*, *Assistant Attorney General Luhring*, and *Mr. Harry S. Ridgely* for the United States.

NO. 1045. GEORGE FORD, GEORGE HARRIS, J. EVELYN, ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. J. Harry Covington*, *Marion De Vries*, *George R. Davis*, and *Louis V. Crowley* for petitioners. *Solicitor General Mitchell*, *Assistant Attorney General Willebrandt*, and *Mr. John J. Byrne* for the United States.

NO. 1051. BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS *v.* YNCHAUSTI AND COMPANY. April 26, 1926. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. L. H. Hedrick* and *O. E. McGuire* for petitioner. *Messrs. Alexander Britton* and *Lawrence H. Cake* for respondent.

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No. 1055. EMPIRE TRUST COMPANY *v.* CHARLES HAZLITT CAHAN. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Van Vechten Veeder* for petitioner. *Messrs. Charles E. Hughes, Jr. Augustus L. Richards, and Bertram F. Willcox* for respondent.

No. 1068. CHICAGO GREAT WESTERN RAILROAD COMPANY *v.* MARION S. JACKSON. April 26, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. Asa G. Briggs* for petitioner. *Mr. F. M. Miner* for respondent.

No. 1069. MIDDLETON S. BORLAND, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE *v.* CARL ROCHLING, ET AL., TRADING AS GEBRUEDER ROCHLING. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Godfrey Goldmark* for petitioner. *Messrs. Henry G. Hotchkiss and William H. White, Jr.* for respondents.

No. 1073. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS *v.* STATE OF TEXAS. April 26, 1926. Petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas granted. *Messrs. J. M. Bryson, C. C. Huff, and Alex. H. McKnight,* for petitioner. *Mr. Dan Moody,* Attorney General of Texas, for respondent.

No. 1077. TEMCO ELECTRIC MOTOR COMPANY *v.* APCO MANUFACTURING COMPANY. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. H. A. Toulmin* and

H. A. Toulmin, Jr. for petitioner. *Messrs. M. A. Keller and Clifford L. Anderson* for respondent.

No. 1116. ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL., ETC. *v.* MIDDLETON S. BORLAND, TRUSTEE IN BANKRUPTCY. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles A. Brodek* for petitioners. *Mr. Godfrey Goldmark* for respondent.

No. 1117. MIDDLETON S. BORLAND, TRUSTEE IN BANKRUPTCY *v.* ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL. April 26, 1926. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Godfrey Goldmark* for petitioner. No appearance for respondent.

No. 1086. GULF, MOBILE AND NORTHERN RAILROAD COMPANY *v.* W. F. WELLS. May 3, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted. *Mr. Ellis B. Cooper* for petitioner. No appearance for respondent.

No. 1091. B. A. MARLIN *v.* JOHN LEWALLEN AND LUCY CONDREN. May 3, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. S. P. Freeling* for petitioner. *Mr. Martin E. Turner* for respondents.

No. 1094. ATLANTIC COAST LINE RAILROAD COMPANY *v.* IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL. May 3, 1926. Petition for a writ of cer-

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tiorari to the Supreme Court of the State of North Carolina granted. *Mr. Thomas W. Davis* for petitioner. No appearance for respondent.

No. 1095. COMPANIA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE. May 3, 1926. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. W. F. Williamson, B. M. Aikens, and Barry Mohun* for petitioner. *Mr. A. R. Stallings* for respondent.

No. 1132. WILLIAM EARL DODGE AND JOSHUA T. DODGE *v.* UNITED STATES. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Daniel T. Hagan, and Peter W. McKiernan* for petitioners. *Solicitor General Mitchell and Assistant Attorney General Willebrandt* for the United States.

No. 1140. GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* MRS. OLENA MOSER, ADMINISTRATRIX. May 10, 1926. Petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas granted. *Messrs. Alexander Britton, C. K. Lee, and J. W. Terry* for petitioner. No appearance for respondent.

No. 1128. ANDREW P. VOUGHT *v.* K. K. KANNE, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ANDREW P. VOUGHT, BANKRUPT. May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Charles Bunn* for petitioner. *Mr. Charles B. Elliott* for respondent.

No. 1138. T. H. DEAL AND UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE *v.* UNITED STATES. May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Louis S. Beedy* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Letts, and Mr. J. Kennedy White* for the United States.

No. 1139. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* STATE OF OKLAHOMA AND OKLAHOMA PORTLAND CEMENT COMPANY. May 24, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Messrs. E. T. Miller, C. B. Stuart, J. F. Sharp, M. K. Cruce, Ben Franklin, and Thomas P. Littlepage* for petitioner. No appearance for respondents.

No. 1147. A. W. MELLON, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT *v.* L. E. MCKINLEY. May 24, 1926. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky granted. *Mr. Ashby M. Warren* for petitioner. *Mr. Thomas C. Mapother* for respondent.

No. 1143. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* WILBUR E. SKINNER. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. A. A. McLaughlin, E. T. Miller, and Henry S. Conrad* for petitioner. *Mr. William S. Hogsett* for respondent.

No. 1144. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* VICTOR H. WILSON. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Mis-

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souri granted. *Messrs. A. A. McLaughlin, E. T. Miller, and Henry S. Conrad* for petitioner. *Mr. William S. Hogsett* for respondent.

No. 1145. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* WARREN R. BENNISON. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. A. A. McLaughlin, E. T. Miller, and Henry S. Conrad* for petitioner. *Mr. William S. Hogsett* for respondent.

No. 1146. ANDREW W. MELLON, DIRECTOR GENERAL, *v.* PETER S. STONEHAM. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. A. A. McLaughlin, E. T. Miller, and Henry S. Conrad* for petitioner. *Mr. William S. Hogsett* for respondent.

No. 1159. PRODUITS METALLURGIQUES ANCIENS ETABLISSEMENTS MEIBOOM & CIE., SOCIÉTÉ ANONYME *v.* GULF EXPORT & TRANSPORT COMPANY. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Henry G. Gray* for petitioner. No appearance for respondent.

No. 1160. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* WELLS-DICKEY TRUST COMPANY, SPECIAL ADMINISTRATOR. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. Bruce Scott* for petitioner. *Mr. F. M. Miner* for respondent.

No. 1161. BALTIMORE & OHIO RAILROAD COMPANY *v.* DORA GOODMAN, ADMINISTRATRIX. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. William A. Eggers and Morison R. Waite* for petitioner. *Mr. Lee Warren James* for respondent.

No. 1166. BEN W. STEELE, EXECUTOR OF THE ESTATE OF A. B. STEELE, DECEASED, *v.* J. H. DRUMMOND. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Harold Hirsch and W. D. Thomson* for petitioner. No appearance for respondent.

No. 1169. MUELLER GRAIN COMPANY *v.* AMERICAN STATE BANK OF OMAHA, NEBRASKA. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Walter Bachrach* for petitioner. *Messrs. Carl Meyer, Henry Russell Platt, and David F. Rosenthal* for respondent.

No. 1173. JUAN POSADOS, JR., COLLECTOR, ETC., ET AL. *v.* CITY OF MANILA. June 1, 1926. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. L. H. Hedrick and O. R. McGuire* for petitioners. *Messrs. Alexander Britton and L. H. Cake* for respondent.

No. 1183. FRANK K. BOWERS, COLLECTOR, ETC. *v.* NEW YORK & ALBANY LIGHTERAGE COMPANY. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,*

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and Messrs. Sewall Key, A. W. Gregg, and Charles T. Hendler for petitioner. Mr. Winifred Sullivan for respondent.

No. 1184. FRANK K. BOWERS, COLLECTOR, ETC. *v.* LLOYD W. SEAMAN. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Messrs. Sewall Key, A. W. Gregg, and Charles T. Hendler* for petitioner. *Mr. Bern Budd* for respondent.

No. 1185. FRANK K. BOWERS, COLLECTOR, *v.* THOMAS STAPLES FULLER. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Messrs. Sewall Key, A. W. Gregg, and Charles T. Hendler* for petitioner. *Mr. Thomas S. Fuller* for respondent.

No. 1195. KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* R. E. ELLZEY. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. D. Wilkinson and C. H. Lewis* for petitioner. *Mr. S. P. Jones* for respondent.

No. 1198. KINNEY-COASTAL OIL COMPANY ET AL. *v.* MICHAEL F. KIEFFER, ET AL. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Paul P. Prosser and Edward M. Freeman* for petitioners. No appearance for respondents.

PETITIONS FOR CERTIORARI DENIED OR DIS-
MISSED, FROM APRIL 13, 1926, TO AND IN-
CLUDING JUNE 7, 1926.

No. 890. AMERICAN TELEGRAPH & CABLE COMPANY *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Sanford Robinson and Francis R. Stark* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Messrs. Edwin S. McCrary, A. W. Gregg, and Charles T. Hendler* for the United States.

No. 912. LUCIUS L. GILBERT, TRUSTEE IN BANKRUPTCY OF THE AMERICAN SHIPBUILDING COMPANY, *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Horace S. Whitman and Challen B. Ellis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Mr. Arthur Cobb* for the United States.

No. 974. CATHERINE M. DREXEL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Barry Mohun* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Mr. Alexander H. McCormick* for the United States.

No. 975. WILLIAM LEATHER *v.* UNITED STATES SPEEDWAY PARK ASSOCIATION. April 19, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Oliver J. Cook* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Mr. Joseph Henry Cohen* for respondents.

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No. 1009. MISSOURI PACIFIC RAILROAD COMPANY ET AL. v. MARION & EASTERN RAILROAD COMPANY. April 19, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. Edward J. White* for petitioners. No appearance for respondent.

No. 1010. NELSON B. UPDIKE ET AL. v. UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Francis A. Brogan, Alfred G. Ellick, and Anan Raymond* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Mr. Sewall Key* for the United States.

No. 1013. CLEMENT GUNN v. UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Vance J. Higgs* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1017. MURRAY JACKSON v. STATE OF TEXAS. April 19, 1926. Petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas denied. *Mr. A. H. Carrigan* for petitioner. No appearance for respondent.

No. 1018. NELLIE TRUELSON ET AL. v. WHITNEY & BODDEN SHIPPING COMPANY, INC. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. M. G. Adams and C. W. Howth* for petitioners. *Messrs. Palmer Pillans and H. Pillans* for respondent.

No. 1022. WILLIAM P. COLBECK ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas J. Rowe* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1023. CHARLES LANHAM ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas J. Rowe* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1025. LEHIGH VALLEY RAILROAD COMPANY *v.* CATHERINE O'ROURKE. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas R. Wheeler* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 1026. LEHIGH VALLEY RAILROAD COMPANY *v.* FELIX O'ROURKE. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas R. Wheeler* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 1029. JOHN W. LE CRONE *v.* ANDREW W. MELLON, SECRETARY, ET AL. April 19, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George N. Baxter and Moses E. Clapp* for petitioner. *Mr. William R. Harr* for respondents.

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No. 1034. FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* JAMES D. HAY ET AL., COMMISSIONERS. April 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace Andrews* for petitioner. *Mr. J. B. Brooks* for respondents.

No. 1035. HENRY L. CORBETT *v.* HENRY VETTE ET AL. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. G. Bissell* for petitioner. No appearance for respondents.

No. 1037. ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, ET AL. *v.* GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry D. Ashley* for petitioners. No appearance for respondent.

No. 1038. HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION, *v.* UNITED STATES EX REL. BEILA DUNER ET AL. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell*, *Assistant Attorney General Luhring*, and *Mr. Frank M. Parrish* for petitioner. *Messrs. Louis Marshall* and *Morris Jablow* for respondents.

No. 1039. G. W. BOHNING ET AL. *v.* R. B. CALDWELL, RECEIVER. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Ellis Douthit* and *Fred L. Wallace* for petitioners. No appearance for respondent.

No. 1040. WILLIAM S. SILKWORTH *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan A. Smyth* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1041. BLAINE J. NICHOLAS ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David V. Cahill and William C. Fitts* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1042. EDWARD A. MCQUADE ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David V. Cahill and James I. Cuff* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1043. RALPH E. TINCHER ET AL. *v.* UNITED STATES. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. M. Belcher* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1044. HOCKING VALLEY RAILWAY COMPANY *v.* BERT F. KONTNER. April 19, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Ohio

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denied. *Mr. Fred C. Rector* for petitioner. *Messrs. R. B. Newcomb* and *David F. Pugh* for respondent.

No. 1049. MILTON VON BOSTON *v.* UNITED RAILWAYS COMPANY OF ST. LOUIS ET AL. April 19, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. P. H. Cullen* and *Taylor R. Young* for petitioner. *Messrs. Charles W. Bates* and *H. S. Priest* for respondents.

No. 1030. JOHN L. CRANMER *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. George A. King* for petitioner. *Solicitor General Mitchell*, *Assistant Attorney General Galloway*, and *Mr. John G. Ewing* for the United States.

No. 1050. FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK *v.* WILLIAM L. WALZ, TRUSTEE, AND ANN ARBOR SAVINGS BANK. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Henry C. Walters*, *Arthur P. Hicks*, and *James O. Murfin* for petitioner. No appearance for respondents.

No. 1052. MARGARET CHAPUT VON CROME, EXECUTRIX OF THE ESTATE OF JULIUS KALTER, DECEASED, *v.* TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frederick H. Bacon* and *Edward W. Foristel* for petitioner. *Messrs. James C. Jones*, *Lon O. Hocker*, and *Frank H. Sullivan* for respondent.

No. 1053. WILLIAMS STEAMSHIP COMPANY, INC., CLAIMANT OF THE AMERICAN STEAMER WILLSOLO, HER ENGINES, ETC. *v.* BRAYTON WILBUR, FLOYD E. ELLIS, and THOMAS GEORGE FRANK, ETC. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George C. Sprague and Thomas A. Thatcher* for petitioner. No appearance for respondent.

No. 1056. THOMAS K. FISHER, DOMINICK FISHER, PETER E. FITZPATRICK, ET AL. *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel T. Hagan* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Mr. John J. Byrne* for the United States.

No. 1057. CHARLES C. GALLOWAY, H. EDSON ROGERS, AND CLARENCE D. BLACHLY *v.* JAMES FRANKLIN BELL, CUNO H. RUDOLPH AND FREDERICK A. FENNING, AS MEMBERS, ETC., ET AL. April 26, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry C. Clark* for petitioners. *Messrs. Francis H. Stephens, Benjamin S. Minor, H. Prescott Gatley, Hugh B. Rowland, and Arthur P. Drury* for respondents.

No. 1058. ARTHUR R. SHOOK *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Howard L. Doyle and Charles C. LeForgee* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Katherine Lloyd Campbell* for the United States.

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No. 1062. CHARLIE GIB *v.* LUTHER WEEDIN, AS COMMISSIONER OF IMMIGRATION OF THE PORT OF SEATTLE, WASHINGTON. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Roger O'Donnell and John J. Sullivan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1063. KEE HOW, ALIAS CHARLIE KEE *v.* LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION OF THE PORT OF SEATTLE, WASHINGTON. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Roger O'Donnell and John J. Sullivan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1064. EDGAR M. CHAPMAN AND ERNEST LYNN *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1065. IN RE J. A. WOLFSON. April 26, 1926. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. L. T. Michener, Swagar Sherley, F. DeC. Faust, and Charles F. Wilson* for petitioner. *Mr. Amos R. Stallings* for respondent.

No. 1066. A. GOLDSTEIN *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. W. Gwynn Gardiner* for petitioner. *Solicitor General Mitchell*, *Assistant Attorney General Luhring*, and *Mr. Harry S. Ridgely* for the United States.

No. 1071. *MARIE PERRY v. HUBERT WORK, SECRETARY OF THE INTERIOR AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE.* April 26, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. S. M. Stockslager* for petitioner. *Solicitor General Mitchell*, *Assistant Attorney General Parmenter*, and *P. G. Michener* for respondent.

No. 1072. *HANDY CHOCOLATE COMPANY v. C. C. MENGEL & BROS.* April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Philip N. Jones* for petitioner. *Mr. Addison C. Burnham* for respondent.

No. 1074. *HAROLD W. LETTON v. AMERICAN MERCHANT MARINE INSURANCE COMPANY.* April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hartwell Cabell* for petitioner. *Messrs. Cletus Keating* and *Ira A. Campbell* for respondent.

No. 1075. *CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. DAISY HALT, ADMINISTRATRIX OF THE ESTATE OF FREDERICK HALT.* April 26, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Samuel W. Baxter*, *Charles A. Houts*, *H. N. Quigley*, and *David E. Keeffe* for petitioner. *Mr. Sidney Thorne Able* for respondent.

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No. 1076. ALMA COAL COMPANY AND KENTLAND COAL & COKE COMPANY *v.* JOHN F. PHILLIPS AND SUSAN J. PHILLIPS. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John F. Hager* for petitioners. No appearance for respondents.

No. 1079. HERBERT R. WILKIN, TRUSTEE IN BANKRUPTCY OF HARMONY THEATRE COMPANY, BANKRUPT, *v.* HEYWOOD-WAKEFIELD COMPANY. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George E. Brand and Walter I. McKenzie* for petitioner. No appearance for respondent.

No. 1080. FARMERS AND MINERS BANK ET AL. *v.* BLUEFIELD NATIONAL BANK ET AL. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William H. Werth* for petitioners. No appearance for respondents.

No. 1081. A. STANLEY COPELAND *v.* UNITED STATES. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. Stanley Copeland, pro se. Solicitor General Mitchell and Assistant Attorney General Willebrandt* for the United States.

No. 1082. PAOLO SACCO, ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF LUIGI SACCO, DECEASED, *v.* DELAWARE AND HUDSON COMPANY. April 26, 1926. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Walter A. Fullerton* for petitioner. *Mr. Lewis E. Carr* for respondent.

No. 1087. *SPENCER BROWN v. UNITED STATES*. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hubert F. Fisher* for petitioner. *Solicitor General Mitchell*, *Assistant Attorney General Luhring*, and *Mr. Harry S. Ridgely* for the United States.

No. 1088. *UNITED STATES EX REL. EDMUND A. VARELA AND CARRY B. WALSH v. J. FRANKLIN BELL, CUNO H. RUDOLPH, AND JAMES F. OYSTER, AS COMMISSIONERS OF THE DISTRICT OF COLUMBIA, ETC.* April 26, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Clayton E. Emig, Wilton J. Lambert, and R. H. Yeatman* for petitioners. *Messrs. R. Golden Donaldson, Hayden Johnson, and Vernon E. West* for respondents.

No. 1089. *UNITED STATES, BY C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE v. GEORGE S. DAVISON*. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Mitchell* for the United States. *Mr. John G. Frazer* for respondent.

No. 1092. *WILLIAM NOIRMOT, J. OLSEN, PEDER HANSEN, ET AL. v. SCHOONER ROSEMARY, CHARLES J. DENCHAUD, OWNER, AND W. N. BURBIDGE, MASTER*. April 26, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. L. Morewitz* for petitioners. No appearance for respondents.

No. 449. *LAZARUS G. JOSEPH AND A. N. JOUREDINI & BROS. v. JOHN BORDMAN, J. M. MENZI, AND THE BANK*

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OF THE PHILIPPINE ISLANDS. On writ of certiorari to the Supreme Court of the Philippine Islands. May 3, 1926. Writ of certiorari dismissed as improvidently granted. *Messrs. Henry D. Green, John W. Clifton, and Marion Butler* for petitioners. *Messrs. Bernard Hershkopf and Isidor J. Kresel* for respondents.

No. 1083. BEN L. BERWALD SHOE COMPANY, BANKRUPT ET AL. *v.* HAMILTON-BROWN SHOE COMPANY ET AL. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Davis* for petitioners. No appearance for respondents.

No. 1084. DAVID S. SEAMAN AND HENRY L. SEAMAN, CO-EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF JOHN W. SEAMAN, DECEASED, *v.* RICHARD McCULLOCH, HENRY S. PRIEST, FESTUS J. WADE, ET AL., ETC. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. P. H. Cullen and Thomas T. Fauntleroy* for petitioners. *Messrs. Samuel A. Mitchell and H. S. Priest* for respondents.

No. 1090. FRED E. KLING *v.* FRITZ HARING. May 3, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. D. P. Wolhaupter* for petitioner. *Messrs. Henry M. Husley and Ralph Munden* for respondent.

No. 1093. ALVARO BOERA AND RAMON J. BOERA, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BOERA BROTHERS, *v.* STEAMSHIP "SKIPSEA," HER ENGINES, ETC., ET AL. May 3, 1926. Petition for a

writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank I. Finkler* for petitioners. *Mr. L. DeGrove Potter* for respondent.

No. 1103. STROMBERG MOTOR DEVICES COMPANY *v.* BENEKE & KROPF MANUFACTURING COMPANY. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles A. Brown* and *Arthur H. Boettcher* for petitioner. *Mr. Charles W. Hills* for respondent.

No. 1104. STROMBERG MOTOR DEVICES COMPANY *v.* BENEKE & KROPF MANUFACTURING COMPANY. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles A. Brown* and *Arthur H. Boettcher* for petitioner. *Mr. Charles W. Hills* for respondent.

No. 1106. CITY OF ATLANTA *v.* MRS. CORINNE S. SMITH. May 3, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied. *Mr. Will T. Gordon* for petitioner. *Messrs. John D. Little, Arthur G. Powell, Marion Smith, and Max F. Goldstein* for respondent.

No. 1107. COLUMBIA INSURANCE COMPANY OF NEW JERSEY, NEWARK FIRE INSURANCE COMPANY, INC., OF NEWARK, N. J., SECURITY INSURANCE COMPANY OF NEW HAVEN, CONN., ET AL. *v.* MART WATERMAN COMPANY, INC. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert J. Fox* and *Royal H. Weller* for petitioners. *Mr. Charles E. Hughes, Jr.* for respondent.

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No. 1108. *BUCKEYE IRON & BRASS WORKS v. ALFRED W. FRENCH AND FRENCH OIL MILL MACHINERY COMPANY*. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. H. A. Toulmin and H. A. Toulmin, Jr.* for petitioner. *Mr. Charles W. Parker* for respondent.

No. 1109. *JAMES MURRAY v. UNITED STATES*. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Bernhardt Frank, Charles E. Woodward, and Lee O'Neil Browne* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1110. *WILLIAM J. FAHY v. UNITED STATES*. May 3, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Bernhardt Frank, Charles E. Woodward, and Lee O'Neil Browne* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1097. *NEW YORK AND PENNSYLVANIA COMPANY, ARMSTRONG, FOREST COMPANY, INC., AND WEST VIRGINIA PULP AND PAPER COMPANY v. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE UNITED STATES, ET AL.* May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur B. Hayes* for petitioners. *Messrs. Sharswood Brinton and John Hampton Barnes* for respondent.

No. 1098. MOUNTAIN LUMBER COMPANY, D'AUTEUIL LUMBER COMPANY, LTD., NEW YORK AND PENNSYLVANIA COMPANY *v.* JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE UNITED STATES, AND DELAWARE AND HUDSON COMPANY. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Arthur B. Hayes and George E. Nelson* for petitioners. *Messrs. Walter C. Noyes and George H. Richards* for respondents.

No. 1100. FRANK OREB *v.* UNITED STATES. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank Oreb, pro se.* *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Mr. John J. Byrne* for the United States.

No. 1102. DEARBORN COAL COMPANY *v.* BORDERLAND COAL SALES COMPANY. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter K. Sibbald* for petitioner. *Mr. Norwood J. Utter* for respondent.

No. 1114. NIAGARA LAUNDRY & LINEN SUPPLY COMPANY ET AL. *v.* I. T. KAHN ET AL. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Marty* for petitioners. No appearance for respondents.

No. 1118. CHARLEY SIMPSON *v.* UNITED STATES. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. M. Belcher* for petitioner. *Solicitor General Mitchell,*

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Assistant Attorney General Willebrandt, and Mr. K. L. Campbell for the United States.

No. 1119. ED ELMAN, F. KECKNIE, A. KNUTSEN, AND J. TORNBORG *v.* O. A. MOLLER, MASTER OF STEAMSHIP "ROXEN," O. A. MOLLER, REDERIAKTIEB TRANSATLANTIC ET AL. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. J. L. Morewitz, Fayette B. Dow, and Silas B. Axtell* for petitioners. No appearance for respondents.

No. 1120. KUSHNER & GILMAN, INC. *v.* MAYFLOWER WORSTED COMPANY. May 10, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joseph G. M. Browne* for petitioner. *Mr. William S. Hodges* for respondent.

No. 1122. JOE JOHNSON AND HENRY PIUS, ALIAS HIND-LEGS, *v.* UNITED STATES. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John S. Beard* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Mr. Byron M. Coon* for the United States.

No. 1123. NEW YORK DOCK COMPANY *v.* LIGHTER M. L. C. No. 10, HER TACKLE, ETC., MARINE EQUIPMENT CORPORATION AND MARINE LIGHTERAGE CORPORATION ET AL. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph S. Auerbach, Harper A. Holt, and Alexander J. Field* for petitioner. *Mr. John L. Lotsch* for respondents.

No. 1124. NEW YORK DOCK COMPANY *v.* LIGHTER "LEVIATHAN," HER TACKLE, ETC., ATLANTIC LIGHTERAGE CORPORATION, ET AL. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph S. Auerbach, Harper A. Holt, and Alexander J. Field* for petitioner. *Mr. John L. Lotsch* for respondents.

No. 1125. NEW YORK DOCK COMPANY *v.* LIGHTER "SOUTHERN CROSS," HER ENGINES, ETC., ATLANTIC LIGHTERAGE CORPORATION, ET AL. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph S. Auerbach, Harper A. Holt, and Alexander J. Field* for petitioner. *Mr. John L. Lotsch* for respondents.

No. 1126. BUSH TERMINAL COMPANY *v.* LIGHTER "ALLEN," HER TACKLE, ETC., HENRY GILLEN SONS LIGHTERAGE COMPANY, INC. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harper A. Holt, Joseph S. Auerbach, and Alexander J. Field* for petitioner. *Mr. John L. Lotsch* for respondent.

No. 1127. RICHARD H. FIELD *v.* KANSAS CITY REFINING COMPANY, KANSAS CITY RAILWAYS COMPANY, FRED W. FLEMING ET AL., ETC. May 10, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Richard H. Field, pro se.* No appearance for respondents.

No. 1129. NG LUNG EX REL. LEW HUNG GET *v.* JOHN P. JOHNSON, UNITED STATES COMMISSIONER OF IMMIGRA-

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TION. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John W. Keith* for petitioner, and *Ng Lung, pro se. Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for respondent.

No. 1131. JACK C. KOLBRENNER, ART KOLBRENNER, AND MENARD KOLBRENNER *v.* UNITED STATES. May 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring*, and *Mr. Harry S. Ridgely* for the United States.

No. 1130. A. C. MACFARLAND *v.* W. D. HADEN ET AL. May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. M. G. Adams* and *C. W. Homth* for petitioner. No appearance for respondents.

No. 1134. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* WINNIE G. DODGE. May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Frederick L. Allen, Randolph Barton, Jr.*, and *Forrest Bramble* for petitioner. *Mr. Alfred S. Niles* for respondent.

No. 1136. SANDOZ CHEMICAL WORKS *v.* UNITED STATES. May 24, 1926. Petition for a writ of certiorari to the Court of Customs Appeals denied. *Mr. Allan R. Brown* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Lawrence* for the United States.

No. 1137. *SIMPLEX WINDOW COMPANY v. FRED HAUSER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HAUSER WINDOW COMPANY.* May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William S. Hodges* for petitioner. *Mr. Lester Wood* for respondent.

No. 1148. *WALLACE ADDRESSING MACHINE COMPANY, INC., v. EDWIN D. BELKNAP AND RAPID ADDRESSING MACHINE COMPANY.* May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Livingston Gifford and E. Clarkson Seward* for petitioner. *Messrs. Samuel O. Edmonds and A. Parker Smith* for respondents.

No. 1149. *NITRO DEVELOPMENT COMPANY v. UNITED STATES.* May 24, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John W. Davis and E. B. Dyer* for petitioner. *Solicitor General Mitchell and Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, for the United States.

No. 1151. *ARMOUR & COMPANY v. BELTON NATIONAL BANK.* May 24, 1926. Petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit denied. *Mr. Mark McMahon* for petitioner. No appearance for respondent.

No. 1155. *MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, ET AL. v. ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES.* May 24, 1926. Petition for a writ of certiorari to the Court of Appeals of

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the District of Columbia denied. *Messrs. Jesse C. Adkins, Julius I. Peyser, and George F. Snyder* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Letts, and Mr. J. Kennedy White* for respondent.

No. 1156. NEW YORK CENTRAL RAILROAD COMPANY, MICHIGAN CENTRAL RAILWAY COMPANY, VERMONT CENTRAL RAILWAY, ET AL. *v.* ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES. May 24, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Jesse C. Adkins, Julius I. Peyser, and George F. Snyder*, for petitioners. *Solicitor General Mitchell, Assistant Attorney General Letts, and Mr. J. Kennedy White* for respondent.

No. 1162. THOMAS K. OBER, JR., AND WILLIAM C. WIL-
LARD, ANCILLARY RECEIVERS OF INTERNATIONAL NOTE AND
MORTGAGE COMPANY, *v.* THOMAS RAEBURN WHITE, RE-
CEIVER OF THE R. L. DOLLINGS COMPANY. May 24, 1926.
Petition for a writ of certiorari to the Circuit Court of
Appeals for the Third Circuit denied. *Messrs. Owen J.
Roberts, Maurice Bower Saul, and Henry A. Williams* for
petitioners. *Mr. Thomas Raeburn White* for respondent.

No. 913. CHANNON-EMERY STOVE COMPANY *v.* UNITED
STATES. June 1, 1926. Petition for a writ of certiorari
to the Court of Claims denied. *Mr. Raymond M. Hudson*
for petitioner. *Solicitor General Mitchell and Assistant
Attorney General Galloway* for the United States.

No. 914. MOSLER METAL PRODUCTS CORPORATION *v.*
UNITED STATES. June 1, 1926. Petition for a writ of
certiorari to the Court of Claims denied. *Mr. Raymond*

M. Hudson for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 915. AMERICAN SEATING COMPANY *v.* UNITED STATES. June 1, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 916. COLLIER MANUFACTURING COMPANY, INC., *v.* UNITED STATES. June 1, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 917. OHIO PUBLIC SERVICE COMPANY *v.* UNITED STATES. June 1, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 1111. LONE STAR BREWING ASSOCIATION *v.* UNITED STATES. June 1, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. John W. Townsend* and *James Craig Peacock* for petitioner. *Solicitor General Mitchell*, *Assistant Attorney General Galloway*, and *Mr. Alexander H. McCormick* for the United States.

No. 1141. CHARLES L. FULLER *v.* STEAMSHIP "BENCLEUCH," ETC., ET AL. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the

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Second Circuit denied. *Mr. Frank I. Finkler* for petitioner. *Messrs. Allan B. A. Bradley, Franklin Grady, Robert S. Erskine, and John M. Woolsey* for respondents.

No. 1142. *CHARLES L. FULLER v. STEAMSHIP "ELLERDALE," ETC., ET AL.* June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank I. Finkler* for petitioner. *Messrs. Allan B. A. Bradley, Franklin Grady, Robert Erskine, and John M. Woolsey* for respondents.

No. 1150. *W. J. FOYE LUMBER COMPANY v. PENNSYLVANIA RAILROAD COMPANY.* June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Matthew A. Hall and Raymond G. Young* for petitioner. *Mr. Frederic D. McKinney* for respondent.

No. 1152. *L. P. SUMMERS v. UNITED STATES.* June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. M. C. Elliott* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1154. *L. VAN DER STEGEN, ETC. v. NEUSS, HESSELEIN & COMPANY.* June 1, 1926. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Warren Gregory and Blair S. Shuman* for petitioner. *Mr. Garret W. McEnerney* for respondent.

No. 1158. *MARY C. MARCH v. VULCAN IRON WORKS.* June 1, 1926. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Louis G. Morten* for petitioner. *Mr. Mark Townsend, Jr.* for respondent.

No. 1167. *ROSCOE D. RAND v. NATIONAL BANK OF NEWPORT.* June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jasper N. Johnson* for petitioner. *Mr. John W. Redmond* for respondent.

No. 1168. *M. KANANACK & COMPANY, INC., ET AL. v. UNITED STATES.* June 1, 1926. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin Slade* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1174. *OLIVE S. MCGREW v. JOHN L. MCGREW ET AL.* June 1, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Davis* for petitioner. No appearance for respondents.

No. 1175. *NEUFIELD T. JONES ET AL. v. UNITED STATES.* June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alvin L. Newmyer* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 1176. *WILLIAM M. BARRETT, AS PRESIDENT, ETC. v. LOUISE DORAN.* June 1, 1926. Petition for a writ of cer-

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tiorari to the Supreme Court of the State of New York denied. *Mr. Charles W. Stockton* for petitioner. *Mr. Eugene Mackey* for respondent.

No. 1177. MILOS VOJNOVIC *v.* HENRY H. CURRAN, COMMISSIONER, ETC. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carol Weiss King* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for respondent.

No. 1181. CHICAGO TITLE & TRUST COMPANY, RECEIVER, *v.* FRANK G. GARDNER, TRUSTEE. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hiram T. Gilbert* for petitioner. *Messrs. Henry M. Wolf, Alexander F. Reichmann, and Arthur M. Cox* for respondent.

No. 1182. GREAT SOUTHERN LIFE INSURANCE COMPANY *v.* S. L. BURWELL, ADMINISTRATOR. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Clyde A. Sweeton, William A. Vinson, and R. H. Thompson* for petitioner. *Mr. William H. Watkins* for respondent.

No. 1186. O. K. KINES ET AL., TRUSTEES, *v.* A. H. LAMBORN ET AL. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leavitt J. Hunt* for petitioner. *Mr. Louis O. Van Doren* for respondents.

No. 1189. EDWARD B. STROM *v.* UNITED STATES. June 1, 1926. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Sixth Circuit denied. *Mr. Myron H. Walker* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1225. SOCIÉTÉ DE NAVIGATION A VAPEUR FRANCE INDO-CHINE *v.* COOPER & COOPER, INC. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper and William J. Dean* for petitioner. *Mr. George Whitefield Betts, Jr.* for respondent.

No. 1226. SOCIÉTÉ DE NAVIGATION A VAPEUR FRANCE INDO-CHINE *v.* HARRISONS & CROSSFIELD, LTD. June 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper and William J. Dean* for petitioner. *Mr. George Whitefield Betts, Jr.* for respondent.

No. 1096. SIMON PLATT, RECEIVER, ETC. *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Fulton Brylawski and Nathan Cayton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, and Mr. Joseph Henry Cohen* for the United States.

No. 1099. FRANK BORNN, TRADING AS THE BORNN DISTILLING COMPANY *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. George V. A. McCloskey* for petitioner. *Solicitor General Mitchell and Assistant Attorney General Galloway* for the United States.

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NO. 1172. WILLIAM WALTER OWEN *v.* GEORGE HEIMANN. June 7, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Walter A. Scott and H. McClure Johnson* for petitioner. *Mr. Edward E. Clement* for respondent.

NO. 1179. PASCAGOULA NATIONAL BANK, ETC. *v.* FEDERAL RESERVE BANK AT ATLANTA ET AL. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander W. Smith, Jr.* for petitioner. *Messrs. Hollins N. Randolph, Robert S. Parker, Newton D. Baker, and M. B. Angell* for respondents.

NO. 1187. E. O. JONES, AS TRUSTEE, *v.* J. B. ADAMS. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Benjamin P. Crum* for petitioner. No appearance for respondent.

NO. 1188. ESTELLE L. MATTICE *v.* NATHAN N. KLAWANS. June 7, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Corrinne L. Rice* for petitioner. *Mr. Weymouth Kirkland* for respondent.

NO. 1190. OTTO H. REINKE ET AL. *v.* J. B. HIRE, ADMINISTRATOR, ET AL. June 7, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. Frans E. Lindquist* for petitioners. No appearance for respondents.

NO. 1191. LOUIS BRENNER ET AL. *v.* ARTHUR H. LAMBORN ET AL. June 7, 1926. Petition for a writ of certio-

rari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leavitt J. Hunt* for petitioners. *Mr. Louis O. Van Doren* for respondents.

No. 1192. MATTHEW SMITH TEA, COFFEE & GROCERY COMPANY *v.* A. H. LAMBORN ET AL. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leavitt J. Hunt* for petitioner. *Mr. Louis O. Van Doren* for respondent.

No. 1193. T. A. HELM *v.* UNITED CENTRAL OIL CORPORATION. June 7, 1926. 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. No appearance for respondent.

No. 1194. HENRY B. HOVLAND *v.* HOVAL A. SMITH. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles H. Potter* and *John H. Brickenstein* for petitioner. *Mr. John M. Ross* for respondent.

No. 1196. H. N. SMITH ET AL. *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioners. *Solicitor General Mitchell*, *Assistant Attorney General Letts*, and *Mr. J. Frank Staley* for the United States.

No. 1197. E. W. GALLAHER *v.* HUNTINGTON ENGINEERING COMPANY. June 7, 1926. Petition for a writ of cer-

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tiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. George S. Wallace* for petitioner. No appearance for respondent.

No. 1200. *BESSIE M. MACK v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT.* June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frederick H. Bacon and James J. O'Donohue* for petitioner. No appearance for respondent.

No. 1201. *PAUL DAWSON ET AL. v. UNITED STATES.* June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William Healy* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1202. *J. A. WALKER ET AL. v. GEORGE C. HOPKINS, COLLECTOR.* June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James W. Wayman* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Mr. Sewall Key* for respondent.

No. 1205. *DAVID BELAIS, INC. v. GOLDSMITH BROS. SMELTING & REFINING COMPANY.* June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles E. Hughes and Alan D. Kenyon* for petitioner. *Mr. Livingston Gifford* for respondent.

No. 1207. WILLIAM S. KREINER *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence V. Opper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1209. MERCANTILE BANK OF THE AMERICAS, INC. *v.* FLOWER LIGHTERAGE COMPANY, INC., ET AL. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Catesby Jones* for petitioner. *Messrs. Martin A. Schenck and I. Maurice Wormser* for respondents.

No. 1210. ATLANTIC COAST LINE RAILROAD COMPANY *v.* A. L. JEFFCOAT. June 7, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. W. E. Kay* for petitioner. *Mr. James J. Mayfield* for respondent.

No. 1211. CHARLES LAND *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Fisher* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1212. M. B. DAVIS, ALIAS MOOD DAVIS *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Philip D. Beall* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

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No. 1214. ISADORE KESLINSKY *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George E. Strong, Frank J. Looney, and Rush L. Holland* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1217. CHARLES WEST *v.* HUBERT WORK, SECRETARY OF THE INTERIOR, ET AL. June 7, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Edward P. Keech, Jr., George W. Morgan, Stanton C. Peele, C. F. R. Ogilby, Charles West, and Everett Petry* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter, and Mr. P. G. Michener* for respondents.

No. 1223. FRANKLIN E. KERR *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James E. Fenton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring, and Mr. Harry S. Ridgely* for the United States.

No. 1224. JOHN LAPIQUE, ASSIGNEE, ETC. *v.* DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Lapique, pro se.* No appearance for respondents.

No. 1257. GEORGE REMUS *v.* UNITED STATES. June 7, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs.*

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Leonard Garver, Jr., W. D. Riter, and David Lorback for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Messrs. Howard P. Jones and K. C. Campbell* for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 13, 1926, TO AND INCLUDING JUNE 7, 1926.

No. 243. STATE OF WASHINGTON *v.* MIKE KORICH. Error to the Supreme Court of the State of Washington. April 14, 1926. Dismissed with costs pursuant to the 21st rule. *Mr. Merritt J. Gordon* for plaintiff in error. No appearance for defendant in error.

No. 327. REAVES WAREHOUSE CORPORATION *v.* COMMONWEALTH OF VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. April 26, 1926. Dismissed with costs, on motion of *Mr. Randolph Harrison* for plaintiff in error. *Messrs. John R. Saunders and Aaron Sapiro* for defendant in error.

No. 342. THOMAS E. WING, AS SUBSTITUTED TRUSTEE, ETC., ET AL. *v.* ERNEST A. WILTSEE. Error to the Supreme Court of the State of Nevada. April 26, 1926. Dismissed with costs, on motion of plaintiff in error. *Messrs. Joseph K. Hutchinson, Samuel Knight, and Henry J. Richardson* for plaintiffs in error. No appearance for defendant in error.

No. 964. TOM HORTON *v.* STATE OF MISSOURI. Error to the Supreme Court of the State of Missouri. April 26, 1926. Dismissed with costs, on motion of *Mr. Major J. Lilly* for plaintiff in error. No appearance for defendant in error.

271 U. S. Cases Disposed of Without Consideration by the Court.

No. 776. MICHAEL McTERNAN *v.* CITY OF KANSAS CITY, MISSOURI. Error to the Supreme Court of the State of Missouri. April 27, 1926. Dismissed with costs on motion of plaintiff in error. *Messrs. James A. Reed and Francis C. Downey* for plaintiff in error. *Mr. Jesse C. Petherbridge* for defendant in error.

No. 1171. MARKET STREET RAILWAY COMPANY *v.* PACIFIC GAS & ELECTRIC COMPANY, RAILROAD COMMISSION OF CALIFORNIA ET AL. Appeal from the District Court of the United States for the Northern District of California. May 3, 1926. Docketed and dismissed without costs on motion of *Mr. Alexander T. Vogelsang* in behalf of counsel.

No. 603. UNITED STATES *v.* BENJAMIN BRAUER, HARRY CANTOR, LEOPOLD BRAUER, ET AL. Error to the District Court of the United States for the District of New Jersey. June 1, 1926. Dismissed on motion of *Solicitor General Mitchell* for plaintiff in error. No appearance for defendants in error.

No. 800. UNITED STATES SUGAR EQUALIZATION BOARD, INC. *v.* P. DE RONDE & COMPANY, INC. Certiorari to the Circuit Court of Appeals for the Third Circuit. June 1, 1926. Dismissed with costs, per stipulation of counsel. *Messrs. William A. Glasgow and Charles F. Curley* for petitioner. *Messrs. Robert H. Richards and Joseph M. Hartfield* for respondent.

No. 1027. HARRY L. ROBERTSON *v.* JOHN M. FANNIN ET AL. Error to the District Court of the United States for the Southern District of Iowa. June 1, 1926. Dismissed with costs, on motion of *Mr. George S. Wright* for plaintiff in error. No appearance for defendants in error.

OCTOBER TERM

THE COURT DELIVERED OPINIONS AS FOLLOWS:

MR. JUSTICE BRADLEY delivered the opinion of the court in the case of *Wheat v. United States*, 107 U.S. 271. The court affirmed the judgment of the lower court, holding that the defendant was guilty of conspiracy to defraud the United States.

MR. JUSTICE SWAYNE delivered the opinion of the court in the case of *United States v. Wainwright*, 107 U.S. 268. The court affirmed the judgment of the lower court, holding that the defendant was guilty of conspiracy to defraud the United States.

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AMENDMENTS OF RULES.

ORDER ENTERED JUNE 7, 1926.

It is now here ordered that the rules of this Court be, and they are hereby, amended as follows, viz:

Paragraphs 3 and 4 of Rule 35 are amended to read as follows:

3. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within 10 days after the filing, and due proof of service shall be filed with the clerk. If the United States, or any of its officers, is respondent and has been represented in the court below by the Attorney General of the United States or any of his subordinates, the service of the petition, record and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have 20 days, and where he resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, shall have 25 days, after notice, within which to file 40 printed copies of an opposing brief, conforming to Rules 24 and 25.

(a) Except during the summer recess, a brief in opposition filed on or before the Friday preceding the motion day on which the petition is to be submitted will be received. If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within 40 days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th.

4. On the first motion day following the expiration of the 20 days or 25 days, as the case may be, the petition, record and briefs shall be submitted by the clerk to the court for its consideration.

Paragraphs 4 and 5 of Rule 38 are amended to read as follows:

4. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, judgment and opinion of the court, but not the evidence. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. The petition and record shall be filed with the clerk and 30 copies thereof shall be printed under his supervision in the same way and upon the same terms that records on writs of error and appeals are required to be printed, save that the estimated cost of printing shall be paid within five days after the estimate is furnished by the clerk and if payment is not so made the petition may be summarily dismissed. When the petition and record are printed the petitioner shall forthwith serve a copy thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

5. Within 20 days after the petition and record are printed the petitioner shall file with the clerk 30 copies of a printed brief in support of the petition—the brief to conform to the provisions of rules 24 and 25; and the petitioner shall at the same time file with the clerk due proof that he has served a copy of the brief on the respondent or his counsel, together with a notice that the petition will be submitted to this court on the first motion day after the expiration of 20 days from the date of such service. The respondent may file with the clerk 30 printed copies of an opposing brief, conforming to Rules 24 and 25, at any time during that 20-day period. On the first motion day following the expiration of that period the petition and record, with the briefs filed, shall be submitted by the clerk to the court for its consideration.

The provisions of subdivision (a) of paragraph 3 of Rule 35 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

AMENDMENT OF RULES.

ORDER AMENDING RULES 35 AND 38 (266 U. S. APPENDIX).
JUNE 7, 1926.

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SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF
THE UNITED STATES FOR OCTOBER TERM, 1925.

Original Docket.

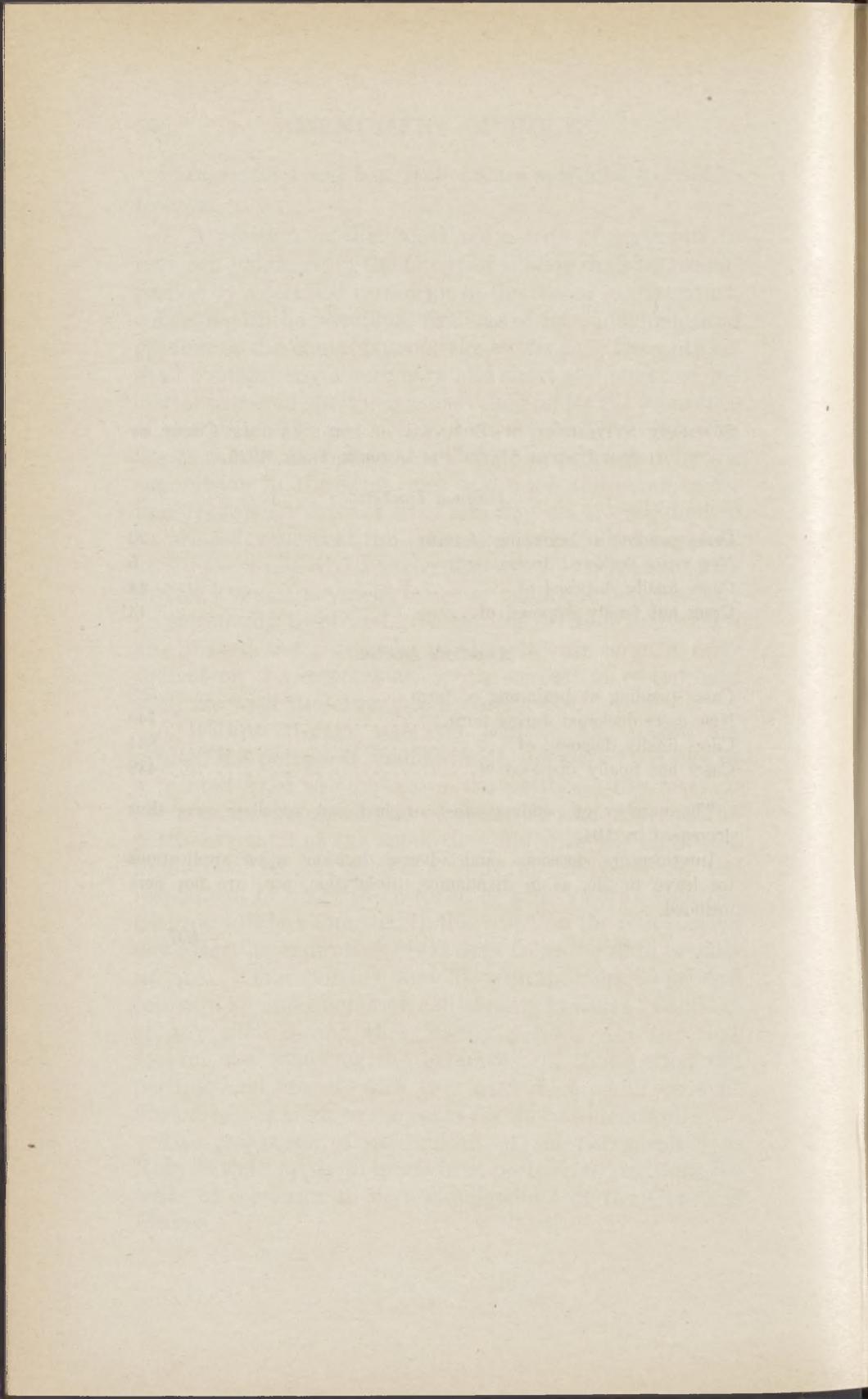
Cases pending at beginning of term.....	22
New cases docketed during term.....	5
Cases finally disposed of.....	14
Cases not finally disposed of.....	13

Appellate Docket.

Cases pending at beginning of term.....	533
New cases docketed during term.....	749
Cases finally disposed of.....	844
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The number of pending cases, original and appellate, was thus decreased by 104.

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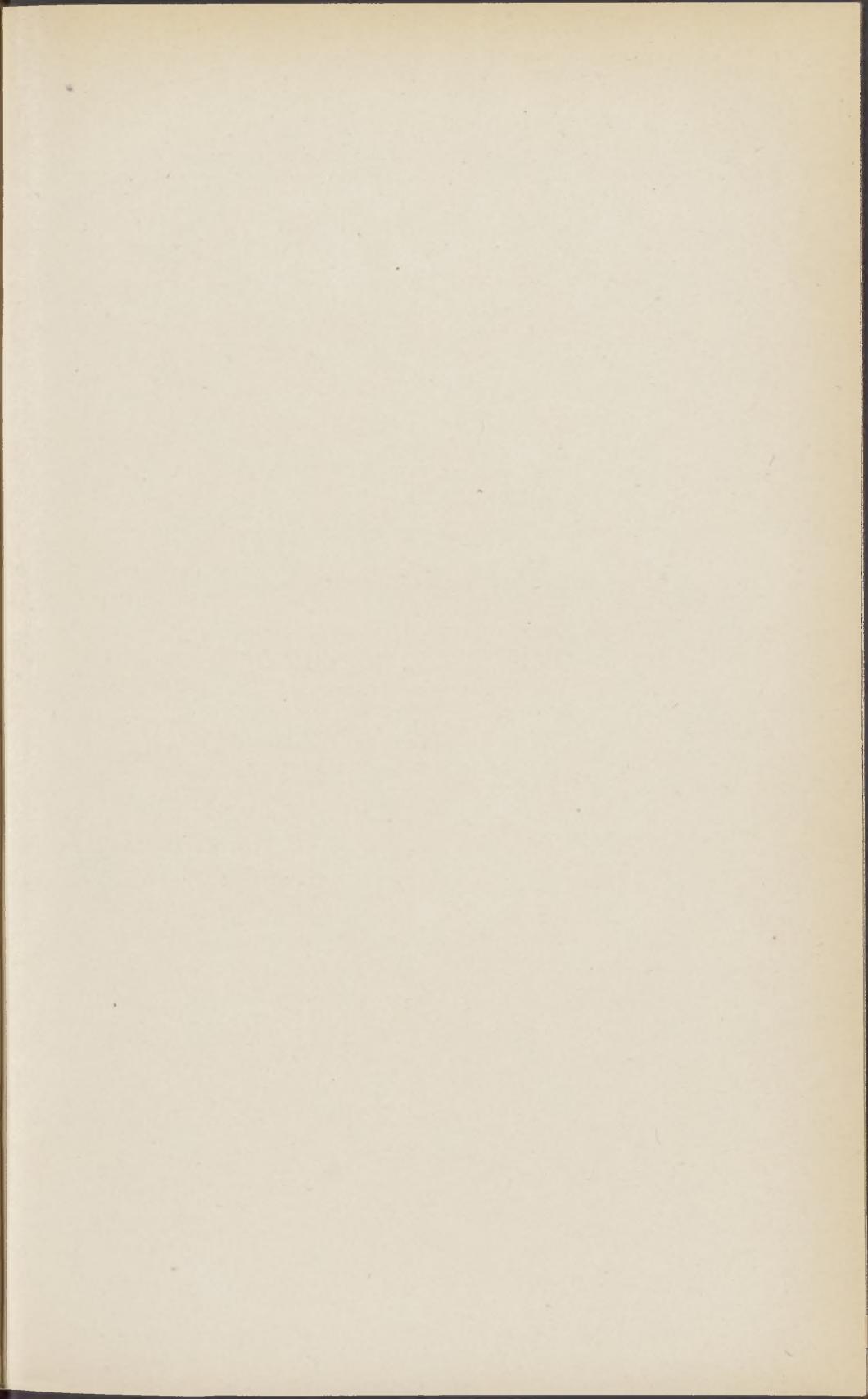
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