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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1926

FROM JANUARY 3, 1927 (IN PART)
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

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

JOHN G. SARGENT, Attorney General.
WILLIAM D. MITCHELL, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES.

October Term, 1926.[1]

Order of Allotment of Justices.

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

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, Edward T. Sanford, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Pierce Butler, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

March 16, 1925.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1926.

ALBRECHT ET AL. *v.* UNITED STATES.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS.

No. 9. Argued November 23, 1926.—Decided January 3, 1927.

1. An arrest under a federal warrant based on affidavits verified before a notary public—a state official without authority to administer oaths in federal criminal proceedings—is in violation of the Fourth Amendment. P. 5.
2. An information can not be filed by a United States attorney without leave of court. P. 5.
3. The official oath of the United States Attorney may be accepted as sufficient verification of an information. P. 6.
4. Where an information gave the court to understand and be informed etc., "on affidavits" referred to, the invalidity of the affidavits and their use with the information as a basis for applying for and issuing warrants of arrest, did not affect the validity of the information. P. 6.
5. Where the information is valid but the warrant of arrest is based on insufficiently verified affidavits, the irregularity of the warrant may be waived. P. 8.
6. Mere giving of a bail bond without objection to the warrant does not waive invalidity of the warrant, or operate as a general appearance. P. 9.
7. Objection to arrest upon the ground that affidavits supporting the warrant are defective should be by motion to quash the warrant, not the information. P. 9.
8. A motion to quash a warrant issued upon insufficiently verified affidavits is too late if the defendant is in court and the affidavits have been amended before the motion is filed. P. 10.

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9. Punishing the same person for the distinct offenses of possessing and then selling the same liquor in violation of the Prohibition Act, is not double punishment violating the Fifth Amendment. P. 11.

Affirmed.

ERROR to a judgment of the District Court sentencing the plaintiffs in error upon each of nine counts of an information charging violations of the Prohibition Act.

Mr. Charles A. Houts, with whom *Messrs. Samuel W. Baxter* and *D. E. Keefe* were on the brief, for the plaintiffs in error.

An information, when made the basis of an application for warrant of arrest, must be supported by an affidavit showing probable cause. 2 Op. Atty Gen. 266; *Weeks* v. *U. S.* 216 Fed. 292; *United States* v. *Michalski,* 265 Fed. 839; *Keilman* v. *United States,* 284 Fed. 845; *United States* v. *Illig,* 288 Fed. 939; *United States* v. *McDonald,* 293 Fed. 433; *In re Gourdian,* 45 Fed. 842; *United States* v. *Tureaud,* 20 Fed. 621; *Ex parte Burford,* 3 Cranch 448. The affidavits filed originally with the information were sworn to before a notary public and were therefore insufficient, *United States* v. *Schallinger Produce Co.,* 230 Fed. 20. The affidavits which were on file at the time the warrant issued were nullities, and the information was unsupported by any affidavit which would be sufficient under the laws of the United States. The affidavits could not be lawfully amended. *United States* v. *Tureaud, supra; United States* v. *Michalski, supra; Rice* v. *Ames,* 180 U. S. 371; *United States* v. *Morgan,* 222 U. S. 275; *People* v. *Clark,* 280 Ill. 160; *People* v. *Honaker,* 281 Ill. 291; *People* v. *Powers,* 283 Ill. 438.

The objection that the information was filed without proper affidavit, or proof of probable cause, was timely and properly made by the motion to quash. *United States* v. *Tureaud, supra; Weeks* v. *United States, supra;*

Sampson v. *United States,* 241 Fed. 841; *United States* v. *McDonald, supra; United States* v. *Schallinger Produce Co., supra.* Amending the affidavits after the issuance and execution of the warrant, by substituting new affidavits, did not have the effect of validating the information as originally filed, and the arrest made thereon, prior to the amendment of the affidavits. *United States* v. *Tureaud, supra; Rex* v. *Inhab. of Barton,* 9 Dowl. 1021; Coles Crim. Informations, p. 51; *United States* v. *Casino,* 286 Fed. 976; 1 R. C. L. 774.

The affidavit itself must be sufficient to state facts which justify the issuance of a warrant and the officer is required by law to satisfy himself of the sufficiency of the affidavit and let the circumstances call for the issuance of a warrant. *United States* v. *Borkoski,* 268 Fed. 408; *Ripper* v. *United States,* 178 Fed. 24; *United States* v. *Kaplan,* 286 Fed. 963.

Neither count of the information charges an offense under the laws of the United States.

The judgment and sentence with respect to certain counts is unlawful as imposing double punishment. *Muncy* v. *United States,* 289 Fed. 780.

Solicitor General Mitchell, with whom *Assistant Attorney General Willebrandt* and *Mr. John J. Byrne,* Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the Court.

This direct writ of error to the federal court for eastern Illinois, was allowed under § 238 of the Judicial Code prior to the amendment of February 13, 1925. Albrecht and his associates were sentenced to either fine or imprisonment upon each of nine counts of an information charging violations of the National Prohibition Act.

There is no contention that the offences charged could not be prosecuted by information. See *Brede* v. *Powers*, 263 U. S. 4, 10; *Rossini* v. *United States*, 6 F. (2d) 350. The claims mainly urged are that, because of defects in the information and affidavits attached, there was no jurisdiction in the District Court and that rights guaranteed by the Fourth Amendment were violated. Several important questions of practice are presented which have not been passed upon by this Court, and on which there has been diversity of opinion in the lower courts, due in part to language in the opinions in *United States* v. *Morgan*, 222 U. S. 274, 282, and in *United States* v. *Thompson*, 251 U. S. 407, 413–414.

The information recites that it was filed by the United States Attorney with leave of the court; and the truth of this allegation has not been questioned. A bench warrant issued; and the marshal executed it by arresting the defendants. When they were brought into court, each gave bond to appear and answer; was released from custody immediately; and was not thereafter in custody by virtue of the warrant or otherwise. At the time of giving the bonds, no objection was made to either the jurisdiction or the service by execution of the warrant; and nothing was done then indicating an intention to enter a special appearance. On a later day, the defendants filed a motion to quash the information; declared in the motion that they "specifically limit their appearance in the cause for the purpose of interposing" it; and protested that the court was without jurisdiction. The main ground urged in support of the objection was that the information had not been verified by the United States Attorney; that it recited he "gives the court to understand and be informed, on the affidavit of I. A. Miller and D. P. Coggins"; and that these affidavits, which were annexed to the information, had been sworn to before a notary public—a state official not authorized to admin-

ister oaths in federal criminal proceedings. Compare *United States* v. *Hall,* 131 U. S. 50. With leave of court, new oaths to the affidavits were immediately sworn to before the Deputy Clerk of the Court, and additional affidavits, also sworn to before him, were filed. Thereupon, a new motion to quash, setting forth the same grounds, was filed by the defendants; and this motion extended to both the information and the warrant. It also was denied; and a demurrer interposed upon the same ground was overruled. Then, upon a plea of not guilty, the defendants were tried, with the result stated; and a motion in arrest of judgment was denied.

As the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of the clause in the Fourth Amendment which declares that "no warrants shall issue but upon probable cause, supported by oath or affirmation." See *Ex parte Burford,* 3 Cranch 448, 453; *United States* v. *Michalski,* 265 Fed. 839. But it does not follow that because the arrest was illegal, the information was or became void. The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled, that leave must be obtained; and that before granting leave, the court must, in some way, satisfy itself that there is probable cause for the prosecution.[1] This is done some-

[1] The great majority of the lower courts dealing with the subject have insisted that the district attorney secure leave of court before filing informations, and have refused to grant leave except upon a showing of probable cause. *United States* v. *Shepard,* Fed. Cas. No. 16,273; *United States* v. *Maxwell,* Fed. Cas. No. 15,750; *United States* v. *Baugh,* 1 Fed. 784; *United States* v. *Reilley,* 20 Fed. 46; *United States* v. *Smith,* 40 Fed. 755; *United States* v. *Schurman,* 177 Fed. 581; *United States* v. *Quaritius,* 267 Fed. 227. In some districts the United States attorney has been permitted to file an information upon a purely formal allegation of leave, but the court determined the question of the existence of probable cause upon a motion of the defendant to withdraw leave. *United States* v. *Simon,* 248 Fed. 980;

times by a verification of the information, and frequently by annexing affidavits thereto. But these are not the only means by which a court may become satisfied that probable cause for the prosecution exists.[2] The United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information. See *Weeks* v. *United States,* 216 Fed. 292, 302.

It is contended that this information was not presented on the official oath of the United States Attorney; that instead of informing on his official oath, he gave "the court to understand and be informed on the affidavit[s]" referred to; and that, for this reason, the information is to be likened, not to those filed in England by the Attorney General or the Solicitor General, but to those exhibited there by Masters of the Crown upon information of a private informer; that the latter class of informa-

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Yaffee v. *United States,* 276 Fed. 497. The statements in *Ryan* v. *United States,* 5 F. (2d) 667, and *Miller* v. *United States,* 6 F. (2d) 463, that the United States attorney may file informations as of right, are based upon an incidental remark in *United States* v. *Thompson,* 251 U. S. 407, 413–414, which must be disregarded.

[2] A few cases have considered a verification essential to the validity of an information. *United States* v. *Tureaud,* 20 Fed. 621; *United States* v. *Strickland,* 25 Fed. 469. Compare *Johnston* v. *United States,* 87 Fed. 187; *United States* v. *Wells,* 225 Fed. 320. See *United States* v. *Morgan,* 222 U. S. 274, 282. The opposite conclusion was reached after great deliberation in *Weeks* v. *United States,* 216 Fed. 292, since followed by many cases. Reference may be made to *United States* v. *Adams Express Co.,* 230 Fed. 531; *Simpson* v. *United States,* 241 Fed. 841; *Abbott Bros. Co.* v. *United States,* 242 Fed. 751; *Kelly* v. *United States,* 250 Fed. 947; *Brown* v. *United States,* 257 Fed. 703; *United States* v. *Newton Tea & Spice Co.,* 275 Fed. 394; *United States* v. *McDonald,* 293 Fed. 433; *Vollmer* v. *United States,* 2 F. (2d) 551; *Wagner* v. *United States,* 3 F. (2d) 864; *Poleskey* v. *United States,* 4 F. (2d) 110; *Gray* v. *United States,* 14 F. (2d) 366.

tions were required by Stat. 4 & 5, W. & M. C. 18, to be supported by affidavit of the person at whose instance they were preferred; that this requirement for informations of that character became a part of our common law; and, that, because the affidavits were not properly verified, the information could not confer jurisdiction.

The practice of prosecuting lesser federal crimes by information, instead of indictment, has been common since 1870.[3] But, in federal proceedings, no trace has been found of the differentiation in informations for such crimes, or of any class of informations instituted by a private informer comparable to those dealt with in England by Stat. 4 & 5, W. & M. C. 18.

The reference to the affidavits in this information is not to be read as indicating that it was presented otherwise than upon the oath of office of the United States Attorney.[4] The affidavits were doubtless referred to in

[3] Two different courts, having before them criminal informations, were able to say, as late as 1870, that there had been no use of that procedure known to them up to that time. *United States* v. *Shepard,* Fed. Cas. No. 16,273; *United States* v. *Cultus Joe,* Fed. Cas. No. 15,478. See also Abbott's United States Practice, Vol. II, 177. Story writing in 1833, said that there was very little use of informations except in civil prosecutions for penalties and forfeitures. The Constitution, § 1780. In 1864, Congress passed a statute which provided for a summary criminal proceeding, begun by sworn complaint, in cases involving minor offenses by seamen. Act of June 11, 1864, c. 121, §§ 2, 3, 13 Stat. 124. In 1870 was passed a statute authorizing prosecution by indictment or information for crimes against the franchise. Act of May 31, 1870, c. 114, § 8, 16 Stat. 142. While there was probably a sporadic use of informations in criminal proceedings during the first eighty years of the government, as in *United States* v. *Mann,* Fed. Cas. No. 15,717 (1812), the use did not become general until after 1870. After 1870 prosecutions by information became frequent. See *United States* v. *Waller,* Fed. Cas. No. 16,634; *United States* v. *Maxwell,* Fed. Cas. No. 15,750; *United States* v. *Baugh,* 1 Fed. 784. See also, *Ex parte Wilson,* 114 U. S. 417, 425.

[4] Compare *Simpson* v. *United States,* 241 Fed. 841. Contra, *United States* v. *Schallinger Produce Co.,* 230 Fed. 290.

the information, not as furnishing probable cause for the prosecution, but because it was proposed to use the information and affidavits annexed as the basis for an application for a warrant of arrest. If before granting the warrant, the defendants had entered a voluntary appearance, the reference and the affidavits could have been treated as surplusage, and would not have vitiated the information.[5] The fact that the information and affidavits were used as a basis for the application for a warrant did not affect the validity of the information as such.[6] Whether the whole proceeding was later vitiated by the false arrest remains to be considered.

The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Compare *Ex parte Bain,* 121 U. S. 1. But a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made. Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance.[7] That a defendant may be brought before the court by a summons, without an arrest, is shown by the practice in prosecutions against corporations which are necessarily commenced by a summons.[8] Here, the court had juris-

[5] Compare *Weeks* v. *United States,* 216 Fed. 292; *Poleskey* v. *United States,* 4 F. (2d) 110; *Miller* v. *United States,* 6 F. (2d) 463. See also *Kelly* v. *United States,* 250 Fed. 947; *Brown* v. *United States,* 257 Fed. 703; *Keilman* v. *United States,* 284 Fed. 845; *Carney* v. *United States,* 295 Fed. 606; *Wagner* v. *United States,* 3 F. (2d) 864.

[6] Compare *Yaffee* v. *United States,* 276 Fed. 497; *Farinelli* v. *United States,* 297 Fed. 198, 199. See *Jordan* v. *United States,* 299 Fed. 298.

[7] See cases cited in note 5, *supra.*

[8] The leading case on the use of summons in criminal prosecutions against corporations in the federal courts is *United States* v. *Kelso,* 86 Fed. 304, followed in *United States* v. *Standard Oil Co.,* 154 Fed.

diction of the subject matter; and the persons named as defendants were within its territorial jurisdiction. The judgment assailed would clearly have been good, if the objection had not been taken until after the verdict.[9] This shows that the irregularity in the warrant was of such a character that it could be waived. Was it waived? And, if not, was it cured?

The bail bonds bound the defendants to "be and appear" in court "from day to day" and "to answer and stand trial upon the information herein and to stand by and abide the orders and judgment of the Court in the premises." It is urged there was a waiver by giving the bail bonds without making any objection. We are of the opinion that the failure to take the objection at that time did not waive the invalidity of the warrant or operate as a general appearance.[10] An objection to the illegality

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728; *United States* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66; *John Gund Brewing Co.* v. *United States*, 204 Fed. 17; *United States* v. *Philadelphia & R. Ry. Co.*, 237 Fed. 292; *United States* v. *Nat. Malleable & S. Castings Co.*, 6 F. (2d) 40.

[9] See *Dowdell* v. *United States*, 221 U. S. 325, 332; *Jordan* v. *United States*, 299 Fed. 298; *Yaffee* v. *United States*, 276 Fed. 497; *United States* v. *McDonald*, 293 Fed. 433, 437. Compare *In re Johnson*, 167 U. S. 120; *Simpson* v. *United States*, 241 Fed. 841; *Abbott Bros. Co.* v. *United States*, 242 Fed. 751.

[10] There has been no discussion, in the federal courts, of the possible effect of a bail bond as a waiver of the right to object to an illegal arrest. In *United States* v. *Shepard*, Fed. Cas. No. 16,273, and *United States* v. *Wells*, 225 Fed. 320, the court quashed informations because of the illegality of the arrest, though the defendants had given bond without objecting to the illegality, but the question of waiver was apparently not pressed upon the courts. The trend of authority in the state courts does not consider that giving bond is a waiver, since the defendant must give bond or go to jail, and will ordinarily have little knowledge of his legal rights. *People* v. *Gardner*, 71 Misc. 335, 130 N. Y. Supp. 202; *State* v. *Simmons*, 39 Kan. 262 (but compare *State* v. *Munson*, 111 Kan. 318). Compare *Solomon* v. *People*, 15 Ill. 291; *State* v. *Hufford*, 28 Ia. 391. See *Eddings* v. *Boner*, 1 Ind. Terr. 173, 179–180. Contra, *State* v. *Wenzel*, 77 Ind.

of the arrest could have been taken thereafter by a motion to quash the warrants, though technically the defendants were then held under their bonds, the warrants having performed their functions. But the first motion to quash was not directed to the invalidity of the warrant. As that motion to quash was directed solely to the information, it could not raise the question of the validity of the warrant.[11] The motion to quash the warrant was not made until after the government had filed properly verified affidavits by leave of court. Thereby the situation had been changed. The affidavits then on file would have supported a new warrant, which, if issued, would plainly have validated the proceedings thenceforward. Compare *In re Johnson,* 167 U. S. 120. There was no occasion to apply for a new warrant, because the defendants were already in court.[12] The defect in the proceeding by which they had been brought into court had been cured. By failing to move to quash the warrant before the defect had been cured, the defendants lost their right to object. It is thus unnecessary to decide whether it would have been proper to allow the amendment, and deny the mo-

428. It is of course possible that giving bail plus very little else may amount to a waiver. *Ard* v. *State,* 114 Ind. 542; *State* v. *McClain,* 13 N. Dak. 368.

[11] There has been confusion as to the proper method of taking an objection to an illegal arrest. Some cases in the lower federal courts have apparently allowed it to be taken by a motion to quash the information or indictment. *United States* v. *Illig,* 288 Fed. 939. Compare *United States* v. *Tureaud,* 20 Fed. 621; *Johnston* v. *United States,* 87 Fed. 187; *United States* v. *Wells,* 225 Fed. 320. Later decisions require that the objection be taken to the warrant, not to the information or indictment. *Farinelli* v. *United States,* 297 Fed. 198, 199; *Schmidt* v. *United States,* 2 F. (2d) 367. Compare *Christian* v. *United States,* 8 F. (2d) 732, 733.

[12] Compare *Smith* v. *State,* 20 Ala. App. 442; *State* v. *Volk,* 144 Minn. 223.

tion to quash, if the attack on the warrant had been made before the amendment of the affidavits.[13]

There is a claim of violation of the Fifth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established.

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[13] See the action of the lower court described in *Poleskey* v. *United States,* 4 F. (2d) 110. As to allowing, after objection taken, the amendment of the process by which the defendant has been brought into court, see *People* v. *Hildebrand,* 71 Mich. 313; *Town of Ridgeland* v. *Gens,* 83 S. C. 562; *Keehn* v. *Stein,* 72 Wis. 196 (but see *Scheer* v. *Keown,* 29 Wis. 586). Compare *State* v. *McCray,* 74 Mo. 303. In *State* v. *Turner,* 170 N. C. 701, 702, the court said: "Even if one is wrongfully arrested on process that is defective, being in court, he would not be discharged, but the process would be amended then and there, or if the service were defective it could be served again."

Compare *Burton* v. *United States,* 202 U. S. 344, 377; *Gavieres* v. *United States,* 220 U. S. 338; *Morgan* v. *Devine,* 237 U. S. 632.

The remaining objections are unsubstantial and do not require discussion.

Affirmed.

FLORIDA *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

No. —, Original. Rule to show cause argued November 23, 1926.—Rule discharged January 3, 1927.

1. To come within the original jurisdiction of this Court, a suit by a State must be for redress of a wrong, or enforcement of a right, susceptible of judicial redress or enforcement. P. 16.
2. The federal inheritance tax law is constitutional, and must prevail over any conflicting provisions of state laws or constitutions. P. 17.
3. The constitutional requirement of uniformity in excise taxation (Art. I, § 8, cl. 1) is satisfied when by the provisions of a tax law the rule of liability under it is the same in all parts of the United States. P. 17.
4. The fact that the provisions of the federal act allowing deduction of State inheritance taxes in computing the federal tax can not be availed of in Florida, since that State by her constitution is forbidden to tax inheritance, does not sustain an allegation that the federal tax will directly injure her revenue by inducing the withdrawal of property from the State. P. 17.
5. A State can not, as *parens patriae,* represent her citizens in a suit to protect them from unconstitutional inequalities alleged to result from a federal tax law. P. 18.

Leave to file bill denied.

UPON a rule to show cause why the petition of the State of Florida to file a bill of complaint in this Court should not be granted. The proposed bill sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from attempting to collect federal inheritance taxes in Florida.

Messrs. John B. Johnson, Attorney General of Florida, and *Peter O. Knight,* with whom *Mr. James F. Glen* was on the brief, for the complainant.

The Constitution never contemplated that Congress could pass an excise tax law which would depend upon affirmative action by the several States to make it uniform in force and effect. It requires that an excise tax law, within itself, shall be uniform throughout the United States.

The Estate Tax provision of the Revenue Act of 1926 was passed to coerce States into adopting estate or inheritance tax laws. If Congress could rebate 80 per centum, it could just as legally rebate 100 per centum of the tax, and the State not imposing a tax of this kind would be the only State paying such a tax to the Federal Government.

Each State is supposed to raise revenue from the sources and in the manner most advantageous to itself, its citizens and to its business. These necessary taxes are bound to come from the earnings of its citizens in some form or other. One State may deem it to its advantage to raise a large part of this revenue from death duties, thus relieving other classes of its property and business from the burden. Another may deem it to its advantage to raise its revenues from other sources than death duties. Yet each State imposes its burden on the earning power of its citizens. Florida raises her revenue from other sources than death duties and income taxes. A majority of the States have combined and intend to force Florida to pay death duties, or estate taxes, for the support of the United States Government, when these same death duties or estate taxes paid by other States go to pay the expenses of state governments. The Constitution never contemplated such a condition. The Federal Government has no power by taxation or otherwise to control the internal affairs of the State in any matter not in conflict with the powers delegated to the United States, or inhibited to the State, by the Constitution. *Texas* v. *White,* 7 Wall.

700. The Estate Tax provision was not passed for the purpose of raising federal revenue. It was directed primarily at the State of Florida. It was not passed to obtain revenue from the tax-paying estates in Florida, but to nullify a constitutional provision of the State. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

Section 3224 Rev. Stat., is intended to be applicable only to individual controversies relating to specific taxes, and not to taxes sought to be imposed upon a large class under color of an unconstitutional statute. It approaches *reductio ad absurdum* to suggest that there must be universal submission throughout the United States to an unconstitutional statute, followed by tens of thousands of claims or suits for the recovery of taxes paid under it. *Hill* v. *Wallace,* 259 U. S. 44; *Graham* v. *Dupont,* 262 U. S. 234.

In the present case we have an Act of Congress operative in Florida, against the will of the State and its citizens, to which obedience must be yielded, if it is constitutional. That Act directly seeks and requires the removal from the State of property to the extent of several millions of dollars per annum. Its removal will diminish the revenues of the State. The Act directly discriminates in its effect against the State of Florida, as compared with other States. Those considerations, and others, particularly the fact that it cannot be denied that the representatives of Florida decedents questioning the constitutionality of the Act will have a justiciable controversy, distinguish this case from *Massachusetts* v. *Mellon,* 262 U. S. 447, and bring it within the category of *Missouri* v. *Holland,* 252 U. S. 416.

Solicitor General Mitchell, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for the defendant.

Messrs. Edward A. Harriman and *Thomas B. Adams* filed briefs as *amici curiae* by special leave of Court.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Court.

The State of Florida seeks leave to file a bill of complaint against the defendants, citizens of other states, to enjoin them from attempting to collect in Florida inheritance taxes imposed by § 301 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 69–70. A rule upon the defendants to show cause why such leave should not be granted was issued and answered.

The complaint alleges that under the constitution of Florida no tax on inheritances can be levied by the state or under its authority; that by § 301 of the act referred to certain graduated taxes are imposed on the estates of decedents subject to the following provision:

"The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

It is further alleged that the defendants are officers of the United States and are seeking to enforce the provisions of § 301; that citizens of Florida have died since the act was passed, leaving estates subject to taxation under the terms of that section; that defendants have required and are requiring the legal representatives of such decedents to make returns under that section, and unless such action is restrained, it will result in the withdrawal from Florida of several million dollars per annum and thus diminish the revenues of the state derived

largely from taxation of property therein; that the state is directly interested in the matter because it raises by taxation a sufficient amount of revenue to pay the expenses of the state government otherwise than by imposing inheritance taxes or taxes on incomes; and that the provisions of the said section constitute an invasion of the sovereign rights of the state and a direct effort on the part of Congress to coerce the state into imposing an inheritance tax and to penalize it and its property and citizens for the failure to do so. It is further alleged that the state is directly interested in preventing the unlawful discrimination against its citizens which is effected by § 301 and in protecting them against the risk of prosecution for failure to comply with the enforcement provisions of the act; that the several states, except Florida, Alabama, and Nevada, levy inheritance taxes, but by reason of the provisions of its constitution Florida cannot place its citizens on an equality with those of the other states in respect of the tax in question, and [therefore] the tax is not uniform throughout the United States as required by § 8 of Article I of the federal Constitution.

The allegations of the bill suggest two possible grounds upon which the asserted right of complainant to invoke the jurisdiction of this court may be supported: (a) that the state is directly injured because the imposition of the federal tax, in the absence of a state tax which may be credited, will cause the withdrawal of property from the state with the consequent loss to the state of subjects of taxation; and (b) that the citizens of the state are injured in such a way that the state may sue in their behalf as *parens patriae*. Neither ground is tenable.

While judicial relief sometimes may be granted to a *quasi*-sovereign state under circumstances which would not justify relief if the suit were between private parties, *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, nevertheless, it must appear that the state has suffered

a wrong furnishing ground for judicial redress or is asserting a right susceptible of judicial enforcement. The mere fact that a state is the plaintiff is not enough. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287; *Oklahoma* v. *A., T. & Santa Fe Ry.*, 220 U. S. 277, 286, 289.

The act assailed was passed by Congress in pursuance of its power to lay and collect taxes, and, following the decision of this court in respect of the preceding act of 1916, *New York Trust Co.* v. *Eisner*, 256 U. S. 345, must be held to be constitutional. If the act interferes with the exercise by the state of its full powers of taxation or has the effect of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield. *Ex parte Virginia*, 100 U. S. 339, 346; *Brown* v. *Walker*, 161 U. S. 591, 606; *Cummings* v. *Chicago*, 188 U. S. 410, 428; *Lane County* v. *Oregon*, 7 Wall. 71, 77.

The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, § 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States.

The claim of immediate injury to the state rests upon the allegation that the act will have the result of inducing potential tax-payers to withdraw property from the state,

thereby diminishing the subjects upon which the state power of taxation may operate. The averment to that effect, however, affords no basis for relief, because, not only is the state's right of taxation subordinate to that of the general government, but the anticipated result is purely speculative, and, at most, only remote and indirect. *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 68–70. If, as alleged, the supposed withdrawal of property will diminish the revenues of the state, *non constat* that the deficiency cannot readily be made up by an increased rate of taxation. Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any *direct* injury as the result of the enforcement of the act in question. See *In re Ayers,* 123 U. S. 443, 496; *Massachusetts* v. *Mellon,* 262 U. S. 447,488.

Nor can the suit be maintained by the state because of any injury to its citizens. They are also citizens of the United States and subject to its laws. In respect of their relations with the federal government "it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." *Massachusetts* v. *Mellon, supra,* pp. 485–486.

It follows that leave to file the bill of complaint must be denied.

Rule discharged and leave denied.

MYERS *v.* HURLEY MOTOR COMPANY.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 65. Argued December 9, 1926.—Decided January 3, 1927.

1. The fact that a contract made in infancy was induced by the infant's fraudulent misrepresentation of his age, does not estop him from disaffirming the contract and maintaining his action to recover money paid under it. *Sims* v. *Everhardt,* 102 U. S. 300. P. 22.

2. But where the action is for money had and received, equitable principles apply defensively, and by way of recoupment, to prevent a recovery of that to which the plaintiff is not in equity and good conscience entitled. P. 23.
3. The infant, representing himself as of age, bought and obtained possession of an automobile, upon conditional sale, but paid only part of the price. The vendor took back the car. In an action by the vendee, who disaffirmed upon reaching his majority, the vendor was equitably entitled to recoup from the amount which the vendee had paid, the amount which the vendor was required to expend to put the car in as good condition as it was when so sold and delivered. P. 27.

RESPONSE to questions certified by the Court of Appeals of the District of Columbia, on appeal from a judgment recovered on a counterclaim by the Motor Company, in an action by Myers to recover money and money's worth paid in infancy on the purchase of an automobile.

Mr. George P. Lemm for Myers.

An estoppel is not applicable to infants. *Sims* v. *Everhardt,* 102 U. S. 300; *Tobin* v. *Spann,* 85 Ark. 556; *Tucker* v. *Moreland,* 10 Pet. 58; *Conrad* v. *Lane,* 26 Minn., 389; *Burdett* v. *Williams,* 30 Fed. 697; *Price* v. *Jennings,* 62 Ind. 111; *Raymond* v. *General Motorcycle Sales Co.,* 230 Mass. 54.

In *Sims* v. *Everhardt, supra,* we find the established rule to be that an infant, who avoids a purchase by him under a contract of a conditional sale and returns the article purchased, is not required to account to the seller for wear, tear, and depreciation for the article while in his hands. *MacGreal* v. *Taylor,* 167 U. S. 688; *McCarthy* v. *Henderson,* 138 Mass. 310; *Whitcomb* v. *Joslyn,* 51 Vt. 79.

In the case under consideration, the specific consideration which passed to the infant plaintiff, namely, the automobile, was returned to or taken possession of by the

defendant. Plaintiff has done all the law requires of him as a condition to the avoidance of his contract.

Mr. Henry C. Clark, with whom *Messrs. Roger J. Whiteford* and *Walter B. Guy* were on the brief, for the Hurley Motor Co.

Infancy is an equitable shield which may be lost by unconscionable conduct. Equity, through the doctrine of *parens patriae,* undertook to relieve against the difficulties which resulted from undue limitation of the capacity of an infant. This took the form of authorizing transactions through guardians, which disposed of the infant's property, and also of upholding acts of the infant which equity would have required him to perform. Infants are not enveloped in absolute incapacity; they are not exempted from all responsibility. The privilege of infancy is not a privilege to cheat civilly any more than to cheat criminally. *MacGreal* v. *Taylor,* 167 U. S. 688; *Fitts* v. *Hall,* 9 N. H. 441; *Kilgore* v. *Jordan,* 17 Tex. 341; *Eckstein* v. *Frank,* 1 Daly 334; *Parker* v. *Hayes,* 39 N. J. Eq. 469; *Rice* v. *Boyer,* 108 Ind. 472; *Commander* v. *Brazil,* 88 Miss. 668; *La Rosa* v. *Nichols,* 92 N. J. L. 375.

We are not dealing with an innocent infant, or one who has been imposed upon, but with an infant admittedly guilty of positive fraud. Nothing is offered in mitigation of the fraud. The only response is his attempt to hide behind his few months minority, a brazen attempt to use the privilege afforded for his protection as a sword of iniquity. The infant in *Sims* v. *Everhardt,* 102 U. S. 300, was compelled by the clear duress of her husband to execute a deed. The innocence of the infant is conspicuous throughout the opinion. This Court not only recognized, but placed its approval upon the distinction between an innocent infant and one guilty of positive fraud, at the time it denied certiorari in *Carmen* v. *Fox Film Corp.,* 255 U. S. 569.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The facts which give rise to the questions of law in respect of which the instruction of this court is asked, are set forth in the certificate as follows:

"Clarence H. Myers, plaintiff in error, on the 28th day of April, 1923, then a minor of the age of 20 years, represented to the defendant company that he was 24 years of age, and engaged in the hacking business in the District of Columbia; whereupon he contracted with defendant for a Hudson touring car at the price of $650.00, upon terms set out in a conditional sales contract. Plaintiff turned in as cash payment a Ford touring car at the price of $250.00, which was subsequently sold by defendant company for that price. Plaintiff subsequently made payments on the contract to the amount of $156.12, making a total payment on the contract of $406.12.

"On October 3, 1923, plaintiff being in default in his payments, defendant company repossessed itself of the Hudson car, under the terms of its sale agreement. Plaintiff attained the age of 21 years on October 21, 1923, and, on the 1st day of November following, disaffirmed his contract and demanded the return of $406.12, the amount paid upon the contract. Upon defendant's refusal to comply with plaintiff's request, the present suit was brought in the Municipal Court of the District of Columbia by plaintiff to recover $406.12, the amount paid by him.

"Defendant company set up, as a counter claim, the amount of $525.96, supported by a bill of particulars, showing that this amount was required in the way of repairs and expense to place the Hudson car in as good condition as it was when sold to plaintiff. The Municipal Court gave judgment upon defendant's plea of set off for the full amount of $525.96, from which the case was brought to the Court of Appeals on writ of error.

"The misrepresenation by plaintiff of his age, supported by evidence that he had the appearance of a man of 24, at the time the contract was made, and the depreciation in the value of the Hudson car from hard and abusive usage, are not denied by plaintiff, and may be accepted for the purpose of this case as conceded facts. Neither does it appear that any deception or misrepresentations were made by the defendant in order to induce the making of the contract, nor that the contract was in any respect an unfair one. Plaintiff rests his case entirely upon his absolute right, on becoming of age, to disaffirm his contract, and recover the amount which he had paid thereon, regardless of any damage the defendant may have sustained, either from his misrepresentation as to his correct age, or from his abusive use of the Hudson car which resulted in the depreciation above set forth."

Two questions are certified:

1. Is the plaintiff, by reason of the misrepresentations as to his correct age, estopped from maintaining an action to recover the amount paid under the conditional sales contract upon the purchase price of the Hudson car?

2. If the plaintiff is not so estopped, may defendant, by way of affirmative defense against plaintiff's claim, set off the amount paid for the repair of the damaged Hudson car, or so much thereof as will equal plaintiff's claim?

First. In *Sims* v. *Everhardt,* 102 U. S. 300, 313, which was a suit in equity, this court said:

"Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown* v. *McCune,* 5 Sandf. (N. Y.) 224; *Keen* v. *Coleman,* 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous

declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

The statement that the authorities are all one way in holding that an estoppel *in pais* is not—that is to say, is never—applicable to infants, at least of doubtful accuracy when made, is clearly incorrect at the present time. A review shows that many, perhaps the major part, of the state decisions hold that in equity the rule is otherwise. See Bigelow on Estoppel (6th Ed.) 627; 1 Williston on Contracts, § 245. In any event, the most that can be said is that the decisions upon that subject are conflicting and to some degree in confusion. The doctrine of the *Everhardt* case, however, was followed in *MacGreal* v. *Taylor,* 167 U. S. 688, 696, and has been made the basis of decisions in several of the lower federal courts, *Bartlett* v. *Okla. Oil Co.,* 218 Fed. 380, 391; *Alfrey* v. *Colbert,* 168 Fed. 231, 235; *Sanger* v. *Hibbard,* 104 Fed. 455, 457; and has become the established federal rule. Likewise it has been accepted and followed by many of the state courts. See, for example, *Tobin* v. *Spann,* 85 Ark. 556, 559; *Cobbey* v. *Buchanan,* 48 Neb. 391, 394; *Kirkham* v. *Wheeler-Osgood Co.,* 39 Wash. 415, 424; *Alvey* v. *Reed,* 115 Ind. 148, 149. In this state of the matter, we are not disposed now to reëxamine the question in the light of the conflict of authority; but, following the *Everhardt* case, we hold that the doctrine of estoppel *in pais* cannot be invoked to defeat plaintiff's action.

Second. While adhering to the determination in the *Everhardt* case, that the doctrine of estoppel *in pais* does not apply to an infant, we are of the opinion that this does not require us, under the facts of the present case, to deny defendant the benefit of its affirmative defense.

In the *Everhardt* case, there was a dismissal by the court below on the ground that it did not appear that there was a disaffirmance by the complainant within a reasonable time after she attained her majority. The bill offered to do equity (p. 301), but this court, in reversing the decree and remanding the cause, expressed no opinion in respect of the equities by which a decree for complainant might be conditioned. The effect of an affirmative defense such as we have here was neither involved nor considered. Whether an infant who fraudulently misrepresents his age and thereby induces the making of a contract can, when he brings a suit in equity in respect of the matter, be compelled to do equity, is a question not concluded by that decision. In *MacGreal* v. *Taylor, supra,* after first calling attention to the fact (p. 698) that the opinion in the *Everhardt* case did not deal with the counter-equities, this court said (p. 700): "A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy."

Here the action brought by the *quondam* infant is one for money had and received—the payments under the disaffirmed contract having been either in money or in property converted into money before the disaffirmance. Such an action, though brought at law, is in its nature a substitute for a suit in equity; and it is to be determined by the application of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part. *Rathbone* v. *Stocking,* 2 Barb. 135, 145–147; *Barr* v. *Craig,* 2 Dall. 151, 154; *Wright* v. *Butler,* 6 Wend. 284, 290; *Eddy* v. *Smith,* 13 Wend. 488,

490; *Christie* v. *Durden,* 205 Ala. 571, 572; *Gifford* v. *Wilcox,* 81 Ind. App. 378, 381.

It has been held that where an infant after coming of age seeks the aid of a court of equity to avoid a contract, under which he has received property, and restore to him the possession of obligations with which he has parted, he will be required, wholly irrespective of his own good faith in the transaction, to do equity, which may extend to compelling him to make full satisfaction for the deterioration of the property due to his use or abuse of it.

In *Gray* v. *Lessington,* 2 Bosw. 257, the plaintiff, alleging her infancy, brought suit to rescind a contract of sale and to cancel a mortgage and unpaid notes. A decree in her favor imposed the condition that she should restore the property and account for the deterioration arising from its use. The court, sustaining this on appeal, said (p. 262):

"And when it becomes necessary for her to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration. Whether that presumption is, under all circumstances, conclusive, it is not necessary to say, since there is nothing in this case to rebut the presumption. The deterioration here, is found to have resulted from the use which she has enjoyed; and if it resulted from an abuse of the property, the plaintiff's equity is no greater."

The same rule is recognized in *Hillyer* v. *Bennett,* 3 Edw. Ch. 222, 225. In that case, after pointing out that the acts and deeds of an infant are voidable at his election, that if sued at law or in equity he may plead his infancy in bar, and that if he has agreed to sell and deliver

personal property he may disaffirm the contract and bring trover to recover it back, the vice-chancellor said:

"But if, after he comes of age, he seeks to disaffirm and avoid his contract in a court of equity and files his bill there for the purpose of obtaining its aid, in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back; especially, if it appears that the other dealt with him in ignorance of the fact of his nonage. This equitable and just principle is recognized by Woodworth, J., 7 Cowen, 183, and is warranted by several cases there cited."

See also, 1 Story's Equity (11th Ed.) § 240; *Carmen* v. *Fox Film Corporation,* 269 Fed. 928, 931; *Rice* v. *Butler,* 160 N. Y. 578; *International Land Co.* v. *Marshall,* 22 Okla. 693, 708.

How far the equitable maxim, that he who seeks equity must do equity, applies generally in suits brought for relief because of infancy, we need not inquire; nor do we need here to go as far as the authorities just cited. The maxim applies, at least, where there has been, as there was here, actual fraud on the part of the infant. When an infant of mature appearance, by false and fraudulent representations as to his age, has induced another person to sell and deliver property to him, it is against natural justice to permit the infant to recover money paid for the property without first compelling him to account for the injury which his deceit has inflicted upon the other person.

Our conclusion that the affirmative defense is available in this action does not rest upon the doctrine of estoppel, though the result may be the same. It recognizes the

plaintiff's right to repudiate his promise and sue for the return of his payments, and his immunity from a plea of estoppel in so doing. Its effect is not to enforce the disaffirmed contract directly or indirectly, but to allow him to invoke the aid of the court to enforce an equitable remedy arising from the disaffirmance, only upon condition that "seeking equity, he must do equity." And the application of the maxim is not precluded because defendant's claim might not be enforceable in any other manner. 1 Pomeroy's Equity, § 386; *Sturgis* v. *Champneys,* 5 Myl. & C. 97, 102; *Farmers' Loan & Trust Co.* v. *Denver, L. & G. R. Co.,* 126 Fed. 46, 51.

The question remains whether defendant should have judgment for the amount by which its expenditures exceeded plaintiff's demand. We are not advised of any statutory rule upon the subject applicable in the District of Columbia; and the matter must be determined in accordance with general principles. The defense, in effect, is that the plaintiff was guilty of tortious conduct to the injury of the defendant in the transaction out of which his own cause of action arose. In such case it is well settled that the relief is by way of recoupment—that is, that the amount of defendant's damage can be allowed only in abatement or diminution of plaintiff's claim—and that defendant cannot, at least in that action, recover any excess. *Winder* v. *Caldwell,* 14 How. 434, 443; *Dushane* v. *Benedict,* 120 U. S. 630, 642; *Ward* v. *Fellers,* 3 Mich. 281, 287–291; *Waterman* v. *Clark et al.,* 76 Ill. 428, 430; *Holcraft* v. *Mellott,* 57 Ind. 539, 544.

It follows that the first question should be answered in the negative and the second question in the affirmative, with the qualification that the amount allowed defendant shall not exceed the amount of plaintiff's claim.

It is so ordered.

BYARS *v.* UNITED STATES.

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

No. 72. Argued November 29, 1926.—Decided January 3, 1927.

1. A state search warrant, based on an information alleging that affiant "has good reason to believe and does believe defendant has in his possession" intoxicating liquors and instruments and materials used in the manufacturing of such liquors, can not, under the Fourth Amendment, sustain a federal search of defendant's house and seizure therein of counterfeit internal revenue stamps. P. 29.
2. Evidences of crime discovered by a federal officer in making a search without lawful warrant may not be used against the victim of the unlawful search where a timely challenge has been interposed. P. 29.
3. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." P. 32.
4. When a federal officer participates officially with state officers in a search, so that in substance and effect it is their joint operation, the legality of the search and of the use in evidence of the things seized, is to be tested, in federal prosecutions, as it would be if the undertaking were exclusively his own. P. 32.

4 F. (2d) 507, reversed.

CERTIORARI (268 U. S. 684) to a judgment of the Circuit Court of Appeals which affirmed a conviction of Byars for unlawful possession of counterfeit "strip" stamps.

Mr. Claude R. Porter for the petitioner, submitted.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner was convicted in the federal district court for the southern district of Iowa upon two counts for unlaw-

fully having in his possession with fraudulent intent certain counterfeit strip stamps of the kind used upon whiskey bottled in bond. The stamps were admitted in evidence over the objection of petitioner that they had been obtained by an unlawful search and seizure. A timely motion previously made by the petitioner to return or impound the stamps was overruled. The judgment of conviction was affirmed by the court of appeals. 4 F. (2d) 507.

The stamps were found in executing a search warrant issued by the judge of a state municipal court and addressed to "any peace officer of Des Moines, Polk County, Iowa," directing search for intoxicating liquors and instruments and materials used in the manufacture of such liquors. The information upon which the search warrant was issued states only that affiant "has good reason to believe and does believe the defendant has in his possession" such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the Fourth Amendment and the laws of the United States. C. 30, Title XI, §§ 3–6, 40 Stat. 217, 228–229; c. 85, Title II, § 2, 41 Stat. 305, 308. See *Ripper* v. *United States,* 178 Fed. 24, 26; *United States* v. *Borkowski,* 268 Fed. 408, 410–411; *United States* v. *Kelly,* 277 Fed. 485, 486–489. Whether it is good under the state law it is not necessary to inquire, since in no event could it constitute the basis for a federal search and seizure, as, under the facts hereinafter stated, it is insisted this was.

Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of

the unlawful search where a timely challenge has been interposed. *Weeks* v. *United States,* 232 U. S. 383, 393; *Gouled* v. *United States,* 255 U. S. 298, 306; *Amos* v. *United States,* 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 391; *Agnello* v. *United States,* 269 U. S. 20, 33.

The warrant directs the officer to search certain described premises and, if any of the liquors, instruments or materials set forth in the information are found, to seize the same and keep them until final action be had thereon. It was put into the hands of Mr. Densmore, a local officer in charge of the night liquor bureau of the police station in Des Moines, Iowa, and he, together with three others, proceeded to make the search in circumstances which can best be shown by quoting from the testimony given upon the hearing of the motion to impound or return the property seized. Mr. Densmore testified as follows:

"As I came down stairs, I asked the Captain about Mr. Adams who was there, and I asked him to go with me. Mr. Adams is the Federal Prohibition Agent, stationed here in Des Moines, Iowa, an officer of the government, operating under the Treasury Department. I met him after the warrant had been sued out, and asked him to go with me. I had the warrant at that time. It was in the police station of the city that I met Mr. Adams and requested him to come along. I had not discussed this case with Mr. Adams before that. He went with me from the city building on the search. As far as I know, he did not have any warrant or any authority to go into that residence other than the authority that I may have given him under the warrant I had. The search and seizure was made entirely upon the authority of the warrant that I had obtained at the City Hall. Arriving at the residence, I assigned each man a room. I assigned Adams a room. We found no intoxicating liquors there. The only thing that we found that we took were the stamps in-

volved in this case. Mr. Taylor found part of them, and Mr. Adams found part of them. Mr. Adams kept the stamps he found in his possession and those found by Mr. Taylor were turned over to him right at that time. The ones that Adams found and the ones that were given to him were taken possession of by Adams right there in the house of A. J. Byars, immediately after the service. Neither myself or any of the other city officers had possession of those stamps after that evening. There was never any prosecution attempted in the city courts or such courts as I was connected with so far as these stamps were involved."

Mr. Adams, the federal prohibition agent, testified:

"I remember assisting in the search of the residence of A. J. Byars on the 22nd day of April, 1924. Officers Densmore, Taylor, DeHaven and Davis were with me. I met them in the Captain's office at the police station in the city of Des Moines and accompanied them to make the search. I had no authority for going into the house other than the search warrant that the officers had secured from the state authorities. The only authority that I had for going into the house of Mr. Byars was on account of the search warrant that Mr. Densmore had. I searched the kitchen. I found some of the stamps that were involved in this case there in the kitchen. I took possession of them then and there, and have retained them ever since. I have retained the stamps that I found and those that were handed me there in the house. I was not present with Mr. Taylor in the room when he found the stamps, but they were brought to me in the dining room by Mr. Taylor, and I took possession of them then and there, and I have retained possession of all the stamps from that time until this. They were never delivered to the state officers or used by them. I do not know of any violation of any state law that they could be used for. I knew there was no state law governing the possession of

these stamps, and as a Federal Officer, I took possession of what I found, and those found by the State Officer, and have had them in my possession ever since and receipted to the Police officers at the Station that evening after the return from the raid, for the stamps found."

While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States,* 116 U. S. 616, 635; *Gouled* v. *United States, supra,* p. 304.

The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. The house to be searched contained only four rooms—a dining room, a kitchen and two bedrooms. We are not prepared to accept the view that the local officer thought a force of four men would be insufficient to search these limited premises; and it is significant, in that connection, that he did not ask his superior officer for additional help, but inquired particularly for Adams, who, he knew, was the federal agent. The stamps found were not within the purview of the state search warrant, nor did they relate in any way to a violation of state law. Those found by the agent were held by him as of right and without question; those found by the state officer were considered by both the local officer

in charge and the federal agent as things which concerned the federal government alone and then and there were surrendered to the exclusive possession of the federal agent,—a practical concession that he was present in his federal character. We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own. Similar questions have been presented in a variety of forms to the lower federal courts, but nothing is to be gained by attempting to review the decisions, since each of them rests, as the present case does, upon its own peculiar facts. But see and compare *Flagg* v. *United States,* 233 Fed. 481, 483; *United States* v. *Slusser,* 270 Fed. 818, 820; *United States* v. *Falloco,* 277 Fed. 75, 82; *Legman* v. *United States,* 295 Fed. 474, 476–478; *Marron* v. *United States,* 8 F. (2d) 251, 259; *United States* v. *Brown,* 8 F. (2d) 630, 631.

We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods,

which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.

Judgment reversed.

DI SANTO *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 288. Argued October 27, 1926.—Decided January 3, 1927.

A state law requiring persons, other than railroad or steamship companies, who engage within the State in the sale of steamship tickets or orders for transportation to or from foreign countries, to procure a license, by giving proof of moral character, paying a small annual fee, and filing a bond as security against fraud or misrepresentation to purchasers, is a direct burden on foreign commerce, contravening the commerce clause of the Constitution, and cannot be sustained as a proper exercise of the state police power to prevent possible fraud. P. 35.

So held as applied to one who was authorized by four steamship companies to sell their tickets at a specified place and who was supplied by them with tickets, advertising matter, schedules of sailings, and other information, and authorized by them to collect the money for the tickets sold and required to give bonds to the respective companies and to account to each for moneys received for its tickets, less a percentage for his remuneration.

285 Pa. 1, reversed.

ERROR to a judgment of the Supreme Court of Pennsylvania, sustaining a conviction of Di Santo, for selling steamship tickets without first having procured a license as required by a law of that State.

Messrs. William H. Neely and *John H. Neely, Jr.*, for the plaintiff in error.

Messrs. Philip S. Moyer and *E. Le Roy Keen,* with whom *Mr. George W. Woodruff,* Attorney General of Pennsylvania, was on the brief, for the defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error was indicted in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for a violation of an Act of the Legislature of July 17, 1919, as amended by the Act of May 20, 1921, P. L. 997, requiring licenses to sell steamship tickets or orders for transportation to or from foreign countries. The indictment alleged that, December 14, 1921, without having obtained a license so to do, plaintiff in error held himself out as authorized to sell tickets and orders for transportation as agent of certain steamship companies, and that he engaged in the sale of such tickets. There was no controversy as to the facts; and, by direction of the court, the jury returned a verdict of guilty. Plaintiff in error, by motion in arrest of judgment, challenged the validity of the Act on the ground that it contravenes the commerce clause of the Federal Constitution. The court held the statute valid, and sentenced him to pay a fine. On appeal the Superior Court held the Act unconstitutional and reversed the judgment. The Supreme Court reversed the Superior Court and reinstated the judgment of the trial court. The case is here under § 237(a) of the Judicial Code.

The Act of 1921 provides that no person or corporation, other than a railroad or steamship company, shall engage within the State in the sale of steamship tickets or orders for transportation or shall hold himself out as authorized to sell such tickets or orders without having first procured a license. It requires every applicant to cause his application to be advertised in specified publications, to furnish proof that he is of good moral character and fit to conduct the business, to give a list of the steamship lines, not less than three, for which he is agent, and to file a bond in the penal sum of $1,000 conditioned that he will account to all interested persons for moneys received for tickets and orders and that he will not be guilty

of any fraud or misrepresentation to purchasers. The license is granted on approval of the Commissioner of Banking and payment of a fee of $50.00, and may be renewed on payment of a like fee annually. The license may be revoked for fraud, misrepresentation, or failure to account. Any person carrying on this business without license is declared guilty of a misdemeanor and liable to fine or imprisonment or both. The state Supreme Court declared that the Act is one to prevent fraud; and held that it does not require an agent or servant of the steamship companies to have a license, but that plaintiff is not such an agent, and that he occupies a position in the nature of an independent contractor, and is required to obtain a license.

Plaintiff represented four steamship companies operating steamships between the United States and Europe. Each of them gave him a certificate authorizing him to sell, at a specified place in Harrisburg, tickets and orders for transportation entitling persons therein named to passage on such steamships; and required the certificate to be posted in his office. This is in accordance with the Pennsylvania Act of 1863, P. L. 582, regulating the display of certificates by steamship agents; and a copy of that Act was printed on the certificate. The companies furnished plaintiff in error books of tickets having stubs on which to make record of tickets sold, advertising matter to be used by him, schedules of sailings, notices of cancelations of sailings, and information as to the immigration and customs services; and they authorized him to collect money for tickets sold. He usually received 25 per cent. of the price when applications were made for the tickets. He gave each company a bond to account; and transmitted immediately to his respective principals the amounts received by him.

The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States

and Europe constitute a well-recognized part of foreign commerce. See *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312, 315. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 199, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. *Real Silk Mills* v. *Portland,* 268 U. S. 325, 336. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150, and *McCall* v. *California,* 136 U. S. 104.

Judgment reversed.

Mr. Justice Brandeis, with whom Mr. Justice Holmes concurs, dissenting.

The statute is an exertion of the police power of the State. Its evident purpose is to prevent a particular species of fraud and imposition found to have been practiced in Pennsylvania upon persons of small means, unfamiliar with our language and institutions.[1] Much of the

[1] A similar statute had been enacted in New York, with the approval of Governor (afterwards Mr. Justice) Charles E. Hughes. Laws of New York 1910, c. 349, amended by Laws of New York 1911, c. 578. And similar laws have been enacted also in other States. Indiana, Burns' Ann. Stat. 1926, §§ 4681–4685; Michigan, Cahill's Comp.

immigration into the United States is effected by arrangements made here for remittance of the means of travel. The individual immigrant is often an advance guard. After gaining a foothold here, he has his wife and children, aged parents, brothers, sisters or other relatives follow. To this end he remits steamship tickets or orders for transportation. The purchase of the tickets involves trust in the dealer. This is so not only because of the nature of the transaction, but also because a purchaser when unable to pay the whole price at one time makes successive deposits on account, the ticket or order not being delivered until full payment is made. The facilities for remitting both cash and steamship tickets are commonly furnished by private bankers of the same nationality as the immigrant. It was natural that the supervision of persons engaged in the business of supplying steamship tickets should be committed by the statute to the Commissioner of Banking.[2]

Although the purchase made is of an ocean steamship ticket, the transaction regulated is wholly intrastate—as much so as if the purchase were of local real estate or of local theatre tickets. There is no purpose on the part of

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Laws Mich. Ann. Supp. 1922, § 7164(1)-7164(9); Ohio Gen. Code, §§ 710-183–710-187.

[2] In 1910 there were 410 of such banking businesses in Pennsylvania. Report of Immigration Commission, vol. 37, p. 209. The Commission found, also, that of the businesses (in Pennsylvania and elsewhere) examined by it, "94 per cent. of the concerns engaged in the business of selling steamship tickets were at the same time engaged in the business of immigrant banking. This shows that the relation between the two is so close as to warrant the classification of them as interdependent. . . . Having made the start, it is natural that he should continue to leave with the agent for safe-keeping his weekly or monthly surplus, so that he may accumulate a sufficient amount for another remittance or for the purpose of buying a steamship ticket to bring his family to this country or for his own return to Europe." *Ibid.*, p. 212.

the State to regulate foreign commerce. The statute is not an obstruction to foreign commerce. It does not discriminate against foreign commerce. It places no direct burden upon such commerce. It does not affect the commerce except indirectly. Congress could, of course, deal with the subject, because it is connected with foreign commerce. But it has not done so. Nor has it legislated on any allied subject. Thus, there can be no contention that Congress has occupied the field. And obviously, also, this is not a case in which the silence of Congress can be interpreted as a prohibition of state action—as a declaration that in the sale of ocean steamship tickets fraud may be practiced without let or hindrance. If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed, but because the Constitution so commands. I cannot believe that it does.

Unlike the ordinance considered in *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150, this statute is not a revenue measure. The license fee is small. The whole of the proceeds is required to defray the expense of supervising the business. Unlike the measure considered in *Real Silk Mills* v. *Portland,* 268 U. S. 325, 336, this statute is not an instrument of discrimination against interstate or foreign commerce. Unlike that considered in *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 199, it does not affect the price of articles moving in interstate commerce. The licensing and supervision of dealers in steamship tickets is in essence an inspection law. Compare *Turner* v. *Maryland,* 107 U. S. 38.

The fact that the sale of the ticket is made as a part of a transaction in foreign or interstate commerce does not preclude application of state inspection laws, where, as here Congress has not entered the field, and the state regulation neither obstructs, discriminates against, or directly burdens the commerce. *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345; *Diamond Glue Co.* v.

United States Glue Co., 187 U. S. 611; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 54; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 380; *Savage* v. *Jones*, 225 U. S. 501; *Sligh* v. *Kirkwood*, 237 U. S. 52, 62; *Merchants Exchange* v. *Missouri*, 248 U. S. 365; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158; *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Weigle* v. *Curtice Brothers Co.*, 248 U. S. 285; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129. To require that the dealer in tickets be licensed in order to guard against fraud in the local sale of tickets certainly affects interstate or foreign commerce less directly than to provide a test of the locomotive engineer's skill, *Smith* v. *Alabama*, 124 U. S. 465; or eyesight, *Nashville, Chattanooga, & St. Louis Ry.* v. *Alabama*, 128 U. S. 96; or requiring that passenger cars be heated and guard posts placed on bridges, *N. Y., N. H., & H. R. R. Co.* v. *New York*, 165 U. S. 628; or requiring every railway to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants, *Lake Shore & Michigan Southern R. R. Co.* v. *Ohio*, 173 U. S. 285; or to require trains to limit within a city their speed to six miles an hour, *Erb* v. *Morasch*, 177 U. S. 584; or to establish a standard for the locomotive headlight, *Atlantic Coast Line R. R.* v. *Georgia*, 234 U. S. 280; or to prescribe "full crews," *Chicago, Rock Island & Pacific Ry.* v. *Arkansas*, 219 U. S. 453; *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518; or to compel the providing of separate coaches for whites and colored persons, *South Covington, etc., Ry.* v. *Kentucky*, 252 U. S. 399; or to compel a railroad to eliminate grade crossings, although the expense involved may imperil its solvency, *Erie R. R. Co.* v. *Public Utility Commissioners*, 254 U. S. 394, 409–412—state requirements sustained by this Court. See also *Engel* v. *O'Malley*, 219 U. S. 128, 138.

It is said that *McCall* v. *California,* 136 U. S. 104, requires that the Pennsylvania statute be held void. McCall was an employee of the railroad, not an independent solicitor or dealer. Di Santo, as the state court found the facts, was not an employee of a steamship company, nor an agent authorized to act for one; and it ruled, as a matter of statutory construction, that, if he had been such, he would not have been required by the statute to be licensed. It found him to be an independent dealer or contractor, "a free lance" authorized by the several steamship companies "to sell tickets or orders entitling the persons therein named to passage upon steamers," but "with no obligation to any particular company," except to remit the net amount payable by him to the company for a ticket or order sold. Moreover, the fee imposed by the San Francisco ordinance was an occupation tax, not an inspection fee. Here, the Pennsylvania court found that the statute did not produce any revenue.

On the facts, the *McCall* case is distinguishable from that at bar. If, because of its reasoning, it is thought not to be distinguishable, it should be disregarded. The doctrine of *stare decisis* presents no obstacle. Disregard of the *McCall* case would not involve unsettlement of any constitutional principle or of any rule of law, properly so called. It would involve merely refusal to repeat an error once made in applying a rule of law—an error which has already proved misleading as a precedent. While the question whether a particular statute has the effect of burdening interstate or foreign commerce directly presents always a question of law, the determination upon which the validity or invalidity of the statute depends, is largely or wholly one of fact. The rule of law which governs the *McCall* case and the one at bar is the same. It is that a State may not obstruct, discriminate against, or directly burden interstate or foreign commerce. The question at bar is whether, as applied to existing facts,

this particular statute is a direct burden. The decision as to state regulations of this character, depends often, as was said in *Southern Railway* v. *King*, 217 U. S. 524, 533, "upon their effect upon interstate commerce." In that case, the Georgia blow post law was held constitutional, as not being a direct burden. In *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310, the same statute was held, on other facts, to be void, because shown to be a direct burden. Each case required the decision of the question of law. Each involved merely an appreciation of the facts. Neither involved the declaration of a rule of law.

It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce.[3]

[3] See "The Compact Clause of the Constitution.—A Study in Interstate Adjustments," by Felix Frankfurter and James M. Landis, 34 Yale Law Journal 685, 720–725, and cases there cited; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," by Henry Wolf Biklé, 38 Harvard Law Review 6.

The many cases on the Commerce Clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized.[4] In the case at bar, also, the logic of words should yield to the logic of realities.

MR. JUSTICE STONE, dissenting.

I agree with all that MR. JUSTICE BRANDEIS has said, but I would add a word with respect to one phase of the matter which seems to me of some importance. We are not here concerned with a question of taxation to which other considerations may apply, but with state regulation of what may be conceded to be an instrumentality of foreign commerce. As this Court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state

[4] See *Pierce* v. *New Hampshire,* 5 How. 504, 554, overruled by *Leisy* v. *Hardin,* 135 U. S. 100, 118; *Osborne* v. *Mobile,* 16 Wall. 479, overruled by *Leloup* v. *Port of Mobile,* 127 U. S. 640, 647–648. See *State Tax on Railway Gross Receipts,* 15 Wall. 284, qualified by *Philadelphia S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 342; *Peik* v. *C. & N. W. Ry. Co.,* 94 U. S. 164, qualified by *Wabash, St. L. & Pac. Ry. Co.* v. *Illinois,* 118 U. S. 557; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, qualified in *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, qualified in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217; *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, and *Standard Oil Co.* v. *Graves,* 249 U. S. 389, all qualified in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. Compare the discussion of *City of New York* v. *Miln,* 11 Pet. 101, in *Passenger Cases,* 7 How. 283; that of *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296, and in *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150; that of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas,* 204 U. S. 403, in *Baltimore & Ohio Southwestern R. R. Co.* v. *Settle,* 260 U. S. 166, 173; that of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, in *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203.

lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.

The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress. Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the states by the decisions of this Court.

In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

It is difficult to say that such permitted interferences as those enumerated in MR. JUSTICE BRANDEIS' opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

I am not persuaded that the regulation here is more than local in character or that it interposes any barrier

to commerce. Until Congress undertakes the protection of local communities from the dishonesty of the sellers of steamship tickets, it would seem that there is no adequate ground for holding that the regulation here involved is a prohibited interference with commerce.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

INTERSTATE BUSSES CORPORATION *v.* HOLYOKE STREET RAILWAY COMPANY.

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

No. 343. Argued October 27, 28, 1926.—Decided January 3, 1927.

1. The Massachusetts law requiring a license and a certificate of public convenience and necessity for such operation of motor vehicles on public highways for intrastate carriage of passengers for hire as affords a means of transportation similar to that afforded by a railway company, is not shown in this case to work a direct interference with or burden upon the interstate business of the plaintiff bus company, which carries both interstate and intrastate passengers. P. 50.
2. The burden is upon the plaintiff bus company to prove that the enforcement of the act would prejudice its interstate passenger business. P. 51.
3. The act cannot be evaded by unnecessarily using the same vehicles and employees for both classes of passengers. P. 51.
4. A State has power reasonably to regulate and control the use of its public highways in the public interest, not directly burdening or interfering with interstate commerce. P. 52.
5. The Massachusetts act is not arbitrary or unreasonable; and the plaintiff, not having applied for a license under it, had no standing to attack its validity under the due process clause of the Fourteenth Amendment. P. 52.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit by the plaintiff bus company to enjoin

the defendants—a street railway company, some of its officers, and various public prosecuting officials of Massachusetts—from taking steps to enforce a Massachusetts statute regulating common carriers of passengers by motor vehicle.

Mr. Edward H. Kelly for the appellant.

Appellant is engaged in interstate commerce in the transportation of passengers between Hartford, Connecticut, and Greenfield, Massachusetts. Persons traveling on appellant's vehicles from Connecticut cannot be carried by motor bus north of Springfield unless appellant transports them, because local operation is prohibited without obtaining the licenses, permits and certificates prescribed by Chapter 159, Section 45, General Laws of Massachusetts, as amended by Chapter 280 of the Laws of 1925. Appellant has undertaken to transport its interstate passengers to destination by the mode of transportation they have chosen in Connecticut, but can only do it at a loss and in partly empty vehicles, unless it is permitted to accommodate on the same vehicles such local traffic as is offered. Appellant not only is deprived of the revenue earned in carrying its interstate travelers north of Springfield, but travelers from Connecticut points wishing to go north of Springfield, will not patronize appellant's busses in Connecticut owing to inconvenience of changing to some other mode of travel in Springfield and *vice versa;* so that the enforcement of this law necessarily imposes on plaintiff a large loss of revenue from interstate traffic in addition to that which might be received from local traffic. If the requirements of Chapter 159 are held to apply to the business done by appellant, then it must be conceded that it restricts, burdens and impedes interstate commerce. *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

Under the rule of the Kansas cases, Massachusetts could not pass a law imposing a tax on appellant's entire capital stock or otherwise burdening its interstate business as a condition of permitting it to do a local business. Can it then prohibit it entirely from doing such business, or can it prohibit such local business on interstate vehicles, except on condition that appellant obtain a license from every city and town through which its vehicles pass on their interstate journey? Has it power to prohibit local business entirely and yet remain powerless to annex to its permission to do local business an unconstitutional condition? Would it be any more a burden on interstate commerce to grant permission to do a local business only on condition of paying an unconstitutional tax or submitting to confiscatory rates for such business than to prohibit local business entirely? Is the latter less of a burden than the former? Would a law or regulation of Massachusetts be held constitutional, which prohibited a railroad from carrying passengers upon its interstate trains between Springfield and Boston, without first obtaining a license from each town through which the train passed, and a certificate from the State Public Utilities Commission? Or could it entirely forbid the railroad from carrying passengers between points within the State upon interstate trains?

The error of *Barrows* v. *Farnum State Lines,* 254 Mass. 240, and related cases is in treating this regulation as a general police regulation. *Hemdon* v. *Chicago,* 218 U. S. 157.

In giving consideration to the respective spheres of state and federal control of commerce no analogy can be drawn from their respective powers in the matter of levying taxes. *Gibbons* v. *Ogden,* 9 Wheat. 1.

The District Court erred in holding that the business carried on by this plaintiff came within the purview of Chapter 159, as amended.

That Act, if held applicable, is in conflict with the Fourteenth Amendment in that it provides no appeal from an arbitrary and unreasonable exercise of power, and in that it permits suits and prosecutions so numerous, and the imposition of so many different fines and penalties, as to compel submission to the arbitrary exercise.

As a police regulation applicable to interstate commerce, Chapter 159 must be held to be unreasonable.

Mr. David H. Keedy, with whom *Mr. William H. Brooks* was on the brief, for the appellees.

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by appellant against the Holyoke Street Railway Company, its president and general manager, police and prosecuting officers of a number of cities and towns, the chief of the state police, and the district attorneys of the Western and Northern Districts of Massachusetts. Its purpose is to restrain the enforcement of a state statute relating to common carriers of passengers by motor vehicles as in conflict with the commerce clause of the Constitution of the United States and with the due process clause of the Fourteenth Amendment. The case was heard before a court of three judges (§ 266, Judicial Code) on an agreed statement of facts; and a final decree dismissing the complaint was entered.

Sections 45, 48A and 49 of c. 159, General Laws, as amended by c. 280, Acts of 1925, contain the provisions attacked: No person shall operate a motor vehicle upon a public way in any city or town for the carriage of passengers for hire so as to afford a means of transportation similar to that afforded by a railway company by indiscriminately receiving and discharging passengers along the route on which the vehicle is operated, or as a business between fixed and regular termini, without first obtaining a license. The licensing authority in a city is its council,

in a town is its selectmen; and, as to public ways under its control, is the metropolitan district commission. No person shall operate a motor vehicle under such license unless he has also obtained from the Department of Public Utilities a certificate that public convenience and necessity require such operation. Anyone operating under a license from local authority and a certificate from the department is declared to be a common carrier and subject to regulation as such. Violations of §§ 45–48 or of any order, rule or regulation made under them are punishable by fine or imprisonment or both. And the Act gives to the Supreme Judicial and Superior Courts jurisdiction in equity to restrain any violation upon petition of the department, any licensing authority, ten citizens of a city or town affected by the violation, or any interested party. Neither license nor certificate is required in respect of such carriage as may be exclusively interstate.

The material facts stipulated are: For many years, the appellee Holyoke Street Railway Company has been a common carrier of passengers by street railway in Massachusetts through Holyoke, South Hadley, Granby, Amherst and into Sunderland. Appellant is engaged in the business of transporting passengers for hire by motor vehicle, and operates busses between Hartford, Connecticut, and Greenfield, Massachusetts. It has operated its busses between Hartford and Springfield since December 1, 1924, and north of Springfield to Greenfield since about December 15, 1925. Its route in Massachusetts passes through Springfield, West Springfield, Holyoke, Granby, Amherst, Sunderland, Deerfield and Greenfield. With certain exceptions not here material, all its busses run the whole distance between Hartford and Greenfield. It transports persons from one State into the other, and also those whose journeys begin and end in Massachusetts. Both classes of passengers, intrastate and inter-

state, are carried in the same vehicles. Intrastate passengers constitute a very substantial part of the whole number carried in Massachusetts. Appellant maintains an office and garage at Springfield and advertises its route and rates. The busses are operated between fixed termini in Massachusetts. They operate regularly on public ways parallel to and alongside the tracks of the street railway company and afford means of transportation similar to those furnished by that company. They stop regularly and also on signal to receive and discharge passengers. The operation of the busses in competition with the street railway has resulted in substantial loss to the latter. Appellant has not obtained a license from any of the cities or towns served by the street railway company. And that company, its president and counsel have caused plaintiff's employees to be arrested and prosecuted and intend to continue to prosecute them for operating without obtaining the licenses and certificate required by the statute.

The statutory provisions in question have been sustained by the highest court of Massachusetts. *New York, N. H. & H. Railroad* v. *Deister,* 253 Mass. 178; *Barrows* v. *Farnum's Stage Lines,* 254 *Mass.* 240; *Boston & M. R. R.* v. *Cate,* 254 Mass. 248; *Boston & M. R. R.* v. *Hart,* 254 Mass. 253; *Commonwealth* v. *Potter,* 254 Mass. 520. And these decisions were followed by the district court in this case.

Appellant's principal contention is that the Act contravenes the commerce clause. If as applied it directly interferes with or burdens appellant's interstate commerce, it cannot be sustained regardless of the purpose for which it was passed. See *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 199; *Real Silk Mills* v. *Portland,* 268 U. S. 325, 336; *Colorado* v. *United States,* 271 U. S. 153, 163; *Di Santo* v. *Pennsylvania, ante,* p. 34. The Act existed in some form before interstate transportation of pas-

sengers for hire by motor vehicle was undertaken. Its purpose is to regulate local and intrastate affairs. *Barrows* v. *Farnum's Stage Lines, supra.* No license from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. Cf. *Buck* v. *Kuykendall,* 267 U. S. 307; *Bush Co.* v. *Maloy,* 267 U. S. 317. The burden is upon appellant to show that enforcement of the Act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, travelling in interstate commerce on appellant's busses over the part of the route competing with the street railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees. The appellant relies on *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; and *Pullman Co.* v. *Kansas,* 216 U. S. 56. But there the State was using its authority as a means to accomplish a result beyond its constitutional power.

There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. *Packard* v. *Banton,* 264 U. S. 140, 144; *Kane* v. *New Jersey,* 242 U. S. 160; *Hendrick* v. *Maryland,* 235 U. S. 610. Cf. *Opinion of the Justices,* 251 Mass. 594, 596. The terms of the Act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department.

Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause.

Decree affirmed.

FEDERAL TRADE COMMISSION *v.* PACIFIC STATES PAPER TRADE ASSOCIATION.

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

No. 71. Argued December 8, 1926.—Decided January 3, 1927.

1. Where the facts stipulated before the Federal Trade Commission showed that wholesale dealers dominating the trade in a certain commodity in several States were members of local and general trade associations; that uniform prices in intrastate sales were fixed and diligently enforced by the local associations, and in the case of one of them, were, by understanding among its members, to be applied to sales made outside of the State; that each local association applied the local prices to sales made locally but filled by direct shipment from outside mills; and that the salesmen of each, in making sales beyond its State, habitually quoted prices from the same lists which were controlling locally—the Commission was justified in inferring that such use of the lists in sales over the state line lessened competition and fixed prices in interstate commerce,

although it did not appear expressly that the fixed prices were made obligatory by rule, or were adhered to, in such interstate business. P. 61.

2. An understanding, express or tacit, that agreed prices will be followed in interstate sales, is enough to constitute transgression of the law. P. 62.
3. Organized maintenance of uniform prices in local business may lend probative significance and weight to facts pointing in the direction of like restraint in interstate business. P. 62.
4. Agreements between wholesalers, by which they fix prices to be charged retailers within the State for goods to be shipped on the wholesaler's order from mills directly to the retailer or to the wholesaler for delivery to him, are agreements to fix prices in interstate commerce, in cases where the seller elects to procure the goods and their shipment from mills outside the State. P. 63.
5. An order of the Federal Trade Commission forbidding agreements fixing prices for sales to be filled by shipments from outside the State, and the making or distributing of price lists to be used in such sales, is valid. P. 66.
6. A respondent in certiorari who did not seek review for himself is not entitled to question the correctness of the decree of the court below. P. 66.

4 Fed. (2d) 457, reversed in part.

CERTIORARI (268 U. S. 684) to a judgment of the Circuit Court of Appeals reviewing, and in part setting aside or modifying, an order of the Federal Trade Commission, requiring the respondents to cease and desist from certain practices which are described in the opinions, here and in the court below. The respondents, included, besides individuals, five local trade associations whose members were wholesale dealers and jobbers in paper, two associations or conferences made up of two or more of the local associations, and a general association, the membership of which was drawn from all five of the local associations.

Mr. Adrien F. Busick, with whom *Solicitor General Mitchell* and *Mr. Bayard T. Hainer* were on the brief, for the petitioner.

Agreements by which wholesalers fix prices to be charged retailers within the State for paper shipped on

the wholesaler's order direct from mills outside the State to the wholesaler's retail customers are agreements to fix prices in interstate commerce. "Commerce among the States is not a technical legal conception, but a practical one drawn from the course of business." *Swift & Co.* v. *United States,* 196 U. S. 375. It exists apart from any contract. Whenever commodities flow in a constantly recurring stream from one State to another, this flow constitutes commerce itself. *Swift & Co.* v. *United States, supra; Dahnke Milling Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers' Grain Co.,* 258 U. S. 50; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

All negotiations and contracts looking to the introduction of commodities from one State to another are a part of the commerce and within the regulating power and protection of the commerce clause. *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489; *Stewart* v. *Michigan,* 232 U. S. 665; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Dozier* v. *Alabama,* 218 U. S. 124; *Davis* v. *Virginia,* 236 U. S. 697. The purchase of commodities within one State, though the transaction be one entered into and performed wholly within the State, is a part of interstate commerce, where the proof is that the commodity so purchased is, after purchase, habitually shipped beyond the limits of the State. *Dahnke Milling Co.* v. *Bondurant, supra; Lemke* v. *Farmers' Grain Co., supra.* Likewise the sale at destination after interstate shipment and before the goods are commingled with property within the State is a part of interstate commerce. *Swift & Co.* v. *United States, supra; Stafford* v. *Wallace, supra.* Thus all of the transactions immediately connected with the movement of the goods, both at the point of origin of the movement and at destination, are a part and parcel of the commerce. See *Addyston Pipe Co.* v. *United States,* 175 U. S. 211; *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105; *Missouri*

v. *Kansas Gas Co.,* 265 U. S. 298; *Peoples Nat. Gas Co.* v. *Pub. Serv. Comm. of Pa.,* 270 U. S. 550.

The fact that the contracts of sale between the wholesalers, members of the associations, and their retail customers are negotiated within the State, does not take the transaction out of interstate commerce.

Where goods are brought into the State to satisfy contracts of sale previously made, the transactions are interstate commerce not subject to state regulation. *Western Union Tel. Co.,* v. *Foster, supra; Sonneborn* v. *Cureton,* 262 U. S. 506. The fact that the wholesaler's contract with the retailer does not in terms require the former to ship direct from the mill does not defeat federal jurisdiction. See cases cited and *Western Oil Ref. Co.* v. *Lipscomb,* 244 U. S. 346. Nor is the absence of any privity of contract between the mill owner and the retail customers of the wholesalers in any way controlling in determining whether the agreements with respect to these direct shipments are subject to federal control. *Western Union Tel. Co.* v. *Foster, supra. Ware & Leland* v. *Mobile County,* 209 U. S. 405, distinguished. But even if the sales by the wholesalers to their retail customers for direct shipment from without the State were not a part of interstate commerce, the agreements fixing prices on such sales so directly affect and burden interstate commerce as to be within federal control.

The use in interstate commerce of the list of agreed prices binding with respect to sales within the several States, lessens competition in interstate commerce and may be prohibited by the Federal Government. The conclusion which the Commission drew from the admitted evidentiary facts is a conclusion of fact unmixed with any question of law. *Levins* v. *Revegno,* 71 Cal. 273. The Commission's findings as to the facts if supported by evidence are conclusive. *Federal Trade Comm.* v. *Curtis Publishing Co.,* 260 U. S. 568; *Nat. Harness Mfrs. Assn.*

v. *Federal Trade Comm.*, 261 Fed. 170; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Amer. Column Co.* v. *United States*, 257 U. S. 377; *United States* v. *Amer. Oil Co.*, 262 U. S. 371; *Federal Trade Comm.* v. *Beech-Nut Packing Co.*, 257 U. S. 441.

Mr. Warren Olney, Jr., with whom *Messrs. Edward J. McCutchen* and *Allan P. Matthew* were on the brief, for the respondents.

A contract of sale between parties in the same State for goods to be delivered within that State, which may be filled by the seller at his option, by goods from whatever source he pleases, is not made a sale in interstate commerce by the fact that the seller chooses to supply the goods by ordering them from a manufacturer without the State. *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210; *Public Utilities Commission* v. *Landon*, 249 U. S. 236; *Wagner* v. *Covington*, 251 U. S. 95; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593; *Ward Baking Co.* v. *Federal Trade Commission*, 264 Fed. 330; *Winslow* v. *Federal Trade Commission*, 277 Fed. 206, Certiorari denied, 258 U. S. 618; *Kansas City Structural Steel Co.* v. *Arkansas*, 269 U. S. 148.

The Commission's order, par. (*b*), in so far as it forbids the use by the respondents in combination, in the making or soliciting of interstate sales, of price lists issued by any local association or otherwise agreed upon, is without support in and contrary to the record. In so far as it forbids such use by the respondents "separately," it is contrary to law. In order that an act may come within the prohibition of the Anti-trust Act there must be present the element of combination or concert of action between two or more persons. In so far as the Anti-trust Act is concerned, any individual dealer has the right to do what he pleases in the conduct of his business regardless of the effect on interstate commerce,

provided only he act independently and not in conjunction with others. *Federal Trade Commission* v. *Raymond Bros. Co.,* 263 U. S. 565; *Western Sugar Ref. Co.* v. *Federal Trade Comm.,* 275 Fed. 725. Paragraph (*b*), in so far as it forbids the defendants from compiling or publishing any joint or uniform price list for use in interstate commerce, is without support in and contrary to the record.

This Court ought to consider the objections made by the respondents to paragraphs (*e*) and (*g*) and (*h*) of the Commission's order which were overruled by the judgment of the Circuit Court of Appeals. Distinguishing *Hubbard* v. *Todd,* 171 U. S. 474; *Montana Mining Co.* v. *St. Louis Mining Co.,* 186 U. S. 24; *French Republic* v. *Saratoga Vichy,* 191 U. S. 427; *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 242. On certiorari the entire record is before the Court, with full power to decide the case as it was presented to the Circuit Court of Appeals. See *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267; *Delk* v. *St. Louis, etc., Co.,* 220 U. S. 580; *Cole* v. *Ralph,* 252 U. S. 286. From the foregoing decisions we take it (*a*) that the full record is not only physically but legally before the Court with full power to direct such disposition of the cause as the Circuit Court of Appeals might have done; (*b*) that, whether the Court will consider all the grounds of objection to the judgment below or confine itself to those only which are alleged in the petition for certiorari, is a matter of the Court's discretion in the particular case; and (*c*), that as a rule the Court will pass on all the questions presented by the record so that its mandate when it goes down will be finally determinative of the controversy. We would also call the Court's attention to the fact that, unless it now disposes of the objections of the respondents to the judgment of the Circuit Court of Appeals, its mandate is not necessarily final. If that judgment should be modified

as to paragraphs (*b*) and (*c*) of the Commission's order, the modified judgment would then be the judgment in the Circuit Court of Appeals and the time within which the present respondents might petition this Court for certiorari would run from the entry of the judgment as so modified. On such petition the respondents would not be precluded as to their objections to the judgment in respect to paragraphs (*e*), (*g*) and (*h*) of the order unless this Court had already passed on those objections; and the Court would have to consider then the very objections which it has the power to consider and determine now. *Klauber* v. *San Diego, etc., Co.*, 98 Cal. 105; *Lambert* v. *Bates*, 148 Cal. 146; *Adkins* v. *Children's Hospital*, 261 U. S. 525.

Mr. Justice Butler delivered the opinion of the Court.

The Federal Trade Commission made an order requiring respondents to cease and desist from certain methods of competition in interstate commerce found to be in violation of § 5, of the Federal Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717. 7 Federal Trade Commission Decisions 155. The order contains eight paragraphs designated by letters (a) to (h) inclusive. The respondents brought (b), (c), (e), (g) and (h) under review in the Circuit Court of Appeals. The first two were set aside, paragraph (e) was modified, and the last two were allowed to stand. 4 F. (2d) 457. This court granted certiorari (268 U. S. 684) on petition of the commission, which asks reversal of the decree as to paragraphs (b) and (c). No petition has been filed by respondents.

The facts were stipulated; and those here material are: Dealers in paper in each of the five principal jobbing centers in the States on the Pacific Coast have a local association. These centers are Seattle and Tacoma taken as one, Spokane, Portland, San Francisco and Los Angeles.

And there is a general association known as the Pacific States Paper Trade Association whose members are the paper dealers in these centers including most but not all of the members of the local associations, and some who do not belong to a local association. The respondents in this case are the five local associations, the general association, and their members.

The territory served by the members of each local association, while loosely defined, is that naturally tributary to the center where the members are located. The territory of Seattle and Tacoma is the northwestern part of Washington and Alaska; that of Spokane is eastern Washington, northern Idaho and western Montana; that of Portland is Oregon, southerly Washington and part of southern and western Idaho; that of San Francisco is the north half of California, a small portion of southern Oregon, and part of Nevada; and that of Los Angeles is the south half of California and part of Nevada and Arizona. A majority of the dealers in the Pacific Coast States are members of the associations, and they have 75 per cent. of the business in paper and paper products, exclusive of roll news paper, which for the most part is not handled by them.

Each local association distributes uniform price lists to its members to be observed in its territory within the State. The secretary of each is authorized to investigate complaints against members to determine whether they sell below the established prices; and three of the associations authorize the imposition of heavy fines on members for making such sales.

The Spokane Association in its list of prices established for Washington printed "suggested prices" for sales to purchasers in Idaho and western Montana, and there was a tacit or implied understanding that the prices suggested would be observed.

And these association lists are habitually carried and used by the salesmen of members in quoting prices and

making sales outside the State. No association has any requirement that such price lists be observed outside the State; and the quoting of, or the making of sales at, lower or different prices in such territory is not deemed an infraction of rules or trade regulations by reason of which any jobber or wholesaler may complain.

Among the prices fixed by each local association for sales by its members within the State where they are located are prices on what are called "mill shipments." These are sales or orders not requiring immediate delivery and capable of being filled by shipment from the place of manufacture. They include less than carload lots and also carload lots. The former are combined with other paper to make a carload which is shipped to the wholesaler as a single consignment. At destination the delivery is taken by the wholesaler and the portion intended for the purchaser is turned over to him. The carload shipments are made on directions specifying as the point of destination the place where delivery is to be made from the wholesaler to the purchaser. In some cases the wholesaler, in other cases the purchaser, is named as consignee. When so named the wholesaler either takes delivery and turns over the shipment to the purchaser or endorses the bill of lading to the purchaser who then receives the paper directly from the carrier. Where named as consignee, the purchaser takes delivery. In all cases the wholesaler orders the paper from the mill and pays for it. There is no contractual relation between the manufacturer and the purchaser from the wholesaler. These shipments are made from mills within and also from those without the State covered by the agreement fixing prices.

The commission in its findings substantially follows the stipulated facts, and, from them it draws certain inferences or conclusions. Referring to the prices fixed by the local associations, the commission said the habitual carrying and use of such price lists by member jobbers in

quoting prices and making sales outside the State, have a natural tendency to and do limit and lessen competition therein, and the result of such practice is fixed and uniform prices for such products within such territories. As to mill shipments, the commission finds the facts in accordance with the stipulation, and concludes that mill shipments from points outside the State to or for purchasers within the State are in interstate commerce until delivered to the purchaser, and that the inclusion of fixed and uniform prices for such sales in the price lists of the associations eliminates price competition.

Paragraph (b) of the commission's order is to prevent the local associations, their officers and members, separately or in combination, from using any price list fixed by agreement between wholesalers in soliciting or selling in interstate commerce, and from making and distributing any such price list intended for use in making such sales. Paragraph (c) prohibits making or acting under agreements fixing prices on mill shipments when the paper sold is shipped from outside the State where the wholesaler is located, and the making or distributing of price lists to be used for making such sales.

The Circuit Court of Appeals held that the stipulated facts do not sustain the commission's finding that the use of association prices by members outside the State where they are located has a tendency to lessen competition and to fix uniform prices in such territories. The validity of the inference or conclusion drawn by the commission and of this part of the order depends upon the proper estimation of the facts stipulated. The language specifically relating to such use of the agreed prices if considered alone might possibly be deemed insufficient. But the commission is not confined to so narrow a view of the case. That part of the stipulation properly may be taken with all the admitted facts and the inferences legitimately to be drawn from them.

The members of the associations dominate the paper trade in question. They are organized to further common purposes. They limit competition in intrastate trade by adherence to uniform prices fixed by agreements through combination. The facts admitted show a strong purpose and much diligence to that end. And some of their activities are for like purpose and have the same effect in the field of interstate commerce. Suggested prices for Idaho and Montana were sent out with the Spokane lists. There was an understanding that such prices would be followed. Mill shipments, whether shipped from within or from without the State, are subject to the agreed prices. From the standpoint of respondents, restraint upon price competition in their interstate commerce is as desirable as in their business local to the States. In both classes of business, they are stimulated by the same motive to lessen competition. All the salesmen while in intrastate territory are required to sell at prices fixed by agreement. And, when across the state line in interstate territories, they use the agreed lists in quoting prices and making sales. It does not appear whether the prices so fixed are adhered to in interstate business. The fact that there is no established rule that the lists shall be followed in taking orders for interstate shipments or that the quoting of lower prices is an infraction for which complaint may be made is not controlling in favor of respondents. An understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary. It would appear difficult for these jobbers to maintain a uniform price list in the State while making sales across the line at different and competing prices. The effective combination to restrain price competition on one side of the state line is not consistent with the absence of such restraint on the other. The organized maintenance of uniform prices in business local

to the States lends probative significance and weight to facts pointing in the direction of like restraint in the interstate territories. The use of the association prices by all the salesmen in making sales in interstate territories is not necessarily to be regarded as coincidence. There is ample ground for saying that such use results from the admitted combination. The failure of the stipulation to contain any direct statement on the subject does not require it to be found that salesmen are free to depart from the prices furnished them, or that the list used by one differs or may differ from that used by others in the same locality.

The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission. Its conclusion that the habitual use of the established list lessens competition and fixes prices in interstate territory cannot be said to be without sufficient support. Paragraph (b) does not go beyond what is justified by the findings. It is valid.

Paragraph (c) applies only to mill shipments from one State to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same State. The seller is free to have delivery made from any source within or without the State. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different States. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the State to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another State to or for

the retailer. "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Company* v. *United States,* 196 U. S. 375, 398. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier* v. *Alabama,* 218 U. S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 55. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 515. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. *Dozier* v. *Alabama, supra; Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, 113; *Lemke* v. *Farmers Grain Co., supra,* 55. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce.

The lower court cites and quotes from *Ware and Leland* v. *Mobile County,* 209 U. S. 405. Respondent cites *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, and asserts that it is identical with the last mentioned case and with the

one now before us. In the *Ware and Leland* case, brokers at their office at Mobile, Alabama, took orders from customers to buy and sell contracts for future deliveries of cotton and grain and sent the orders to another office of theirs for execution on an exchange or board of trade in New York, New Orleans or Chicago. Such contracts were for the most part closed out by sale or purchase of other contracts necessary to cover them. No actual deliveries were made except in a few instances; and then they were made outside Alabama at the place where the orders were sent for execution. Deliveries, if any, of cotton purchased for a customer were made to the brokers at the places where the exchanges are located. When the Mobile office of brokers made delivery of cotton on the sale of a future for a customer, the cotton was shipped by the customer from Alabama to the place of sale and there delivered through the brokers to the buyer. Delivery of grain on such contracts, when required, was made at Chicago. In the *Moore* case, the contracts considered were between members of the exchange made for the purchase or sale of cotton for future delivery; the cotton was represented by warehouse receipts issued by a licensed warehouse in New York and was deliverable from the warehouse. The transactions on exchanges and boards of trade, which were considered in these cases, are essentially local in character. It was well understood that they might be closed out without any delivery. And, while for the most part if not wholly, the cotton and grain deliverable under these contracts originated in other States and had theretofore been transported in interstate commerce, it was not contemplated by the parties, seller or buyer, that delivery would be made while the commodity remained in such commerce. It would be a mere chance if any such transaction should be completed by delivery of the commodity while still the subject of commerce among the States.

When regard is had to the facts and known course of business, it is quite clear that the transactions considered in these cases are essentially different from the mill shipments now before us.

And, as the contracts between the wholesaler and the retailer constitute a part of commerce among the States, the elimination of competition as to price by the application of the uniform prices fixed by the local associations was properly forbidden by the order of the commission. Paragraph (c) is valid.

Respondents, notwithstanding their failure to petition for certiorari, now ask for reversal of that part of the decree which leaves in force part of paragraph (e) and paragraphs (g) and (h). This court has the same power and authority as if the case had been carried here by appeal or writ of error. A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the decree reviewed. *Hubbard* v. *Tod,* 171 U. S. 474, 494; *French Republic* v. *Saratoga Vichy Co.,* 191 U. S. 427, 440; *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242. Cf. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 257. And, assuming power, we are not moved by any persuasive consideration to examine the parts of the commission's order to which respondents object.

That part of the decree which sets aside paragraphs (b) and (c) of the commission's order is reversed.

MAGUIRE AND COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 39. Argued December 1, 1926.—Decided January 3, 1927.

In a sale of cloth by the Government, a description, accompanying the advertisement for bids and giving the weight per yard, is not a warranty, when bidders are invited to inspect the goods before bidding and notified that bids subject to inspection will not be received. P. 69.

59 Ct. Cls. 575, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a claim based on an alleged breach of warranty upon the part of the Government, in a sale of surplus water-proof duck.

Mr. Harry Peyton, with whom *Messrs. A. E. Maves* and *W. W. Bride* were on the brief, for the appellant.

Solicitor General Mitchell for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Maguire Company filed its petition, under the Tucker Act, to recover from the United States for the alleged breach of a contract made by the Surplus Property Division of the War Department for the sale of a certain quantity of waterproof duck. The Court of Claims, on its findings of fact, dismissed the petition. 59 C. Cls. 575. And the case was brought here by appeal under § 242 of the Judicial Code, prior to the Jurisdictional Act of 1925.

The basis of the Company's contention is that it purchased, pursuant to an advertisement by the Surplus Property Division, certain material listed as olive drab waterproof duck, weighing 12.4 oz. per yard; that this description, according to commercial usage, referred to

the weight of the duck before it had been waterproofed, and indicated that it had weighed 12.4 oz. in that condition; but that the duck delivered under the contract, although then weighing 12.4 oz. or more, had weighed only 10.5 oz. before being waterproofed, and was of less value than the 12.4 oz. duck which it had purchased.

The findings of fact show that the Zone Supply Officer at Jeffersonville, Indiana, advertised for sale a list of surplus textiles containing an item No. 20, described as 121,964 yards of waterproof duck, "width, 29 inches; color, O. D.; weight, 12.4." Attached to this list was a letter stating that the inspection of the textiles was invited and might be made at the Supply Depot at Jeffersonville, where the material was stored; but that "bids subject to inspection" would not be received. The Company, a New York corporation, after seeing this list and the accompanying letter submitted, through an authorized agent, a bid for the material listed as item No. 20, at 36½ cents per yard. This was accepted by a letter in which the materials were described as "Duck, W. P. 29", O. D. 12.4 oz." The Company paid the purchase price; and the Government delivered to it all the material listed in item No. 20.

The Court of Claims also found that samples taken from this duck, both before and after delivery, weighed 13.4 oz., or more, per yard; that there were no recognized commercial standard weights of waterproof duck—the increased weight caused by waterproofing varying according to the process and ingredients used—and that it was the commercial practice to sell waterproof duck on samples without mentioning weight; and that the Government delivered to the Company "the actual material offered and described in item No. 20" of the surplus textile list and sold by the letter of acceptance.

In support of the judgment dismissing the petition the Court of Claims in its opinion said: "Neither the plain-

tiff nor its agent inspected the material before bidding or before consummating the sale. Inspection was invited by the Government, and it was expressly stated that no bids would be received subject to inspection after the bidding. The advertisement of sale and the letter accompanying it, which the plaintiff saw before bidding, put purchasers upon notice and charged them with the duty of seeing what they were buying before they bought. Purchasers were told, in effect, that if they bought something other than they thought they were buying they could not afterwards assert a claim upon the ground that they were mistaken in the character and quality of the materials. . . . If the plaintiff received from the Government a different material from that which it thought it had bought it is not the fault of the Government, and the plaintiff can not recover for its own negligence." And, "As a matter of fact the Government delivered to the plaintiff exactly the material which it advertised for sale."

We think that the construction and effect of the advertisement and accompanying letter were correctly stated by the Court of Claims. In view of the specific statements in the letter that inspection of the materials was invited, and that they would not be sold subject to inspection, the description of the weight of the duck cannot be regarded as in the nature of a warranty. In this aspect the present case is analogous to *Lipshitz & Cohen* v. *United States,* 269 U. S. 90, 92. There, an agent of the United States having listed junk for sale at several forts, setting forth the weights and kinds of each, accompanied by a statement that the weights shown were approximate and must be accepted as correct by the bidder, the plaintiffs, without inspection or other information, bid a lump sum for the material, " as is where is." And, although the quantities turned out to be much less than those shown in the list, it was held that the plain-

tiff's had no cause of action, since the naming of quantities "cannot be regarded as in the nature of a warranty, but merely an estimate of the probable amounts in reference to which good faith only could be required of the party making it."

This principle is conclusive of the present case. And for this reason, if no other, a motion made by the Maguire Company to remand the cause to the Court of Claims for a further finding of fact as to the weight of the duck before waterproofing, must be denied.

The judgment is

Affirmed.

LIBERTY WAREHOUSE COMPANY ET AL. *v.* GRANNIS, COMMONWEALTH ATTORNEY.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 60. Argued December 7, 1926.—Decided January 3, 1927.

1. Under Art. III of the Constitution the jurisdiction of the federal courts is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them and of pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case. P. 73.
2. So *held* of a proceeding in the District Court brought under the Declaratory Judgment Law of Kentucky, against a prosecuting attorney, for the purpose of obtaining a declaration concerning the construction and validity of an act of the State regulating sales of leaf tobacco at public auction, in which there was no allegation that the plaintiffs had done or were contemplating any of the things forbidden by and punishable under the Act, or that the defendant threatened proceedings against them; or any prayer for relief against him.
3. The federal Conformity Act relates only to "practice, pleadings, and forms and modes of procedure"; and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations. P. 76.

4. Section 274a of the Judicial Code relates merely to a case in which the objection is to the side of the court on which the suit is brought, and not to the entire lack of jurisdiction in the court. P. 76.

Affirmed.

ERROR to a judgment of the District Court dismissing for want of jurisdiction an action brought under the Declaratory Judgment Law of Kentucky.

Mr. Allan D. Cole, with whom *Mr. J. M. Collins* was on the brief, for the plaintiff in error.

Messrs. Aaron Sapiro and *Robert S. Marx* were on the brief, for the defendant in error.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

This proceeding was commenced by a petition filed by the plaintiffs in error on the law side of the Federal District Court for Eastern Kentucky, seeking to obtain a judgment declaring their rights under an Act of the Kentucky Legislature.

The Declaratory Judgment Law of Kentucky, Acts of 1922, ch. 83, provides that in any action in a court of record of that Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may, by means of a petition on the law or equity side of the court, as the nature of the case may require, ask for and obtain " a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked; " and that further relief, based on such declaratory judgment, may be granted by the court whenever necessary or proper, either in the same proceeding or in an independent action, upon notice to any adverse party whose rights have been adjudicated by the declaratory judgment.

The petition alleged that the plaintiffs, a Kentucky corporation and a citizen of North Carolina, were engaged in operating a looseleaf tobacco warehouse in Kentucky, in which they sold leaf tobacco at public auction for their customers and patrons; that their rights were materially and seriously affected by chapter 10 of the Kentucky Acts of 1924, regulating the sales of leaf tobacco at public auction; that this Act was invalid and repugnant to the Bill of Rights and Constitution of Kentucky, the commerce clause of the Constitution of the United States, the due process and equal protection clauses of the Fourteenth Amendment, and the Sherman Anti-Trust Law; that an actual controversy existed with respect thereto, in that the plaintiffs had been threatened with various civil and criminal punishments and penalties for the violation of the Act, which were about to be enforced thereunder; that in conducting their business, it was necessary for them to know whether the Act was valid or invalid, and whether they were liable for the crimes therein denounced, and subject to the fines and penalties it prescribed, and they could not continue their business without a financial loss, amounting to confiscation of their rights, business and property, unless the court made a declaration of their rights and duties under the Act; that they made this application to the court in accordance with the Federal Conformity Statute and the Declaratory Judgment Law of Kentucky "for the purpose of securing a declaration of their rights and duties" under the Act of 1924, and having the "court determine whether in the conduct of their business it will be necessary for them to comply" with the provisions of the Act, or whether it is "invalid in whole or in part, and if so, in what part"; and that the Commonwealth Attorney was made a party defendant as the representative of the Commonwealth charged with the duty of enforcing the Act, and who, as such, "prepared the indictments referred to herein." No

other reference, however, was made to any such indictments in the petition.

The plaintiffs prayed the court "by its judgment to declare what their rights and duties under said Act of 1924 are, and that a judgment be rendered declaring said Act of 1924 invalid, and for all proper relief."

The defendant demurred to the petition, on the ground, among others, that the court had no jurisdiction of the cause of action set forth, having no power or authority as a Federal Court to entertain a proceeding for a declaration of the rights of parties or to act under the provisions of the Declaratory Judgment Law of Kentucky. This demurrer was sustained. Twelve days later a final judgment was entered, reciting that the plaintiffs having failed to amend their petition, and the court being of opinion that it had no jurisdiction of the action, the same was dismissed. This direct writ of error was allowed upon the question of jurisdiction, under § 238 of the Judicial Code, before the amendment made by the Jurisdictional Act of 1925 became effective.

The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.

The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.

We need not review these at length. It suffices to say that in the light of the decisions in *Muskrat* v. *United States,* 219 U. S. 346, 357; *Fairchild* v. *Hughes,* 258 U. S. 126, 129; *Texas* v. *Interstate Commerce Comm.,* 258 U. S. 158, 162; *Keller* v. *Potomac Elec. Co.,* 261 U. S. 428, 444; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *New Jersey* v. *Sargent,* 269 U. S. 328, 330; and *Postum Cereal Co.* v. *California Fig-Nut Co.,* 272 U. S. 693, in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to "cases" and "controversies" in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.

In the *Muskrat* case, *supra,* in which it was held that it was not within the constitutional authority of this Court to entertain an appeal from the Court of Claims in a suit brought, under a permissive act of Congress, by members of the Cherokee Tribe of Indians to determine the constitutional validity of certain congressional enactments, the Court, in an extended opinion reviewing the earlier

cases, said: "As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred. . . . It is . . . evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination . . . of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. . . . This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. . . . The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question."

And in *New Jersey* v. *Sargent, supra,* it was held that this Court could not entertain a bill for an injunction against federal officers charged with the administration

of a federal statute, which did not show that any justiciable right of the State was being, or about to be, affected prejudicially by the application of the statute, but, in effect, sought merely to obtain an abstract judicial declaration that, in certain features, the statute exceeded the authority of Congress and encroached upon that of the State.

It follows necessarily from these decisions that the District Court, as a court of the United States established under Article III of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment.

Manifestly the Federal Conformity Statute, R. S. § 914 (U. S. Code, Tit. 28, § 724) conferred upon the court no jurisdiction to proceed in accordance with the Declaratory Judgment Law of Kentucky. This statute relates only to "practice, pleadings, and forms and modes of procedure;" and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations. See *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 209; *Mexican Central Ry.* v. *Pinkney,* 149 U. S. 194, 206.

The plaintiffs in error also rely in argument here upon § 274a of the Judicial Code (U. S. Code, Tit. 28, § 397), which provides that on finding that a suit at law should have been brought in equity, or *vice versa,* the court shall order any amendments to the pleadings which may be necessary to conform to the proper practice, and that any party may amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. This statute relates merely to a case in which the objection is to the side of the court on which the suit is brought, and not to the entire lack of jurisdiction in the court. It is plain that it has no application here, where the court was without jurisdiction to entertain the petition for a declaratory judgment either upon the equity or the law side.

The judgment dismissing the petition for want of jurisdiction is accordingly

Affirmed.

WONG TAI *v.* UNITED STATES.

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

No. 79. Argued November 24, 1926.—Decided January 3, 1927.

1. The Court need not consider objections not contained in the assignment of errors but set out for the first time in the briefs filed here. P. 78.
2. To comply with the Sixth Amendment, an indictment must be sufficiently specific to advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial and, after judgment, be able to plead the record and judgment in bar of a further prosecution for the same offense. P. 80.
3. In an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense. P. 81.
4. An application for a bill of particulars in a criminal case is addressed to the sound discretion of the trial court. P. 82.
5. An exception is necessary for review of an alleged assigned error in charging a jury. P. 83.

Affirmed.

ERROR to a judgment of the District Court in a prosecution for conspiracy to commit offenses against the United States in violation of the Opium Act.

Mr. Marshall B. Woodworth, with whom *Mr. Frank J. Hennessy* was on the brief, for the plaintiff in error.

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

MR. JUSTICE SANFORD delivered the opinion of the Court.

The plaintiff in error was indicted in the Federal District Court for Northern California under § 37 of the Criminal Code,[1] for conspiring to commit offenses against the United States in violation of the Opium Act of 1909, as amended in 1914 and 1922.[2] He was tried and convicted; and thereupon brought the case here by a direct writ of error under § 238 of the Judicial Code, before the amendment made by the Jurisdictional Act of 1925 became effective, as one involving the application of the Constitution and in which the constitutionality of a law of the United States was drawn in question.

The errors assigned and specified here are that the Opium Act, as amended, is repugnant to the due process and self-incrimination clauses of the Fifth Amendment; that the indictment is invalid under the Sixth Amendment; and that the court erred in overruling a demurrer to the indictment, denying a motion for a bill of particulars and a motion in arrest of judgment, and in its charge to the jury.

1. There was no challenge to the constitutionality of the Opium Act in the District Court. This question was not presented in that court and was neither considered nor determined by it. The objections to the constitutionality of the Act which were set out in the assignment of errors are fully answered in *Yee Hem* v. *United States,* 268 U. S. 178, decided after this writ of error had been

[1] This section provides that: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy" shall be fined, or imprisoned, or both.

[2] Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Acts of January 17, 1914, c. 9, 38 Stat. 275, and May 26, 1922, c. 202, 42 Stat. 596.

sued out; and the additional objections set forth for the first time in the brief for the defendant in this Court, do not require consideration here.

2. The case is, however, otherwise brought here under the writ of error, by reason of a challenge which the defendant interposed to the validity of the indictment on the ground that it did not inform him of the " nature and cause of the accusation " as required by the Sixth Amendment.

The Opium Act, as amended, provides, in § 2(c), that if any person " receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale " of any narcotic drug " after being imported " into the United States, " knowing the same to have been imported contrary to law," he shall upon conviction be fined or imprisoned. 42 Stat. 596.

The indictment, which was returned in September, 1924, charged that on or about September 10, 1922, the exact date being to the grand jurors unknown, the defendant, being in the City and County of San Francisco, within the jurisdiction of the court, conspired to commit the acts made offenses by the Opium Act, as amended, that is to say, that at the time and place aforesaid, he knowingly and feloniously conspired and agreed with one Ben Drew and divers other persons to the grand jurors unknown, to " knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to-wit, smoking opium, the said defendant well knowing the said drugs to have been imported into the United States and into the jurisdiction of this Court contrary to law "; that this conspiracy continued throughout all the times after September, 1922, mentioned in the indictment and particularly at the time of the commission of each of the overt acts thereinafter set forth; and that in furtherance of this conspiracy and to effect its object, the defendant,

in the City and County of San Francisco received, bought, sold and facilitated the transportation after importation of three small sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923, without the knowledge and consent of the customs officers in charge of the port at San Francisco, and also, to effect the same object, and in the same place, received, bought, etc., after importation other sacks containing tins of opium, which likewise arrived without the knowledge and consent of said customs officers, namely, five sacks which arrived on the Steamer Nanking on or about May 10, 1923, three sacks which arrived on the Steamer President Wilson on or about May 25, 1923, five sacks which arrived on the Steamer Taiyo Maru on or about May 27, 1923, five sacks which arrived on the Steamer President Taft on or about June 29, 1923, two sacks which arrived on the Steamer President Lincoln, on or about August 19, 1923, and one sack which arrived on the Steamer President Cleveland on or about February 3, 1924, the exact number of tins of opium in these several sacks and the exact dates of their arrival being unknown to the grand jurors.

The defendant demurred to the indictment on the ground that its allegations as to the conspiracy and overt acts were so vague, indefinite and uncertain that they did not inform him of the nature and cause of the accusation as required by the Sixth Amendment, and enable him to make proper defense or plead his jeopardy in bar of a later prosecution for the same offense. This demurrer and a subsequent motion made in arrest of judgment on the same grounds, were both overruled by the District Court.

While it is essential to the validity of an indictment under the Federal Constitution and laws that it shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for

trial and, after judgment, be able to plead the record and judgment in bar of a further prosecution for the same offense, *Bartell* v. *United States,* 227 U. S. 427, 431, we find in the present indictment no lack of compliance with this requirement. It charged the defendant, with definiteness and certainty and reasonable particularity as to time and place, with conspiring with a named person and others to commit certain specified offenses in violation of the Opium Act; and further charged him, in like manner, with doing various specified acts to effect the object of the conspiracy. It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States,* 207 U. S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense, *Thornton* v. *United States,* 271 U. S. 414, 423; *Jelke* v. *United States* (C. C. A.), 255 Fed. 264, 275; *Anderson* v. *United States* (C. C. A.), 260 Fed. 557, 558; *Wolf* v. *United States* (C. C. A.), 283 Fed. 885, 886; *Goldberg* v. *United States* (C. C. A.), 277 Fed. 211, 213. In charging such a conspiracy "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary." *Williamson* v. *United States, supra,* 447; *Goldberg* v. *United States, supra,* 213. That this requirement was complied with in the present indictment is clear. In *Keck* v. *United States,* 172 U. S. 434, upon which the defendant relies, the indictment was not, as here, for conspiring to commit offenses, but for committing the substantive offenses. And in *Hartson* v. *United States* (C. C. A.), 14 F. (2d) 561, upon which he also relies, a count charging a single conspiracy to commit several offenses,

was held sufficient, although another count charging in like manner the commission of one of these substantive offenses, was held insufficient. In the present case we think that the allegations of the indictment, both in respect to the conspiracy and the overt acts, sufficiently advised the defendant of the nature and cause of the accusation, and with the requisite particularity. We conclude that there was no invalidity in the indictment under the Sixth Amendment, and that both the demurrer and the motion in arrest of judgment were properly overruled.

3. The defendant also made a motion, supported by affidavit, for a detailed bill of particulars, setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment, with various specifications as to times, places, names of persons, quantities, prices, containers, buildings, agencies, instrumentalities, etc., and the manner in which and the specific circumstances under which they were committed. This motion—which in effect sought a complete discovery of the Government's case in reference to the overt acts—was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called " for too much details of evidence."

The application for the bill of particulars was one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed. See *Rosen* v. *United States,* 161 U. S. 29, 40; *Dunlop* v. *United States,* 165 U. S. 486, 491; *Knauer* v. *United States* (C. C. A.), 237 Fed. 8, 13; *Horowitz* v. *United States* (C. C. A.), 262 Fed. 48, 49; *Savage* v. *United States* (C. C. A.), 270 Fed. 14, 18. And there is nothing in the record indicating that the defendant was taken by surprise in the progress of the trial, or that his substantial rights were prejudiced in any way by the refusal to require the bill of particulars. See *Connors* v. *United States,* 158 U. S. 408, 411; *Armour Packing Co.*

v. *United States,* 209 U. S. 56, 84; *New York Central R. R.* v. *United States,* 212 U. S. 481, 497.

4. Error is also assigned as to a statement made in the charge to the jury in respect to the defendant's knowledge that certain opium had been unlawfully imported; but it suffices to say that this was not excepted to.

The judgment is

Affirmed.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND ET AL. *v.* ATTLEBORO STEAM & ELECTRIC COMPANY.

CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND.

No. 217. Argued October 11, 12, 1926.—Decided January 3, 1927.

Where a company engaged in the generation and sale of electricity in one State enters into a time contract with another company in an adjacent State, whereby current, to be paid for at an agreed rate, is delivered by the first to the second company at the state line and thence transmitted by the second company and sold to its customers in the second State, the transaction, and the transmission of the current, are interstate commerce, and the rate is not subject afterwards to regulation by the first State, though this be deemed necessary for the protection of the first company and its local consumers. *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, distinguished. P. 86.

46 R. I. 496, affirmed.

CERTIORARI (269 U. S. 546) to a judgment of the Supreme Court of Rhode Island which, on appeal, disapproved an order of the Rhode Island Public Utilities Commission, increasing the rate chargeable to the Attleboro Company by the Narragansett Electric Lighting Company—the moving party before the commission, and one of the petitioners here—for electricity furnished at the Rhode Island and Massachusetts line.

Messrs. R. W. Boyden and *Arthur M. Allen,* with whom *Messrs. Charles P. Sisson* and *Frank D. Comerford* were on the brief, for the petitioners.

Mr. Robert G. Dodge, with whom *Messrs. Archibald C. Matteson* and *Harold S. Davis* were on the brief, for the respondent.

Mr. Justice Sanford delivered the opinion of the Court.

This case involves the constitutional validity of an order of the Public Utilities Commission of Rhode Island putting into effect a schedule of prices applying to the sale of electric current in interstate commerce.

The Narragansett Electric Lighting Company is a Rhode Island corporation engaged in manufacturing electric current at its generating plant in the city of Providence and selling such current generally for light, heat and power. The Attleboro Steam & Electric Company is a Massachusetts corporation engaged in supplying electric current for public and private use in the city of Attleboro and its vicinity in that State.

In 1917, these companies entered into a contract by which the Narragansett Company agreed to sell, and the Attleboro Company to buy, for a period of twenty years, all the electricity required by the Attleboro Company for its own use and for sale in the city of Attleboro and the adjacent territory, at a specified basic rate; the current to be delivered by the Narragansett Company at the State line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts, where it was to be metered. The Narragansett Company filed with the Public Utilities Commission of Rhode Island a schedule setting out the rate and general terms of the contract and was authorized by the Commission to grant the

Attleboro Company the special rate therein shown; and the two companies then entered upon the performance of the contract. Current was thereafter supplied in accordance with its terms; and the generating plant of the Attleboro Company was dismantled.

In 1924 the Narragansett Company—having previously made an unsuccessful attempt to obtain an increase of the special rate to the Attleboro Company[1]—filed with the Rhode Island Commission a new schedule, purporting to cancel the original schedule and establish an increased rate for electric current supplied, in specified minimum quantities, to electric lighting companies for their own use or sale to their customers and delivered either in Rhode Island or at the State line. The Attleboro Company was in fact the only customer of the Narragansett Company to which this new schedule would apply.[2]

The Commission thereupon instituted an investigation as to the contract rate and the proposed rate. After a hearing at which both companies were represented, the Commission found that, owing principally to the increased cost of generating electricity, the Narragansett Company in rendering service to the Attleboro Company was suffering an operating loss, without any return on the investment devoted to such service, while the rates to

[1] In 1921 the Commission had authorized the Narragansett Company to put into effect a schedule increasing the special rate to the Attleboro Company; but its enforcement had been enjoined on the ground of the lack of an essential finding by the Commission. *Attleboro Steam & E. Co.* v. *Narragansett E. Light Co.* (D. C.), 295 Fed. 895.

[2] No other electric lighting company supplied by the Narragansett Company required, either then or prospectively, the quantity of current necessary to make the proposed rate applicable. The Commission stated that the Attleboro Company was the only customer of the Narragansett Company affected by the proposed rate; and the brief for the petitioners states that the Attleboro Company was the only customer then falling within the schedule class.

its other customers yielded a fair return; that the contract rate was unreasonable and a continuance of service to the Attleboro Company under it would be detrimental to the general public welfare and prevent the Narragansett Company from performing its full duty to its other customers;[3] and that the proposed rate was reasonable and would yield a fair return, and no more, for the service to the Attleboro Company. And the Commission thereupon made an order putting into effect the rate contained in the new schedule.

From this order the Attleboro Company prosecuted an appeal to the Supreme Court of Rhode Island which—considering only one of the various objections urged—held, on the authority of *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, that the order of the Commission imposed a direct burden on interstate commerce and was invalid because of conflict with the commerce clause of the Constitution; and entered a decree reversing the order and directing that the rate investigation be dismissed. 46 R. I. 496.

It is conceded, rightly, that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the State line. The transmission of electric current from one State to another, like that of gas, is interstate commerce, *Coal & Coke Co.* v. *Pub. Serv. Comm.*, 84 W. Va. 662, 669, and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination. *Peoples' Gas Co.* v. *Pub. Serv. Comm'n*, 270 U. S. 550, 554.

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[3] The evidence showed that in 1923 the Narragansett Company had 71,554 customers, and that about one thirty-fifth of the current which it produced went to the Attleboro Company.

The petitioners contend, however, that the Rhode Island Commission cannot effectively exercise its power to regulate the rates for electricity furnished by the Narragansett Company to local consumers, without also regulating the rates for the other service which it furnishes; that if the Narragansett Company continues to furnish electricity to Attleboro Company at a loss this will tend to increase the burden on the local consumers and impair the ability of the Narragansett Company to give them good service at reasonable prices; and that, therefore, the order of the Commission prescribing a reasonable rate for the interstate service to the Attleboro Company should be sustained as being essentially a local regulation, necessary to the protection of matters of local interest, and affecting interstate commerce only indirectly and incidentally. In support of this contention, they rely chiefly upon *Pennsylvania Gas Co.* v. *Pub. Serv. Com.*, 252 U. S. 23; and the controlling question presented is whether the present case comes within the rule of the *Pennsylvania Gas Co.* case or that of the *Kansas Gas Co.* case upon which the Attleboro Company relies.

In the *Pennsylvania Gas Co.* case, the Company transmitted natural gas by a main pipe line from the source of supply in Pennsylvania to a point of distribution in a city in New York, which it there subdivided and sold at retail to local consumers supplied from the main by pipes laid through the streets of the city. In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a State may not "directly" regulate or burden interstate commerce, it may in some instances, until the subject-matter is regulated by Congress, pass laws "indirectly" affecting such commerce, when needed to protect or regulate matters of local interest; that the thing which the New York Commission had undertaken to regulate, while part of an interstate transmission, was "local in its na-

ture," pertaining to the furnishing of gas to local consumers, and the service rendered to them was "essentially local," being similar to that of a local plant furnishing gas to consumers in a city; and that such "local service" was not of the character which required general and uniform regulation of rates by congressional action, even if the local rates might "affect" the interstate business of the Company.

In the *Kansas Gas Co.* case, the Company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local consumers. In holding that the rate which the Company charged for the gas sold to the distributing companies—those at which these companies sold to the local consumers not being involved—was not subject to regulation by the Public Utilities Commission of Missouri, the court said that, while in the absence of congressional action a State may generally enact laws of internal police, although they have an indirect effect upon interstate commerce, "the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce," and a state enactment imposing such a "*direct burden*" must fall, being a direct restraint of that which in the absence of Federal regulation should be free, *Minnesota Rate Cases,* 230 U. S. 352, 396; that the sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve;" that in the *Pennsylvania Gas Co.* case, the decision rested on the ground that the serv-

ice to the consumers for which the regulated charge was made, was "essentially local," and the things done were after the business in its essentially national aspect had come to an end—the supplying of local consumers being "a local business," even though the gas be brought from another State, in which the local interest is paramount and the interference with interstate commerce, if any, indirect and of minor importance; but that in the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of and requiring uniformity of regulation," which, "even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

It is clear that the present case is controlled by the *Kansas Gas Co.* case. The order of the Rhode Island Commission is not, as in the *Pennsylvania Gas Co.* case, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 199; *Real Silk Mills* v. *Portland*, 268 U. S. 325, 336; *Di Santo* v. *Pennsylvania, ante*, p. 34. It is immaterial that the Narragansett Company is a Rhode Island corporation subject to regulation by the Commission in its local business, or that Rhode Island is the State from which the electric current is transmitted

in interstate commerce, and not that in which it is received, as in the *Kansas Gas Co.* case. The forwarding state obviously has no more authority than the receiving State to place a direct burden upon interstate commerce. *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596. Nor is it material that the general business of the Narragansett Company appears to be chiefly local, while in the *Kansas Gas Co.* case the Company was principally engaged in interstate business. The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the State because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. See *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204, 220; *Hanley* v. *Kansas City S. Ry. Co.,* 187 U. S. 617, 620.

The decree is accordingly

Affirmed.

MR. JUSTICE BRANDEIS, dissenting.

The business of the Narragansett Company is an intrastate one. The only electricity sold for use without the State is that agreed to be delivered to the Attleboro Company. That company takes less than 3 per cent. of the electricity produced and manufactured by the Narragansett, which has over 70,000 customers in Rhode Island. The problem is essentially local in character. The Commission found as a fact that continuance of the service to the Attleboro Company at the existing rate would prevent the Narragansett from performing its full duty towards its other customers and would be detrimental to the general public welfare. It issued the order specifically to prevent unjust discrimination and to prevent unjust increase in the price to other customers. The Narragansett, a public service corporation of Rhode Island, is subject to regulation by that State. The order complained of is clearly valid as an exercise of the police power, unless it violates the Commerce Clause.

The power of the State to regulate the selling price of electricity produced and distributed by it within the State and to prevent discrimination is not affected by the fact that the supply is furnished under a long-term contract. *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372. If the Commission lacks the power exercised, it is solely because the electricity is delivered for use in another State. That fact makes the transaction interstate commerce, and Congress has power to legislate on the subject. It has not done so, nor has it legislated on any allied subject, so there can be no contention that it has occupied the field. Nor is this a case in which it can be said that the silence of Congress is a command that the Rhode Island utility shall remain free from the public regulation—that it shall be free to discriminate against the citizens of the State by which it was incorporated and in which it does business. That

State may not, of course, obstruct or directly burden interstate commerce. But to prevent discrimination in the price of electricity wherever used does not obstruct or place a direct burden upon interstate commerce. Such regulation or action is unlike the burden imposed where a transportation rate is fixed. *Wabash, St. Louis & Pacific R. R. Co.* v. *Illinois,* 118 U. S. 557, or where property moving in interstate commerce is taxed. *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366. The burden resulting from the order here in question resembles more nearly that increase in the cost of an article produced and to be delivered which arises by reason of higher taxes laid upon plant, operations or profits, *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, 305; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, or which arises by reason of expenditures required under police regulations. *Pittsburgh & Southern Coal Co.* v. *Louisiana,* 156 U. S. 590; *Sligh* v. *Kirkwood,* 237 U. S. 52; *Merchants Exchange* v. *Missouri,* 248 U. S. 365, 368. It is like the regulation sustained in *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, where an order of the New York Public Service Commission fixed the rates at which gas piped from without the State and delivered directly to the consumers might be sold.

The case at bar seems to me distinguishable from others in which the state regulation has been held precluded by the Commerce Clause. In *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298, this Court held void a regulation which fixed the rates at which gas piped from without the State and delivered to distributing companies could be sold to the latter. The *Pennsylvania Gas Co.* case was distinguished in that there "the things done were local. . . . The business of supplying on demand, local consumers is a local business, even though the gas be brought from another State and drawn directly from interstate mains. . . . In such case the local interest

is paramount. . . . But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities . . . in different states. The paramount interest is not local but national . . ." (p. 309). It was there emphasized that the "business of the Supply Company, with an exception not important here, [was] wholly interstate." (p. 306.) In *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 192, where a North Dakota regulation was held invalid, "about 90 per cent. [of the wheat was] sold within the state to buyers who purchase for shipment, and ship, to terminal markets outside the state" and the "price paid at the country elevators rises and falls with the price at the terminal markets." In these two cases the burden was deemed a direct one because the businesses were essentially interstate. In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, the state regulation was held void as discriminating against interstate commerce.

In my opinion the judgment below should be reversed.

OKLAHOMA *v.* TEXAS, UNITED STATES, INTERVENER.

No. 6, Original. Decree entered January 3, 1927.

Decree declaring part of the boundary between Texas and Oklahoma; appointing and instructing a commissioner to survey and mark it, subject to approval of the Court; with provisions as to costs.

Announced by Mr. Justice Sanford.

This cause having been heard and submitted under the counterclaim of the State of Texas, and the Court having considered the same and announced its conclusions in an opinion delivered October 11, 1926 [272 U. S. 21], it is ordered, adjudged and decreed as follows:

1. The boundary between the State of Texas and the State of Oklahoma constituting the eastern boundary of

the Panhandle of Texas and the main western boundary of Oklahoma, is the line of the true one-hundredth meridian of longitude west from Greenwich, extending north from its intersection with the south bank of the South Fork of Red River to its intersection with the line of the parallel of 36 degrees 30 minutes north latitude.

2. Samuel S. Gannett, geodetic and astronomic engineer, is designated as commissioner to run, locate and mark the boundary between the two States as determined by this decree. In ascertaining and locating the line of said meridian the commissioner shall use the most accurate method now known to science and applicable in that locality; and he shall mark the boundary, as thus ascertained, by establishing permanent monuments thereon, suitably marked and at appropriate distances.

3. The commissioner shall include in his report a description of the monuments so established and of their locations. And he shall file with his report the field notes of his survey, showing the method used by him in ascertaining and locating the line of the meridian, and a map showing the boundary line as run and marked by him; also ten copies of his report and map.

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

5. The work of the commissioner shall be subject in all its parts to the approval of the Court. One copy each of the commissioner's report and map shall be promptly transmitted by the clerk to the Governors of the two States and the Secretary of the Interior; and exceptions or objections to the commissioner's report, if there be such, shall be presented to the Court, or, if it be not in

session, filed with the clerk, within forty days after the report is filed.

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

7. All the costs of executing this decree, including the compensation and expenses of the commissioner, shall be borne in three equal parts by the two States and the United States.

McGUIRE *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued November 24, 1926.—Decided January 3, 1927.

Samples of intoxicating liquor constituting part of a quantity seized by federal officers under a valid search warrant may consistently with the Fourth and Fifth Amendments be used as evidence against the occupant of the premises, in a prosecution under the Prohibition Act, even though when they made the seizure the officers unlawfully destroyed the remainder of the liquor, and even assuming that, by so doing, they became civilly liable as trespassers *ab initio*. P. 97.

ANSWER to questions propounded by the Circuit Court of Appeals, 6 Fed. (2d) 276, upon review of a conviction of McGuire in the District Court for a violation of the Prohibition Act. 300 Fed. 98.

Mr. Ransom H. Gillett for the plaintiff in error.

Congress never intended to authorize government officers to summarily destroy either liquor or any other kind of property which they seized when acting under the authority conferred upon them by a search warrant. *Steele* v. *United States,* 267 U. S. 498; *United States* v. *9 Bbls. Beer,* 6 Fed. (2d) 401; *Murby* v. *United States,*

293 Fed. 849; *Giles* v. *United States,* 284 Fed. 208; *In re Quirk,* 1 Fed. (2d) 484; *Godat* v. *McCarthy,* 283 Fed. 689; *United States* v. *Certain Intoxicating Liquor,* 291 Fed. 717; *Keefe* v. *Clark,* 287 Fed. 372. The government officers were trespassers *ab initio. Averill* v. *Smith,* 17 Wall. 82; *United States* v. *Cooper,* 295 Fed. 709; *Allen* v. *Crofoot,* 5 Wendell (N. Y.) 507. *B. & M. R. R.* v. *Small,* 85 Me. 462.

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

For the purposes of the present case the revenue officers did not become trespassers *ab initio* because they destroyed a part of the liquor seized. *Hurley* v. *United States,* 300 Fed. 75; *In re Quirk,* 1 F. (2d) 484; *United States* v. *Clark,* 298 Fed. 533; *Giacolone* v. *United States,* 13 Fed. (2d) 108; *United States* v. *Old Dominion Warehouse,* 10 F. (2d) 736; *People* v. *Schregardus,* 226 Mich. 279; *State* v. *Germain,* 132 Atl. Rep. 734; *United States* v. *Cooper,* 295 Fed. 709; *Six Carpenters,* 8 Coke 146; *Allen* v. *Crofoot,* 5 Wend. 506. Distinguishing, *Averill* v. *Smith,* 17 Wall. 82; *Ferrin* v. *Symonds,* 11 N. H. 363.

Mr. Justice Stone delivered the opinion of the Court.

McGuire was convicted in the District Court for northern New York of the crime of possessing intoxicating liquor in violation of the National Prohibition Act. 300 Fed. 98. On review of the judgment of conviction, the Court of Appeals for the Second Circuit certified to this Court two questions concerning which it desires instructions. 6 Fed. (2d) 576, § 239 Jud. Code.

The certificate states that before the filing of the information on which McGuire was convicted, a search warrant was issued by a United States Commissioner com-

manding certain revenue agents to enter and search described premises for liquors alleged to be possessed by McGuire. The officers named, acting under the warrant, searched the premises, discovering several gallons of intoxicating liquor which they seized. While there, they destroyed without court order or other legal authority all the seized liquor except one quart of whiskey and one quart of alcohol, which they retained as evidence. On the trial the liquor retained was received in evidence over the objection that it was inadmissible because of the destruction of the other liquor. The questions certified are:

"1st. Were the officers of the law by reason of their action in destroying the liquors seized trespassers *ab initio?*

"If the answer to the first question is in the affirmative, we ask

"2d. Was the admission in evidence of the samples of liquor unlawful?"

It is contended that the officers by destroying the seized liquor became trespassers *ab initio;* that they thus lost the protection and authority conferred upon them by the search warrant; that therefore the seizure of the liquor, both that destroyed and that retained as evidence, was illegal and prohibited by the Fourth Amendment; and that the reception of the liquor in evidence violated the Fourth and Fifth Amendments to the Constitution. This conclusion has received some support in judicial decisions. *United States* v. *Cooper,* 295 Fed. 709; cf. *Godat* v. *McCarthy,* 283 Fed. 689. But the weight of authority is against it. *Hurley* v. *United States,* 300 Fed. 75 (overruling *United States* v. *Cooper, supra*); *Giacolone* v. *United States,* 13 Fed. (2d) 108; *In re Quirk,* 1 Fed. (2d) 484; *United States* v. *Clark,* 298 Fed. 533; *People* v. *Schregardus,* 226 Mich. 279.

That the destruction of the liquor by the officers was in itself an illegal and oppressive act is conceded.[1] But it does not follow that the seizure of the liquor which was retained violated constitutional immunities of the defendant or that the evidence was improperly received. The arguments advanced in behalf of the accused concern primarily the personal liability of the officers making the search and seizure for their unlawful destruction of a part of the liquor seized. They have at most a remote and artificial bearing upon the right of the government to introduce in evidence the liquor seized under a proper warrant.

The doctrine of trespass *ab initio,* chiefly relied upon, is usually traced to the case of the *Six Carpenters,* 8 Coke 146(a). There, in a civil action for trespass, the principle was announced that where one enters the premises of another under authority of law, his subsequent misconduct while there taints the entry from the beginning with illegality. See as to the origin of the rule, *Commonwealth* v. *Rubin,* 165 Mass. 453, 455. This fiction, obviously invoked in support of a policy of penalizing the unauthorized acts of those who had entered under authority of

[1] Section 25 of the National Prohibition Act provides for the issuance of search warrants pursuant to the requirements of Title XI of the Espionage Act; June 15, 1917, c. 30, 40 Stat. 228–230, and that seized property "be subject to such disposition as the court may make thereof." The Espionage Act regulates the issuance, execution and return of warrants. If the grounds on which the warrant was issued be controverted, a hearing before a judge or commissioner must be held (§ 15); and the property returned if erroneously taken. But if the warrant properly issued and the property seized was that described in the warrant, "then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law" (§ 16). "An officer who in executing a search warrant wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1000 or imprisoned not more than one year" (§ 21).

law, has only been applied as a rule of liability in civil actions against them. Its extension is not favored. See Salmond, *Law of Torts,* 5th Ed. § 54; Jeremiah Smith, *Surviving Fictions,* 27 Yale Law Journal, 147, 164, *et seq.* Thus it has been held to have no application in criminal actions against the trespasser. *State* v. *Moore,* 12 N. H. 42. Nor does the unlawful distraint or attachment of certain articles make unlawful the seizure of property otherwise rightfully taken at the same time. *Harvey* v. *Pocock,* 11 M. & W. 740; *Wentworth* v. *Sawyer,* 76 Me. 434, 441; *Cone* v. *Forest,* 126 Mass. 97, 101; cf. *Dod* v. *Monger,* 6 Mod. 215.

Even if the officers were liable as trespassers *ab initio,* which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465; *Adams* v. *New York,* 192 U. S. 585; *Weeks* v. *United States,* 232 U. S. 383, 398. The Fourth and Fifth Amendments protect every person from the invasion of his home by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion. *Weeks* v. *United States, supra; Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20; *Amos* v. *United States,* 255 U. S. 313; cf. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Here there was no such invasion. The seizure of the liquor received in evidence was in fact distinct from the destruction of the rest. Its validity so far as the government is con-

cerned should be equally distinct. We can impute to the one the illegality of the other only by resorting to a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved.

It follows that neither the seizure of this liquor nor its use as evidence infringed any constitutional immunity of the accused. In this view of the case, the answer to the second question in the certificate is not dependent upon the answer to the first which pertains to the personal liability of the officers. Interpreting the second question as an inquiry whether the samples of intoxicating liquor should have been excluded as evidence, the answer is

No.

Mr. Justice Butler concurs in the result.

GOODYEAR TIRE & RUBBER COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Submitted December 9, 1926.—Decided January 3, 1927.

In the provision in the Revenue Acts of 1918 and 1921, imposing a stamp tax of two cents per "$100 of face value or fraction thereof" on transfers of the legal title to shares or certificates of stock, "face value" is synonymous with par value. The par value fixed by the corporate charter at the time of transfer of a certificate is the true par value and must control, in assessment of the tax, over any different par value stated on the face of the certificate. P. 102.

60 Ct. Cls. 486, reversed.

Appeal from a judgment of the Court of Claims rejecting a claim for recovery of an excessive tax.

Messrs. George Rublee and *Spencer Gordon* for the appellant, submitted.

Solicitor General Mitchell for the United States, was unable to support the reasoning of the Court of Claims,

but felt constrained to present the case fully, in deference to the views of that Court.

MR. JUSTICE STONE delivered the opinion of the Court.

Prior to April 11, 1921, the par value of the outstanding capital stock of appellant, an Ohio corporation, was $100 per share. On that date this par value was reduced to $1 a share by appellant's filing a proper certificate of reduction with the Secretary of State, pursuant to the laws of Ohio. No new certificates of stock were issued in place of the old which remained outstanding and stated on their face that they were of the par value of $100. After the reduction of the par value of the stock, the holders of 534,849 shares, evidenced by the old certificates, transferred them to voting trustees in order to carry out a plan of reorganization. The Commissioner of Internal Revenue demanded a stamp tax on the transfer computed upon the apparent par value of $100 as indicated on the face of the certificates and not on the actual reduced value of $1 per share, which appellant contended was the proper tax base. Appellant paid the tax at the higher rate under protest and brought suit in the Court of Claims to recover the excess. From a judgment in favor of the government, the case comes here on appeal. Jud. Code, § 242, prior to the amendment of February 13, 1925.

The sole question presented is whether the tax assessed is to be measured by the actual par value of the stock as disclosed by the amended charter of the corporation at the time of the transfer, or by the value printed on the certificates themselves. The applicable revenue statutes are the Act of 1918 and 1921, as some of the transfers here involved were made while the Act of 1918 was in force and others after the Act of 1921 had taken effect. Section 1100 and Schedule A of Title XI of the Revenue Act of 1918 (February 24, 1919, c. 18, 40 Stat.

1133, 1135), which, so far as material here, are indentical with § 1100 and Schedule A of Title XI of the Revenue Act of 1921 (November 23, 1921, c. 136, 42 Stat. 301, 304), impose a stamp tax of 2¢ per "$100 of face value or fraction thereof" "on all sales, or agreements to sell, or memoranda of sales, or deliveries of, or transfers of legal title to shares or certificates of stock." The pertinent provisions of this section are printed in the margin.*

The tax is not a tax on certificates of stock but upon the transfer of legal title of shares or certificates of stock. Compare *Provost* v. *United States,* 269 U. S. 443. The payment of the tax must be evidenced by stamps to be affixed either to the delivered certificate or other document manifesting the transfer. The Treasury Department has consistently ruled that the tax applies to transfers even though no certificates be issued, 40 Treas. Regulations, Art. 12(b).

The statutory measure of the tax is the "face value" of the stock transferred. It was conceded by the government, both here and below, that the phrase "face value" in the statute is synonymous with par value. It is used in contradistinction to the actual value which is made the measure of the tax when applied to non-par value stock which the statute describes as "without par or face value." To say that the term face value is intended to apply to a fictitious statement of value on the face of the certificates, having no relation to the actual par value, would be to give the statute a strained construction and

* "Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock . . . whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share, . . ."

open the way for evasion. Obviously the face or par value of the stock transferred is to be determined by an inspection of the instrument which alone fixes par value, namely, the corporate charter. The statements in the certificate of incorporation as amended and not those appearing on the face of the stock certificates control. It follows that the measure of the tax here was the actual par value of the stock transferred and that a recovery of the excess tax paid should have been allowed.

This conclusion is not inconsistent with the decision in *United States* v. *Isham,* 17 Wall. 496, urged in support of the assessment as made. There, in applying a documentary tax, the form and terms of the instrument controlled in determining whether the instrument was subject to the tax. Compare *Malley* v. *Bowditch,* 259 Fed. 809; *Danville Building Ass'n.* v. *Pickering,* 294 Fed. 117; *Haverty Furniture Co.* v. *United States,* 286 Fed. 985; *Merchants' Warehouse Co.* v. *McClain,* 112 Fed. 787; *Granby Mercantile Co.* v. *Webster,* 98 Fed. 604. But here the tax was levied on the transfer rather than on any particular document and applies to transfers not evidenced by a writing. It is measured by evidence extrinsic to any document to which the stamp is affixed, found only in the corporate charter.

Judgment reversed.

UNITED STATES EX REL. VAJTAUER *v.* COMMISSIONER OF IMMIGRATION.

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

No. 111. Argued November 24, 29, 1926.—Decided January 3, 1927.

1. Want of due process in proceedings for the deportation of an alien is not established by showing merely that the decision was erroneous or that incompetent evidence was received and considered. P. 106.

2. Insofar as concerns proofs, an order of deportation is upheld, in *habeas corpus,* if there was some evidence to support it and no error so flagrant as to convince a court of the essential unfairness of the trial. P. 106.
3. Statements of an alien tending to show that he belonged to an excluded class at time of entry may be used in deportation proceedings, whether made before or after his admission. P. 110.
4. Evidence of identity of an alien with the author of seditious pamphlets and speeches may be found in a similarity of names, appellations, nativity, etc. P. 111.
5. The silence of the alien without sufficient explanation, when called upon to testify, may be persuasive evidence against him, even as to incriminating matters, when they are not privileged. P. 111.
6. The privilege against self-incrimination may be waived if not timely asserted. P. 113.

15 Fed. (2d) 127, affirmed.

APPEAL from a judgment of the District Court dismissing a writ of *habeas corpus.*

Mr. Walter H. Pollak, with whom *Messrs Isaac Shorr* and *Carol Weiss King* were on the brief, for the appellant.

Solicitor General Mitchell for the appellee.

MR. JUSTCE STONE delivered the opinion of the Court.

Vajtauer, appellant, was arrested in deportation proceedings on a warrant issued April 4, 1924, by the Assistant Secretary of Labor, charging that Vajtauer, an alien, had entered the United States, December 1, 1923, in violation of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008, printed so far as relevant in the margin.[1]

[1] The following classes are excluded from admission:

"(a) Aliens who are anarchists;

"(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

"(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, . . .

The particular violations of the statute alleged were that prior to or at the time of his entry, appellant (1) believed in and advocated the overthrow of the government of the United States or all forms of law; (2) wrote, published, circulated or had in his possession for circulation written or printed matter advocating opposition to all organized government; (3) wrote, published, circulated or had in his possession for circulation written or printed matter advocating the overthrow by force or violence of the government of the United States or of all forms of law.

After a hearing before an immigration inspector, and a review of all the proceedings by the Board of Review, the Secretary of Labor, upon the recommendation of that board, ordered deportation. While in the custody of the Commissioner of Immigration at the Port of New York, the alien assailed the legality of his detention in a petition for a writ of *habeas corpus* which was issued by the District Court for southern New York. Upon the return of the writ and after a hearing, that court dismissed the writ, remanded appellant to the custody of the Commissioner and stayed deportation pending an appeal. 15 Fed. (2d) 127. The case comes here on direct appeal, on the ground that appellant was denied rights guaranteed by the Fifth Amendment of the federal Constitution. § 238 Jud. Code, prior to the amendment of February 13, 1925.

"(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, . . ."

Section 2 provides for the deportation of those who at any time after entering this country are found to have been at the time of entry members of the excluded class.

The constitutional questions assigned are (1) that the deportation order was unsupported by any substantial evidence and consequently appellant was denied a fair hearing and deprived of his liberty without due process; (2) that the action of the immigration authorities in drawing certain inferences from his refusal to answer questions asked, deprived him of the protection against self incrimination accorded by the Fifth Amendment.

Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. Cf. *Chin Yow* v. *United States*, 208 U. S. 8; *Kwock Jan Fat* v. *White*, 253 U. S. 454. But a want of due process is not established by showing merely that the decision is erroneous, *Chin Yow* v. *United States, supra*, 13, or that incompetent evidence was received and considered. See *Tisi* v. *Tod*, 264 U. S. 131, 133. Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial. *Tisi* v. *Tod, supra.*

The ultimate question presented by this record, therefore, is whether the warrant of deportation was supported by any evidence that the alien when he entered the United States advocated opposition to all organized government or the overthrow of the United States government by force and violence, within the meaning of the statute. This requires a review of the evidence.

At the hearing before the immigration authorities on May 14, 1924, appellant, who was represented by counsel, was sworn as a witness, gave his name as Emanuel Vajtauer and his occupation as "Doctor of Psychology," and editor of the "Spravedlvost," a Bohemian newspaper published in Chicago. He testified that he resided in Illinois; that he entered the United States on Decem-

ber 1, 1923; and that he was a citizen of Czechoslovakia by birth. After answering other preliminary questions, he was then asked: "Why did you come to the United States?" Appellant's attorney then stated: "I will advise the alien not to answer any further questions until the evidence upon which the warrant is based will be presented here."[2] Appellant then stated that he would follow his attorney's advice, and gave no further testimony. The Immigration Inspector introduced in evidence a pamphlet, stated by him to bear the name of Dr. E. M. Vajtauer as author. An interpreter testified that it was Dr. Vajtauer's study of the Russian Revolution. The title, as printed in the record, was "Revolution and the Dictatorship of the Proletariat, by Dr. E. *D*ajtauer, written in Moscow in the Spring of 1920." Translations of certain passages from the pamphlet by the interpreter were spread upon the record. Some of these excerpts merely gave an account of the Russian Revolution and the revolutionists' own justification for their overthrow of the Russian government. Others, printed in the margin, purported on their face to advocate the overthrow of government by revolution or force.[3]

[2] It was argued here that the objection took this form because counsel at the hearing labored under the misapprehension that the former rules which entitled an alien at the beginning of the hearing to inspect the warrant of arrest and all the evidence on which it was issued, were still in force. These rules had been changed before the first hearing of May 14, 1924. Even if counsel was unaware of the changes at that time, the hearing was not resumed until August 27, 1924, when the government's case was closed. Counsel declined an invitation to have the alien testify in his own behalf or to permit his examination although all the evidence on which the warrant was based had been presented. No reason for his not testifying was given.

[3] "Only when you kill the bourgeois-capitalist, only then you will be free. By this kind of primitive logic it is usually necessary to lead the revolting soldier, in order that he should not unnecessarily sacrifice himself and others.

* * * * *

The Inspector also placed in evidence a newspaper published by the Slovak Labor Socialist Federation of America, containing a report of a speech stated in the record to have been made by a Dr. Vajtauer, the editor of the Bohemian daily, "Spravedlvost." In this address the causes and effects of the world war and of the revolutionary movements in Europe were described from the

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"During the attack, the revolution must be merciless. It must destroy the old system, not leaving even a single stone unturned.

* * * * *

"The people, who suffered too long, will knock to the ground the socialist traitors and bourgeois, and will punish with death any attempt of resistance. They have a right to do that! Others have killed millions of their brothers previously. The lowest, the most suffering class of people has seized the rule into its own hands. It took away every chance of the murderers for further oppression and crime. It dictates quietly to the farmer vampires. It carries on the dictatorship of the proletariat!

"This is the first problem of the proletarian dictatorship, and that is to capture the murderers and traitors of the people, the imperialists, militarists, capitalists, bourgeoisie and social-democrats and prevent them from committing any further crimes.

* * * * *

"Should the Bohemian worker have as much courage as the Russian worker has, he would see quickly the necessity of seizing the rule of factory into his own hands and expell the owner of the factory who has no right to own the property of the factory. The plant, which is to supply the needs of the people, belongs to the people, and must be run only by the people, only by the working people. The means of production are not a private property, they are the people's property. Private property is only a masked loot of people's property. The government, which recognizes private property, is the government which recognizes the looting the people, and how the robbers are treated? They are treated so that they are not given chance to loot. The robber should be locked up, irons should be put on his wrists, and guard placed to watch him. . . .

* * * * *

"Revolution is a sudden expansion of the people which suddenly abolishes the injustice piled for centuries. The proletarian dictatorship is an armed guard of liberties gained by revolution."

viewpoint of the proletariat. The speaker predicted a much fiercer revolutionary struggle in this country than that which took place in Europe and the concluding paragraphs, printed in the margin,[4] suggest at least that the speaker advocated such a revolution. Other documentary evidence received consisted of an abridged report of the "Fourth Congress of the Communist International, Meetings held at Petrograd and Moscow, November 7 and December 3, 1922," containing a statement purported to have been made by a Dr. Vajtauer, Czechoslovakia, on Czechoslovakian affairs.

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[4] "Pointing out the proletariat of America, the speaker said, that when the time comes when the American proletariat, which have tasted a bit of the capitalistic luxuries, will find itself deprived of these luxuries, then the American proletariat will be much more revolutionary than that of Europe, it is hard to preach revolution to the full stomach, but once this stomach is empty it revolts, and seeks the means to obtain the supplies. The speaker pictured the American proletariat as a mole, which got hold of a bone thrown from the capitalistic table, to satisfy the hunger of this mole. He predicted much fiercer revolutionary struggle in this country than that which took place in Europe, much more blood will be shed in this country than was shed in Europe.

"Toward the end of his speech, the speaker predicted that the next large war will be between the European countries and America, because America being a creditor, would in due time demand the payment of debt from debtors, and these being poor, would try to repudiate the American debt, this naturally would lead to war, and it would be up to the proletariat to stop the war of this kind, because the proletariat once more would be asked to supply the army. The speaker pointed out the Communistic government of Russia as an example for the proletariat of the other countries of the world, further he said, that there is a probability of another great war and this war may be the war between the United States Proletariat countries of Europe, against the capitalistic America, and then the proletariat of America would find itself in the position either to fight the proletariat of Europe, or else fight against its own capitalists, and it is up to the conscientious leaders of the proletariat to prepare the workers for this fatal moment."

Under instructions of his attorney, appellant refused to answer further questions calculated to establish his identity with the author of the pamphlet and with the Dr. Vajtauer who made the address reported in the newspaper article and the Dr. Vajtauer who addressed the Congress of the Communist International.

A point much argued before us was whether § 23 of the Immigration Law of May 26, 1924, c. 190, 43 Stat. 165, which took effect before the hearing was closed, placed on appellant the burden of proving that he was not a member of a class of aliens excluded from entering the United States by the Immigration laws. Section 23 provides in part: "and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully." It was plausibly urged that the language of the statute as well as its legislative history indicates that this clause relates only to the proof of the regularity of the alien's entry with respect to time, place, manner and the like, and not to his membership in an excluded class. But we find it unnecessary to consider this question, as we think that the record taken as a whole and without the aid of any statutory presumption presents some evidence supporting the deportation order.

We disregard the Moscow address as having no substantial bearing on appellant's membership in an excluded class. But the extracts from the pamphlet and the report of the Chicago speech, taken together, are at least some evidence tending to show that the author of them advised and advocated opposition to all organized government and the overthrow of the United States government by violence, and therefore could, as an alien, be excluded from admission into the United States by the provisions of § 1 of the Act of June 5, 1920, *supra,* or if admitted, deported if found to have been a member of an excluded class at the time of entry (§ 2). Statements made before or after

entry may be taken to indicate that he was subject to exclusion at the time of entry.

The only other issue on which the government was required to present evidence, assuming that the burden of proof rested on it, was the identity of the appellant, admittedly an alien, with the author of the pamphlet and the address. The similarity of names; the fact that each was known as "Doctor"; that a Dr. Vajtauer, also of Czechoslovakia, as was appellant, addressed the Fourth Congress of the Communist International on Czechoslovakian affairs in Moscow where the pamphlet was written, and that after the arrival of appellant in the United States and his proceeding to Chicago, a Dr. Vajtauer, who was editor of the Bohemian daily paper, "Spravedlvost," as was appellant, made a public address in Chicago, discussing the Russian revolution and suggesting the possibilities of a similar revolution here, all taken together admit of the inference that the appellant and the author of the pamphlet and speech were one and the same person. This inference was strengthened when the appellant, confronted by this record, stood mute.

"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *Bilokumsky* v. *Tod,* 263 U. S. 149, 153–4. Appellant as a witness was called upon to testify whether he was the author of the pamphlet and the Chicago speech, facts within his knowledge. If the author, he was in a position to challenge or explain away if possible any unfavorable inference which might be drawn from the passages read into the record. His silence without explanation other than that he would not testify until the entire evidence was presented, was in itself evidence that he was the author. In addition, it fortified the inferences drawn from the pamphlet and speech by the immigration authorities.

Attention is directed to the fact that the refusal to testify was based upon a supposed right of the witness

not to be called upon to testify until all the evidence in support of the warrant was presented, and it is said that if silence is induced by a person's "doubts of his rights or by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence." Citing *Comm.* v. *Kenny,* 12 Metc. 235, 237; *People* v. *Pfanschmidt,* 262 Ill. 411, 449. But these cases merely apply the rule that no inference may be drawn from silence where there is no duty to speak, a rule which is not applicable where the witness is sworn and under a legal duty to give testimony which is not privileged. Undoubtedly, inferences from silence should be cautiously drawn, *Bilokumsky* v. *Tod, supra,* but the weight to be given to silence is for the tribunal conducting the trial.

It is said also that the evidentiary effect of silence was limited by the decision in *Bilokumsky* v. *Tod, supra,* to a refusal to testify as to non-incriminating facts only. Although the inference from silence in that case pertained to non-incriminating facts, there was no intimation there that inferences could not be drawn from a failure to testify to incriminating matters which are not privileged. Here as in that case the objection to drawing the inference can have force only insofar as there was a denial of the constitutional immunity.

It is insisted that answers to the questions put to appellant at the hearings which were held in Chicago might have tended to incriminate him under the Illinois Syndicalism Law, Ill. R. S. 1925, c. 38, §§ 587–593, which condemns as a felony the advocacy or publication of matter advising crime or violence or other unlawful means of accomplishing the reformation or overthrow of the government. Assuming that the constitutional immunity against self-incrimination may be violated as well by inferences drawn from silence with respect to incriminating matters as by testimony which the witness is compelled to give, still it is necessary to inquire whether the

appellant here has brought himself within the protection of the immunity.

Throughout the proceedings before the immigration authorities, he did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, *Mason* v. *United States,* 244 U. S. 362, a determination which it cannot make if not advised of the contention. Cf. *In re Edward Hess & Co.,* 136 Fed. 988; *Ex parte Irvine,* 74 Fed. 954, 960. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. See *In re Knickerbocker Steamboat Co.,* 139 Fed. 713; *United States* v. *Skinner,* 218 Fed. 870, 876; *United States* v. *Elton,* 222 Fed. 428, 435. This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by *Hale* v. *Henkel,* 201 U. S. 43; *Brown* v. *Walker,* 161 U. S. 591, 608; compare *United States* v. *Saline Bank,* 1 Pet. 100; *Ballmann* v. *Fagin,* 200 U. S. 186, 195.

Judgment affirmed.

WAGGONER ESTATE ET AL. *v.* WICHITA COUNTY ET AL.

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

No. 52. Argued December 3, 1926.—Decided January 3, 1927.

1. Under Judicial Code § 238, before the Act of February 13, 1925, a decree of the District Court in a suit wherein its jurisdiction was based on the sole ground that substantial constitutional questions were involved, was appealable directly to this Court. P. 116.

2. Where such a decree was appealed to the Circuit Court of Appeals erroneously, but within the time allowed for direct appeal to this Court, an appeal from a decree rendered therein by the Court of Appeals will operate to transfer the case here, to be treated as a direct appeal from the District Court. P. 116.
3. On direct appeal to this Court from the District Court, where the sole ground of the original jurisdiction was constitutional questions, the decision may be limited to either state or federal questions that dispose of the case. P. 116.
4. Whether a royalty interest in an oil and gas lease is realty or personalty is a question of local law. P. 117.
5. Under the particular facts of this case, where lands in Texas were demised for the sole purpose of drilling for gas and oil, the lessee covenanting to deliver free of charge to the lessor one-eighth of all oil or gas produced and to pay seven-eighths of all increase of tax "by virtue of oil or gas," the interest of the lessor is properly taxed as real property. P. 118.

298 Fed. 818, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, 3 F. (2d) 962, which affirmed a decree of the District Court dismissing, after trial, a bill to enjoin collection of a tax. The case is treated as on direct appeal from the District Court on transfer from the Circuit Court of Appeals.

Mr. George Thompson, with whom *Mr. J. H. Barwise, Jr.,* was on the brief, for the appellants.

Mr. T. R. Boone, with whom *Messrs. E. W. Napier, E. L. Fulton, E. T. Duff,* and *John B. King* were on the brief, for the appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellants, Waggoner, a citizen of Tarrant County, Texas, and the Waggoner Estate, domiciled in Texas, brought suit in the district court for northern Texas against Wichita County, the members of the Board of Equalization, and the Tax Collector of the county to enjoin the collection of a tax stated to be illegally assessed. The bill alleged that the tax contested as illegal

exceeded the jurisdictional amount; that Waggoner at the time of the assessment, January 1, 1923, was the owner of 12,000 acres of oil producing land located in Wichita County; that the land which was transferred after the assessment to appellant, the Waggoner Estate, was subject to certain oil leases under which Waggoner, as lessor, was entitled to receive as royalties one-eighth of all the oil produced; that the Board of Equalization in computing the tax upon the lessor's interest in the oil under his leases, determined that the royalty in the daily production of oil from the leased land, estimated as of January 1, 1923, would be 723 barrels per day and that the total value of such oil was $1,000 per barrel of daily production thus estimated, or $723,000. The bill assailed the tax assessed as illegal and in violation of the due process and equal protection clauses of the Fourteenth Amendment, in that appellant's interest in the oil leases up to $718,300 of the assessed value had been erroneously treated for taxing purposes as real estate in Wichita County, instead of personal property taxable in Tarrant County where the lessor resided; that in valuing this interest appellees had intentionally and systematically applied a higher rate than upon similar property in the county, thus denying appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

The judgment of the district court dismissing the bill after a trial, 298 Fed. 818, was affirmed on appeal by the Court of Appeals for the Fifth Circuit. 3 Fed. (2d) 962. Both courts held that the interest taxed was realty and hence subject to tax in Wichita County where the leased lands were situated. They held also that the assessment was not discriminatory and did not violate the provisions of the Fourteenth Amendment. Although the tax was assessed on appellant at the rate of $1,000 per barrel on the estimated daily production and the interests of the several lessees in the oil under the various leases were

valued at $450 per barrel, it was held that there was substantial basis for the difference in the rate since the entire expense and risk incident to production were borne by the lessees.

The case comes here on appeal allowed by the Circuit Court of Appeals. The jurisdiction of the district court was invoked on the sole ground that substantial constitutional questions were involved. Hence, a direct appeal should have been taken from the district court to this Court. Jud. Code, § 238, before amended. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73; *Carolina Glass Co.* v. *Murray,* 240 U. S. 305, 318; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 52. Having been erroneously brought to the Circuit Court of Appeals, the case should have been transferred to this Court. Jud. Code, § 238(a), before the amendment of February 13, 1925. But as the appeal to the Circuit Court of Appeals was allowed within three months after the entry of judgment in the district court, the present appeal will operate effectively to lodge the case in this Court for its decision without the needless ceremony of remanding the case to the Circuit Court of Appeals to enable that court to transfer it back to us for a second consideration. *Wagner* v. *Lyndon,* 262 U. S. 226; cf. *McMillan Co.* v. *Abernathy,* 263 U. S. 438. Treating this as a direct appeal from the district court in a case where the sole ground of its jurisdiction was the construction or application of the Constitution of the United States, we may limit our decision to either federal or state questions which dispose of the case. *Davis* v. *Wallace,* 257 U. S. 478, 482; *Risty* v. *Chicago, R. I. & Pac. Ry.,* 270 U. S. 378, 387.

That there was a basis for discrimination in valuing the lessor's and lessees' interests in the oil is not questioned here. But appellants insist that it was erroneous to tax the lessor's interest as realty in Wichita County instead of personalty taxable in Tarrant County, the residence of the taxpayer. As they rely on the allegation in the bill

that the board intentionally and systematically exempted from taxation other personal property in Wichita County, it is implicit in this contention that the taxing authorities, by treating these interests as realty instead of personalty, denied them the equal protection of the laws. But we find it unnecessary to deal with the constitutional aspect of the question as we conclude that the interest was properly taxable as realty.

Whether realty or personalty is a question of local law upon which the local decisions and statutes control. *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, 462. Under Art. 7510, Complete Tex. Stat. 1920, all real estate is taxable in the county where located.

It is the contention of appellants that by the law of Texas, minerals, including oil in place in the soil may by appropriate deed or conveyance be severed from the remainder of the land and granted in full ownership; that Waggoner by the several leases of the lands in question conveyed the entire interest in the oil to the lessees; hence the royalty provisions in the leases are at most contractual obligations of the lessees to deliver to the lessor a part of the oil when removed from the earth; and that such contractual rights are personalty, taxable in the county of the domicile of the obligee.

Assuming, as appellants contend, that mineral rights may be thus severed and conveyed, *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 113 Tex. 160; *Texas Co.* v. *Daugherty,* 107 Tex. 227, the question remains whether the present leases purport to convey to the lessees all rights in the oil in the leased lands, or whether they reserve in the lessor an undivided one-eighth share. All the leases are in substantially the same form. They recite that in consideration of a money payment and the lessees' covenants, the lessor leases the described lands "for the sole and only purpose of drilling and mining for gas and oil." The lessees covenant:

"To deliver to the Lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced on said premises, settlement to be made not later than the tenth day of each month for the preceding month.

"That the Lessee will pay 7/8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises."

It is to be noted that the leases contain no words of grant of the minerals as such, but the lands are demised solely for the purpose of drilling and mining. The lessees are in terms given neither title, right of appropriation nor power of disposition of the share of the oil which is to be delivered to the lessor when severed from the soil. The covenant of the lessees to pay 7/8 of all increase in tax "by virtue of gas and oil" is inconsistent with the contention that the lessor retained no interest in the minerals in place in the soil.

In the absence of controlling authority in the Texas courts, we can find in the terms of the leases themselves no basis for the contention that the lessor granted or conveyed away his entire interest in the oil. The case of *Stephens County* v. *Mid-Kansas Oil & Gas Co., supra,* is relied upon by appellants, but in that case the lease, in other respects similar to those now under consideration, provided that the lessee at his option should pay the stipulated royalties in oil or cash. It thus conferred on the lessee the essentials of ownership: possession, with unrestricted power of appropriation and disposition of the oil. The lessee was therefore properly taxed as owner. The considerations which led to that result lead to the conclusion here that the ownership of the royalty oil remained in the lessor who retained the power of disposition and the right to receive possession, and that his interest was properly taxed as realty.

This conclusion is supported by the decision of the Texas courts in *Japhet* v. *McRae,* 276 S. W. 669, indicat-

ing that the lessor's right to an oil lease royalty, although not specifically mentioned, is embraced in a conveyance of the land by the lessor, so that upon the subdivision of the land, the respective grantees acquire the right to the royalty in all oil produced on the granted land. Compare the decision of the Texas courts in *Jones* v. *O'Brien,* 251 S. W. 208; *O'Brien* v. *Jones,* 274 S. W. 242, for the application of the statute of frauds to sales of the lessor's interest in leased lands. See also *United States* v. *Noble,* 237 U. S. 74, 80; *Barnsdall* v. *Bradford Gas Co.,* 225 Pa. St. 338, 343.

Judgment affirmed.

JAMES-DICKINSON FARM MORTGAGE COMPANY ET AL. *v.* HARRY.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS.

No. 40. Submitted November 29, 1926.—Decided January 10, 1927.

1. Jurisdiction over a corporation of one State cannot be acquired in another State in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he be there on business of the company. P. 122.
2. By common law, and under the Texas statute here involved (Comp. Stat. 1920, Title 62, Arts. a–c,) the liability of one who, personally or through agents, knowingly makes false statements with intent that another shall act upon them, does not depend upon the receipt of any benefit by himself. P. 122.
3. A statute making actionable as a fraud a false promise of future action, by which the other party is induced to enter into a contract, is within state power and not a violation of due process. P. 123.
4. A State constitutionally may make proof of one fact presumptive evidence of another rationally connected with it, and may shift the burden of proof. P. 124.
5. A state statute defining liability and regulating procedure in cases of fraud in transactions involving purchase of real estate or of stock in a corporation or joint stock company, does not violate the equal protection clause of the Fourteenth Amendment in not embracing other frauds. P. 125.

6. The fact that a state statute defining special classes of frauds allows recovery of exemplary damages up to twice the actual damages does not make it a penal law; and a cause of action arising under it may be enforced in a federal court in another State where, though there be no statute of similar import, there is no public policy against it. So *held* of a statute adding no extraordinary feature to the common law liability for fraudulent misrepresentations, and in the absence of any showing that substantial justice between the parties could not be done consistently with the procedure and practice of the federal courts in the second State. P. 125.

Reversed in part, affirmed in part.

ERROR to a judgment in the District Court, in Illinois, on a verdict for the plaintiff, in an action for common law and statutory frauds committed in Texas in a sale of lands.

Mr. George F. Rearick for the plaintiffs in error, submitted.

Mr. William M. Acton, with whom *Mr. Walter T. Gunn* was on the brief, for the defendant in error, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action was commenced in an Illinois court by Mrs. Harry, a citizen of that State, against Dickinson, a citizen of Texas, and James-Dickinson Farm Mortgage Company, a Missouri corporation. The defendants removed the case to the federal court on the ground of diversity of citizenship. Dickinson, who had been served personally within Illinois, pleaded to the merits. The Company, upon whom service had been made by reading and delivering the summons to Dickinson, "as its president," while he was temporarily in Illinois, challenged the jurisdiction of the court over it. This objection was overruled; and it also filed pleas to the merits. The case was then tried, as against both defendants, before a

jury; the plaintiff got a verdict; and judgment was entered thereon. Because of a claim that rights guaranteed by the Fourteenth Amendment had been denied them, a direct writ of error was allowed under § 238 of the Judicial Code, before the amendment of February 13, 1925.

The action is in tort to recover damages resulting from false representations by which the plaintiff was induced to purchase while in Texas a tract of land located there. The declaration contains two counts, the first based on the common law liability, the second on a statute of that State. Act of March 11, 1919, c. 43, General Laws, p. 77; Compl. Stat. Tex. 1920, Title 62, Articles 3973, a, b, c, p. 639. Dickinson was vice-president and treasurer of the defendant corporation and also of two other allied corporations. He together with James, the president of the corporations, owned 90 per cent. of their stock. It was charged that these corporations were the instruments through which the fraudulent scheme was carried out. The device employed in effecting the sale was the taking of the plaintiff and other alleged victims from the North in mid-winter by a special Pullman from Kansas City to Brownsville, near which the land lies, and securing signatures from all on the spot. There was evidence to show that the people in charge of the party made materially false statements concerning the quality of the land sold. Dickinson did not then talk personally with the plaintiff. But he was present on the occasion; heard the false statements then made; took direct part in sales then made; and later personally induced the plaintiff to anticipate the payment on notes given as part of the purchase price.

In the course of the trial a multitude of requests for rulings made by the defendants were denied. Many other rulings to which they objected were given. Exceptions were duly taken. As the case is properly here on constitutional grounds, the jurisdiction of this Court extends

to a review of all questions. *Chaloner* v. *Sherman,* 242 U. S. 455, 457. All have been considered. Only a few require discussion.

First. The objection to the jurisdiction over the corporation was taken by a plea in abatement. The decision thereon was made upon a demurrer to the replication. By these pleadings it was admitted that the residence and principal place of business of the corporation was in Missouri; that it had never been a resident of Illinois; that Dickinson, its president, was in Illinois on business of the corporation at the time of the service; but that it had not engaged in, or carried on, business within the State. Jurisdiction over a corporation of one State cannot be acquired in another State or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264; *Rosenberg Bros.* v. *Curtis Brown Co.,* 260 U. S. 516; *Bank of America* v. *Whitney Central National Bank,* 261 U. S. 171; *Lumiere* v. *Wilder,* 261 U. S. 174, 177. The objection to the jurisdiction over the corporation should have been sustained. As it was not waived by the later proceeding in the case, the judgment against this defendant is reversed with directions to dismiss the action as to it. This reversal does not require that the judgment be reversed also as to Dickinson. Compare *Camp* v. *Gress,* 250 U. S. 308, 317.

Second. It is contended, on several grounds, that the statute violates the due process clause. One ground is that the statute includes among the persons jointly and severally liable for the actual damages "all persons deriving the benefit of said fraud." This provision is said to be unconstitutional. The argument is that thereby the State undertakes to fix a liability for damages regardless of participation in the wrong, so that where a corporation

has received the money arising from a fraudulent sale, every stockholder becomes liable for the tort; and that by making the liability joint and several, the statute makes one person liable for the wrong of another, although there was neither participation in nor ratification of it, nor even knowledge. At common law every member of a partnership is subject to such a liability, *Strang* v. *Bradner,* 114 U. S. 555; *McIntyre* v. *Kavanaugh,* 242 U. S. 138, 139; and often stockholders of corporations are made similarly liable by statute. Compare *Thomas* v. *Matthiessen,* 232 U. S. 221, 235; *Buttner* v. *Adams,* 236 Fed. 105. The case presented by the pleadings and the evidence, so far as Dickinson is concerned, is, however, a very different one from that suggested. He is not sued as stockholder; and the count on the Texas statute does not charge him with full liability for the loss suffered, because as stockholder he received some benefit. It charges specifically that "the defendants, and each of them, derived the benefit of the fraud and deceit." And their liability is sought to be enforced primarily because "they represented themselves to the plaintiff to be the owners" of the large tract of land; and cheated her "through their authorized agents." If Dickinson, either personally or through agents, made knowingly false statements with intent that the plaintiff should act upon them, his liability, either at common law or under the statute, would not depend upon the receipt of any benefit by him. See *Nevada Bank v. Portland Nat. Bank,* 59 Fed. 338; *Hindman* v. *First Nat. Bank,* 112 Fed. 931, 944–945; *Goldsmith* v. *Koopman,* 140 Fed. 616, 621; *Talcott* v. *Friend,* 179 Fed. 676, 680. There was in the evidence ample support for a finding of such deception.

Another contention is that the statute violates the due process clause in providing that actionable fraud shall exist not only when there is "a false representation of a past or existing material fact," but also if there is a "false

promise to do some act in the future which is made as a material inducement to another party to enter into a contract and but for which promise said party would not have entered into said contract, . . ." The contention is groundless. To modify the substantive and procedural law so that recovery may be had in tort for a breach of contract, is well within the power of a State. An action for deceit was long the sole remedy for a breach of warranty, and it still lies in some jurisdictions. See *F. L. Grant Shoe Co.* v. *Laird,* 212 U. S. 445, 449; *Nash* v. *Minn. Ins. & Trust Co.,* 163 Mass. 574, 587; *Carter v. Glass,* 44 Mich. 154. Recovery in contract on a tort that is waived is common. See *Crawford* v. *Burke,* 195 U. S. 176, 194. Here, moreover, no such change is brought about by the statute. Some courts have long recognized that a false promise is a species of false representation for which there is remedy in tort, *Church* v. *Swetland,* 243 Fed. 289, 294–295; *Wright* v. *Barnard,* 248 Fed. 756, 775; as, for instance, where goods are obtained on credit by a purchaser who does not intend to pay for them. See *Burrill* v. *Stevens,* 73 Me. 395; *Stewart* v. *Emerson,* 52 N. H. 301.

It is also contended that the statute violates the due process clause by providing that whenever a promise thus made has not been complied with by the party making it within a reasonable time, "it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith but was prevented from complying therewith by the Act of God, the public enemy or by some equitable reason." This contention also is groundless. It is well settled that a State may consider proof of one fact presumptive evidence of another, if there is a rational connection between them, *Hawes v. Georgia,* 258 U. S. 1, 4, and also that it may change the burden of proof, *Minn. & St. L. R. R. Co.* v. *Minnesota,* 193 U. S. 53. Moreover,

the lower court gave no charge based upon this provision of the statute. And it is at least doubtful whether this provision should be construed as applying to actions brought outside Texas.[1]

Third. It is claimed that the Texas statute violates the equal protection clause of the Fourteenth Amendment because it applies only to fraud in transactions involving the purchase of real estate or of stock in a corporation or joint stock company. The contention is clearly unfounded. A statute does not violate the equal protection clause merely because it is not all-embracing. *Zucht* v. *King*, 260 U. S. 174, 177. A State may direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses. *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 661. The occasion of the legislation is indicated by the urgency provision of the statute which recites " that there are now in this state a number of fraudulent land schemes and that a great number of citizens of this State have been defrauded thereby."

Fourth. It is urged that a federal court for Illinois should not enforce the liability under the Texas statute, because Illinois has not enacted a statute of similar import. The general rule is that one State will enforce a cause of action arising under the laws of another; that a federal court of any district will enforce a cause of action arising under the law of any State; but that ordinarily the courts of one government will not enforce the penal laws of another. The argument is that the Texas statute is a penal law, because it provides: "All persons knowingly

[1] See *Pritchard* v. *Norton*, 106 U. S. 124, 129–136; *Richmond & D. R. R. Co.* v. *Mitchell*, 92 Ga. 77; *Chicago T. T. R. R. Co.* v. *Vandenberg*, 164 Ind. 470; *Jones* v. *C. St. P. M. & O. Ry. Co.*, 80 Minn. 488, 490–491; *Pennsylvania Co.* v. *McCann*, 54 Ohio St. 10, 17–18. Compare *Hoadley* v. *Northern Transp. Co.*, 115 Mass. 304; but see *Hartmann* v. *Louisville & N. Ry. Co.*, 39 Mo. App. 88, 98–101.

and willfully making such false representations or promises or knowingly taking advantage of said fraud shall be liable in exemplary damages to the person defrauded in such amount as shall be assessed by the jury not to exceed double the amount of the actual damages suffered." Exemplary damages are recoverable at common law in many States. A statute providing for their recovery by and for the injured party is not a penal law. *Huntington* v. *Attrill,* 146 U. S. 657, 666–683. Compare *Atchison, T. & S. F. Ry.* v. *Nichols,* 264 U. S. 348, 350–351. No reason appears why the cause of action arising under the Texas statute should not be enforced in Illinois. The Texas statute as applied in this case does not add any extraordinary feature to the common law liability for fraudulent representations. There is nothing in the public policy of Illinois with which the statutory cause of action is inconsistent. It is not shown that substantial justice between the parties cannot be done consistently with the forms of procedure and the practice of the federal courts for Illinois.

Reversed as to James-Dickinson Farm Mortgage Co. Affirmed as to A. D. Dickinson.

MISSOURI, EX REL. WABASH RAILWAY COMPANY *v.* PUBLIC SERVICE COMMISSION.

ERROR TO THE SUPREME COURT OF MISSOURI.

No. 69. Argued December 10, 1926.—Decided January 10, 1927.

Upon review of a judgment of a state court, this Court has jurisdiction to decide questions of state law concerning the construction, and effect on the case, of a state statute enacted since the decision below was made; or it may refer such questions to the state court by reversing and remanding the case. P. 130.

306 Mo. 149, reversed.

ERROR to a judgment of the Supreme Court of Missouri which sustained an order of the Public Service Com-

mission requiring the Wabash Railway Company to abolish a grade crossing in St. Louis. The Chicago, Rock Island & Pacific Railway Company was also a party to the proceedings and joined in suing out the writ of error.

Messrs. Homer Hall and *Frederic D. McKenney,* with whom *Messrs. Marcus L. Bell, W. F. Dickinson,* and *Luther Burns* were on the brief, for the plaintiffs in error.

Messrs. Oliver Senti and *Marion C. Early,* with whom *Messrs. D. D. McDonald, Julius T. Muench,* and *Lawrence McDaniel* were on the brief, for the defendants in error.

MR. JUSTICE STONE delivered the opinion of the Court.

The mayor of St. Louis instituted a proceeding before the Public Service Commission of the State of Missouri to eliminate a grade crossing of the Wabash Railway Company at Delmar Boulevard in the City of St. Louis. The Commission ordered the Wabash Railway to abolish this grade crossing by depressing its tracks and constructing a viaduct for street traffic, with an 18 feet clearance above the tracks. This order, set aside by the Circuit Court of Cole County, was reinstated by the Supreme Court of Missouri. 306 Mo. 149. The case is here on writ of error to that court on the ground that the order results in an unconstitutional deprivation of property, impairs the obligation of contract, and violates par. 18, § 1, of the Interstate Commerce Act. Jud. Code, § 237, before amended.

All the proceedings below were limited in their purpose and effect to the removal of the single grade crossing named. There is no dispute that the hazardous character of the crossing makes the separation of grades necessary. The controversy arises from the fact that the change in grade at Delmar Boulevard is the initial step in a general

scheme for abolishing all grade crossings within an extensive area of the city. Both the railroad and the city have evolved comprehensive plans for grade crossing elimination. The essential difference between the two programs is that the city proposes the depression of the railroad tracks with a consequent elevation of streets spanning the tracks by viaduct, while the railroad urges the elevation of the tracks upon embankments, leaving the streets at their present level. The Delmar Boulevard crossing is so situated that the Commission's order directing depression of the railroad tracks there is a virtual, though not legal, adoption of the city plan to the extent that other crossings at grade in the vicinity can, as a practical matter, be eliminated only by depressing the tracks. The Commission, however, expressly disclaimed passing on other details of the plan. A consideration of the proposed plans is necessary for a fuller understanding of the issues involved, although our review is limited to the immediate change at Delmar Boulevard directed by the order.

The Wabash Railway passes from Delmar Boulevard southeasterly through a residential district, thence through Forest Park. The location of its tracks within this large public park was fixed by a contract with the park commissioners. The Chicago, Rock Island and Pacific Railway Company, also a party to the proceeding, enters the city from the west, crosses the right of way of the Wabash several squares southeast of Delmar Boulevard, runs parallel with both the Wabash tracks and the northern end of Forest Park, and then joins the Wabash line, whose tracks it uses through the park to the Union Terminal. Its right to use the tracks is defined by the contract considered in *Joy* v. *St. Louis,* 138 U. S. 1. It is not directly affected by the Commission's order except insofar as the separation of grades at Delmar crossing amounts to an adoption of the city plan causing a change of level of the

Wabash tracks at other crossings and requiring a similar change of its own.

The city plan, in its principal features, calls for the lowering of all the tracks within a cut screened from view, the relocation of the tracks within the park so that the railroad would intersect with fewer streets as it emerges from the park, and the construction of viaducts with a vertical clearance of 18 feet. The plan also provides for the depression or abandonment of part of the Rock Island's tracks, for proper safeguards to be taken to obviate the danger of flood from a neighboring stream, and the purchase of additional land to increase the width of the right of way uniformly to 100 feet within a designated area. The railroad plan makes unnecessary the change of location of the right of way in the park, but involves the construction of unsightly embankments which would materially reduce the value of residential property in the district. Each party makes claim for its plan the advantages of safety, economy, numerous mechanical and engineering conveniences and the avoidance of certain mechanical and engineering hazards, all or most of which, it is insisted, the other lacks. The Commission found that either plan is practicable from an engineering standpoint. The parties differ principally with respect to the prospective costs, the details of which, in view of the disposition to be made of the case, need not be considered.

Treating the Commission's order as an approval and effective adoption of the entire city plan, plaintiffs in error contend that the order deprives them of their property without due process of law; that it impairs the Wabash Railway's charter, its contract with the park commissioners by which the present right of way of the railroad was located in Forest Park, and the contract under which the Rock Island is now using the tracks of the Wabash through the park, all in violation of Article

I, § 10, of the Constitution. It is also urged that the order by its indirect adoption of the comprehensive city program calling for a partial abandonment and relocation of tracks is invalid as violating par. 18, § 1, of the Interstate Commerce Act, which requires a certificate of public convenience and necessity from the Interstate Commerce Commission before tracks may be abandoned or relocated.

To support the burden of proving that the order of the Commission is arbitrary and unreasonable, plaintiffs in error criticize numerous engineering features of the city's plan, especially the provision of an 18 feet clearance between tracks and viaduct, which is characterized as dangerous to life and limb.

While the federal questions thus raised, so far as they relate to the order now before us, are not difficult of solution, in view of the complexity of the facts to which the principles announced by this Court are to be applied, we cannot say that these questions are so unsubstantial as to deprive us of jurisdiction to pass upon them and to make proper disposition of the case as it is now presented. *Erie R. R.* v. *Pub. Util. Comm.,* 254 U. S. 394; *Mo. Pac. Ry.* v. *Omaha,* 235 U. S. 121; *Denver & R. G. R. R.* v. *Denver,* 250 U. S. 241; cf. *R. R. Comm.* v. *Southern Pac. Co.,* 264 U. S. 331. But we find it unnecessary to decide these questions because of the situation which has been created since the entry of the judgment below by the enactment of the Railroad Clearance Act, Laws of Missouri of 1925, pp. 323, 324. That statute provides that clearances over railroad tracks shall not be less than 22 feet " except in cases in which the public service commission finds that such construction is impracticable." The state Commission directed that the clearance at Delmar Boulevard crossing be 18 feet, but it made no finding that the construction of a 22 feet clearance is impracticable. There is thus presented a question of state law; the effect

of this statute upon the Commission's order, the judgment of the state Supreme Court and upon action taken pursuant to them.

Ordinarily this Court on writ of error to a state court considers only federal questions and does not review questions of state law, *Murdock* v. *City of Memphis,* 20 Wall. 590; *Detroit & Mackinac Ry.* v. *Paper Co.,* 248 U. S. 30. But where questions of state law arising after the decision below are presented here, our appellate powers are not thus restricted. Either because new facts have supervened since the judgment below, *Kimball* v. *Kimball,* 174 U. S. 158; cf. *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Meccano, Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141, or because of a change in the law, *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Gulf, Col. & S. F. Ry.* v. *Dennis,* 224 U. S. 503, this Court, in the exercise of its appellate jurisdiction, may consider the state questions thus arising and either decide them, *Steamship Co.* v. *Joliffe, supra,* or remand the cause for appropriate action by the state courts. *Gulf, Col. & S. F. Ry.* v. *Dennis, supra; Dorchy* v. *Kansas,* 264 U. S. 286. The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this Court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. *Dorchy* v. *Kansas, supra,* 290, 291. In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered. *Gulf, Col. & S. F. Ry.* v. *Dennis, supra,* 509. The judgment is accordingly reversed and the cause remanded for further proceedings.

Reversed.

MOSLER SAFE COMPANY *v.* ELY-NORRIS SAFE COMPANY.

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

No. 94. Argued January 7, 1927.—Decided January 17, 1927.

A manufacturer of safes which are equipped with a patented "explosion chamber" does not make out a case of unfair competition by alleging that a competitor falsely represents his own safes as having "an explosion chamber," when *non constat* that such a chamber is found only in safes covered by the patent or that, but for the misrepresentation, the purchasers affected by them would go to the plaintiff rather than to some other dealer. P. 134.

7 F. (2d) 603, reversed.

CERTIORARI (268 U. S. 684) to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing the petitioner's bill to enjoin alleged unfair competition by the respondent.

Mr. Samuel Owen Edmonds for the petitioner.

Mr. Lawrence Bristol, with whom *Mr. F. P. Warfield* and *George S. Schmidt* were on the brief, for the respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by a corporation of New Jersey against a corporation of New York alleging unfair competition. It was treated below as a suit by the only manufacturer of safes containing an explosion chamber for protection against burglars. It seeks an injunction against selling safes with a metal band around the door in the place where the plaintiff put the chamber, or falsely representing that the defendant's safes contain an explosion chamber. The plaintiff admitted that

the defendant's safes bore the defendant's name and address and that the defendant never gave any customer reason to believe that its safes were of the plaintiff's make. The District Court, following *American Washboard Co.* v. *Saginaw Manufacturing Co.*, 103 Fed. 281, held that representations such as were sought to be enjoined did not give a private cause of action. The Circuit Court of Appeals held that if, as it took it to be alleged, the plaintiff had the monopoly of explosion chambers and the defendant falsely represented that its safes had such chambers, the plaintiff had a good case, and that since the decision above cited the law had grown more liberal in granting relief. It therefore reversed the decree below. 7 F. (2d) 603. In view of the conflict between the Circuit Courts of Appeals a writ of certiorari was granted by this Court. 268 U. S. 684.

At the hearing below all attention seems to have been concentrated on the question passed upon and the forcibly stated reasons that induced this Court of Appeals to differ from that for the Sixth Circuit. But, upon a closer scrutiny of the bill than seems to have been invited before, it does not present that broad and interesting issue. The bill alleges that the plaintiff has a patent for an explosion chamber as described and claimed in said Letters Patent; that it has the exclusive right to make and sell safes containing such an explosion chamber; that no other safes containing such an explosion chamber could be got in the United States before the defendant, as it is alleged, infringed the plaintiff's patent, for which alleged infringement a suit is pending. It then is alleged that the defendant is making and selling safes with a metal band around the door at substantially the same location as the explosion chamber of plaintiff's safes, and has represented to the public that the said metal band was employed to cover or close an explosion chamber by reason of which the public has been led to pur-

chase defendant's said safes as and for safes containing an explosion chamber, such as is manufactured and sold by the plaintiff herein. It is alleged further that sometimes the defendant's safes have no explosion chamber under the band but are bought by those who want safes with a chamber and so the defendant has deprived the plaintiff of sales, competed unfairly and damaged the plaintiff's reputation. The plaintiff relies upon its patent suit for relief in respect of the sales of safes alleged to infringe its rights. It complains here only of false representations as to safes that do not infringe but that are sold as having explosion chambers although in fact they do not.

It is consistent with every allegation in the bill and the defendant in argument asserted it to be a fact, that there are other safes with explosion chambers beside that for which the plaintiff has a patent. The defendant is charged only with representing that its safes had an explosion chamber, which, so far as appears, it had a perfect right to do if the representation was true. If on the other hand the representation was false as it is alleged sometimes to have been, there is nothing to show that customers had they known the facts would have gone to the plaintiff rather than to other competitors in the market, or to lay a foundation for the claim for a loss of sales. The bill is so framed as to seem to invite the decision that was obtained from the Circuit Court of Appeals, but when scrutinized is seen to have so limited its statements as to exclude the right to complain.

Decree reversed.

McGRAIN *v.* DAUGHERTY.

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

No. 28. Argued December 5, 1924.—Decided January 17, 1927.

1. Deputies, with authority to execute warrants, may be appointed by the Sergeant-at-Arms of the Senate, under a standing order of the Senate, such appointments being sanctioned by practice and by acts of Congress fixing the compensation of the appointees and providing for its payment. P. 154.
2. Such deputy may serve a warrant of attachment issued by the President of the Senate and addressed only to the Sergeant-at-Arms, in pursuance of a Senate resolution contemplating service by either. P. 155.
3. A warrant of the Senate for attachment of a person who ignored a subpoena from a Senate committee, is supported by oath within the requirement of the Fourth Amendment when based upon the committee's report of the facts of the contumacy, made on the committee's own knowledge and having the sanction of the oath of office of its members. P. 156.
4. Subpoenas issued by a committee of the Senate to bring before it a witness to testify in an investigation authorized by the Senate, are as if issued by the Senate itself. P. 158.
5. Therefore, in case of disobedience, the fact that the subpoena, and the contumacy, related only to testimony sought by a committee, is not a valid objection to a resolution of the Senate, and warrant issued thereon, requiring the defaulting witness to appear before the bar of the Senate itself, then and there to give the desired testimony. P. 158.
6. Each house of Congress has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution. P. 160.
7. This has support in long practice of the houses separately, and in repeated Acts of Congress, all amounting to a practical construction of the Constitution. Pp. 161, 167, 174.
8. The two houses of Congress in their separate relations have not only such powers as are expressly granted them by the Constitution, but also such auxiliary powers as are necessary and appro-

priate to make the express powers effective, but neither is invested with "general" power to inquire into private affairs and compel disclosures. P. 173.

9. A witness may rightfully refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry. P. 176.

10. A resolution of the Senate directing a committee to investigate the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers, specific instances of alleged neglect being recited,—concerned a subject on which legislation could be had which would be materially aided by the information which the investigation was calculated to elicit. P. 176.

11. It is to be presumed that the object of the Senate in ordering such an investigation is to aid it in legislating. P. 178.

12. It is not a valid objection to such investigation that it might disclose wrong-doing or crime by a public officer named in the resolution. P. 179.

13. A resolution of the Senate, directing attachment of a witness who had disobeyed a committee subpoena to such an investigation, and declaring that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper," supports the inference, from the earlier resolution, of a legislative object. The suggestion of "other action" does not overcome the other part of the declaration and thereby invalidate the attachment proceedings. P. 180.

14. In view of the character of the Senate as a continuing body, and its power to continue or revive, with its original functions, the committee before which the investigation herein involved was pending, the question of the legality of the attachment of the respondent as a contumacious witness did not become moot with the expiration of the Congress during which the investigation and the attachment were ordered. P. 180.

299 Fed. 620, reversed.

APPEAL from a final order of the District Court, in *habeas corpus*, discharging the respondent, Mally S.

Daugherty, from the custody of John J. McGrain, Deputy Sergeant at Arms of the Senate, by whom he had been arrested, as a contumacious witness, under a warrant of attachment, issued by the President of the Senate in pursuance of a Senate resolution.

Mr. George W. Wickersham, Special Assistant to the Attorney General, with whom *Attorney General Stone* and *Mr. William T. Chantland,* Special Assistant to the Attorney General, were on the brief, for the appellant.

Each House of Congress has power to conduct an investigation in aid of its legislative functions, to compel attendance before it of witnesses and the production of books and papers which may throw light upon the subject of inquiry; subject, of course, to protection against the invasion of such privileges as those against unreasonable searches and seizures, self-incrimination and the like. This power is for the purpose of aiding each House more fitly to discharge its legislative duties. The investigation ordered by the Senate resolution of March 1st was of that character; and the court below erred in the construction it put upon the resolution and in holding the entire proceeding void. For many years it has been the practice of both Houses of Congress to conduct investigations into matters of public interest within the general domain of federal jurisdiction, and to summon witnesses to appear and give testimony and produce books and papers bearing upon the questions under investigation. See §§ 102 and 104, Revised Statutes. The power of the respective Houses to compel the attendance and testimony of witnesses in order to secure information necessary or useful to enable them to perform their legislative functions was thus recognized by law, and defiance of that power made punishable as a crime against the United States. This was without impairing in the slightest the right of a House to employ the power regarding contempt to compel obedi-

ence to its orders. *In re Chapman*, 166 U. S. 661. The power of each House was asserted from the beginning, not because it was exercised by the House of Commons in England, but because it is " necessary or proper for carrying into execution " the powers vested by the Constitution in Congress, and each House thereof.

In December, 1859, the Senate, by resolution, appointed a committee to inquire into the facts concerning the invasion and seizure of the armory and arsenal at Harper's Ferry and to report facts and recommend legislation, the committee to have power to send for persons and papers. In February, 1860, a resolution was adopted directing the Sergeant-at-Arms to take into his custody the body of Thaddeus Hyatt, and to have the same forthwith before the bar of the Senate to answer as for a contempt of its authority. Pursuant to this resolution, Hyatt was brought before the bar, and a resolution was adopted, after a long debate, by a vote of 44 ayes and 10 noes, directing him to be committed by the Sergeant-at-Arms to the common jail of the District of Columbia, to be kept in close custody until he should signify his willingness to answer the questions propounded by the Senate. Con. Globe, 1st Sess. 36th, pp. 1102, 1105. In upholding the existence of the power, the Senate did not divide on sectional lines, and the vote was overwhelmingly in support of the asserted power.

The question seems never to have been squarely decided in this Court. In some cases, the point was expressly reserved for future decision; in others there are expressions of opinion strongly favoring the existence of the power. *Kilbourn* v. *Thompson*, 103 U. S. 168. See *Burnham* v. *Morrissey*, 14 Gray, (Mass.) 226; *Anderson* v. *Dunn*, 6 Wheat. 204.

The Massachusetts court in the above case did not reach its conclusions from any analogy to the privileges of Parliament, nor from any residuum of power left in

the legislature because not taken away by the state constitution. The power was recognized as necessary to the functions expressly delegated to the legislature by the constitution. The same principle is equally applicable to each House of Congress under the Constitution of the United States.

The point was reserved, in *Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407, and *Henry* v. *Henkel*, 235 U. S. 219. *Kilbourn* v. *Thompson, supra,* and *Interstate Commerce Comm.* v. *Brimson.* 154 U. S. 447, seem slightly hostile to such a power. *Marshall* v. *Gordon,* 243 U. S. 521, 543, contains an argumentative dictum in favor of the right. See the instances of legislative action cited, with approval, on the margin of the report. Cf. Hinds' Precedents, Vol. 3: 21, 24.

A final proof that the express constitutional grant of certain judicial powers to Congress, or a House thereof, does not negative the implication of further powers of that nature, (See *Anderson* v. *Dunn,* 6 Wheat. at p. 232,) exists in the fact that the Constitution expressly forbids the exercise of the parliamentary judicial power of passing bills of attainder. Art. I, § 9. Where there are both express grants and express prohibitions, the application of the principle *expressio unius* is self-contradictory, and so the field is left clear for ordinary implication with no bias *ab initio* against it.

The matter in the *Kilbourn* case was a settled debt, an executed transaction, one that should not be undone by legislative but only by judicial act, if at all, and which was being considered in the District Court which was the proper forum of the bankruptcy proceedings. *In re Chapman,* 166 U. S. 661, is of value here chiefly for the presumption of validity conceded to the Senate's resolution. The opinion shows that the usual presumption of validity of legislative acts applies to the resolution of a single House, indicates a qualification on the *Kilbourn* case, and

disposes of the District Court's point in the present case, that a legislative purpose was not expressly averred in the original resolution but only in the one directing Daugherty's arrest. It also shows that that case is not to be distinguished on the ground that the proceedings were under the statute, but that the Senate could have proceeded directly.

In *Marshall* v. *Gordon,* 243 U. S. 521, "the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties" (p. 546). That is to say, while the right to punish contempts obstructing legislation was upheld, the letter sent by Marshall was not deemed to amount to an obstruction.

The rule to be derived from these contempt cases may be summarized thus: in addition to the express power to "punish its members for disorderly behavior," Constitution, Art. I, § 5, each House has an implied power to punish outsiders for contempts, *Anderson* v. *Dunn, supra;* but no such power is implied in aid of a proceeding outside the jurisdiction of the House, *Kilbourn* v. *Thompson, supra;* however, a presumption of validity attaches to a resolution of either House, just as to legislation of both Houses jointly, so that all doubts are to resolved in its favor, *In re Chapman,* and an investigation of a public officer or department is therefore presumed legislative in purpose and therefore valid until the contrary is shown, *Marshall* v. *Gordon, semble.*

The power rests upon the well-settled rule of unexpressed power necessary or proper to the exercise of express powers, being recognized by the Courts as necessarily a part of the constitutional grant. The leading case of course is *McCulloch* v. *Maryland,* 4 Wheat. 316. That the principle of that case justifies the implication in favor of either House of Congress having power to punish contempts, is recognized in *Marshall* v. *Gordon,* p. 537. Multiplication of the cases following *McCulloch* v. *Maryland,* or of the practical arguments to show that the

gathering of information by the compulsion of contempt proceedings is appropriate, if not imperative, for legislation under modern conditions, seems unnecessary.

A similar question arises where boards or commissions exercising delegated legislative power seek to compel testimony and the production of documents in the aid of its exercise. *Harriman* v. *Interstate Commerce Comm.,* 211 U. S. 407, and the language of the majority opinion is qualified by *Smith* v. *Interstate Commerce Comm.,* 245 U. S. 33. While the cases last cited are not controlling, they indicate a trend away from the idea expressed in the earlier cases and the opinion in the court below, that testimony can be compelled only in an investigation into a specific breach of existing law—a judicial inquiry. Furthermore, the case for a House of Congress investigating by its own committee is much stronger than that of an administrative body acting under delegated powers.

The question of the power of either House to compel testimony in aid of legislation has not been decided adversely in any of the inferior federal courts. See *Ex Parte Nugent,* Fed. Cas., 10375 (1848); *In re Pacific Railway Comm.,* 32 Fed., 241; *Henry* v. *Henkel, supra;* and 207 Fed. 805; *Briggs* v. *Mackeller,* 2 Abbott's Practice, N. Y., 30; *United States* v. *Sinclair,* 52 Wash L. Rep. 451 [July, 1924].

A number of state court decisions have upheld the existence of the power here contended for. *Briggs* v. *Mackellar,* 2 Abbott's Practice, N. Y., 30 (1835); *People* v. *Keeler,* 99 N. Y. 463 (1885); *Matter of Barnes,* 204 N. Y. 108 (1912); *Burnham* v. *Morrissey,* 14 Gray 226; *State* v. *Guilbert,* 75 Ohio St. 1, distg.; *State* v. *Brewster,* 89 N. J. L. 658 (1916); *In re Falvey,* 7 Wis. 630 (1858); *Ex parte Parker,* 74 S. C. 466 (1906).

It is submitted that the District Court's distinction between the rule which obtains in States where the whole legislative power is vested in the legislature and those

where all powers not expressly granted are reserved to the people, is wholly unsound in its application to the powers of Congress under the Constitution. The rule finally worked out by the courts and expressed by Chief Justice White in *Marshall* v. *Gordon, supra,* is based upon the doctrine of the grant by the Constitution of all powers necessary or proper to the use of the powers expressly granted. Each House has power to do whatever is customarily required to enable it intelligently to participate in the making of laws. Such implied power cannot be reserved to the States, respectively, or to the people, for it can only be exercised by the House itself. If it be not vested in such House, it exists nowhere. That it does exist in each House, and constantly has been exercised for nearly a century past, is abundantly demonstrated.

The English cases dealing with the powers of the House of Commons to compel testimony and punish for contempt of its process are interesting as furnishing an historical background but are not otherwise of great importance, their authority having been rejected by the Supreme Court (*Kilbourn* v. *Thompson, supra,*) disregarded in Massachusetts and rejected in New York, both of which uphold the power (*Burnham* v. *Morrissey, supra, People* v. *Keeler,* 99 N. Y. 463, 473,) and rejected in Ohio which denies it (*State* v. *Guilbert, supra,*) *Regina* v. *Paty,* 2 Ld. Raym., 1105; *Murray's case,* 1 Wils. 299; *Brass Crosby's Case,* 3 Wils., 188; *Rex* v. *Flower,* 8 T. R., 314; *Burdett* v. *Abbott,* 14 East, 1; *Stockdale* v. *Hansard,* 9 Ad. & E. 1; *Stockdale* v. *Hansard,* 11 Ad. & E. 253; *Case of Sheriff of Middlesex,* 11 Ad. & E. 273.

Colonial Cases: *Beaumont* v. *Barrett,* 1 Moo. P. C., 59; *Kielley* v. *Carson,* 4 Moo. P. C., 63; *Fenton* v. *Hampton,* 11 Moo. P. C. 347; *Doyle* v. *Falconer,* L. R., 1 P. C., 328; *Ex parte Dansereau,* XIX Lower Canada Jurist, 210; *Ex parte Brown,* 5 B. & S., 280.

The investigation ordered by the Senate, in the course of which the testimony of Appellee and the production of

books and records of the bank of which he is president were required, was legislative in its character. The investigation of the Attorney General's office was the exact action ordered. It is impossible to separate the person occupying that office, and his assistants, from the office; and the resolution of March 1st directed the committee to investigate circumstances and facts concerning the alleged failure of the Attorney General to prosecute and defend cases wherein the Government of the United States was interested, and to inquire into his activities and those of his assistants in the Department, which would in any manner tend to impair their efficiency or influence as representatives of the Government. The resolution of April 26th, by which the issuance of a warrant was ordered to bring the body of the Appellee before the bar of the Senate, then and there to answer questions pertinent to the matter under inquiry, is predicated upon a recital that "the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." See *Chapman* case, 166 U. S. 661; *People* v. *Keeler, supra; Kilbourn* v. *Thompson, supra; In re Falvey, supra; People* v. *Webb,* 5 N. Y. Supp., 855; *People* v. *Milliken,* 185 N. Y. 35; *Matter of Barnes, supra;*

The Department of Justice is one of the great executive branches of the Government. It is created by statute (Rev. Stats., Title VIII). The duties of the Attorney General and his assistants are in great measure defined by law. Annually Congress, with the concurrence of both Houses, appropriates large sums of money to be expended for the purpose of enforcing the law or defending the Government against claims in the courts, under the direction of the Attorney General and his assistants. Can it

possibly be said that the discovery of any facts showing the neglect or failure of the Attorney General or his assistants properly to discharge the duties imposed upon them by law cannot be and would not naturally be used by Congress as the basis for new legislation safeguarding the interests of the Government and making more improbable in the future the commission of any illegal or improper acts which might be shown to have been committed in the past? Appellee by refusing to appear in response to either subpoena and be sworn to testify, can only succeed in this case by establishing that the entire proceeding was void as beyond the constitutional powers of the Senate. Questions as to the materiality or relevancy of evidence are for later consideration.

Messrs. Arthur I. Vorys and *John P. Phillips,* with whom *Mr. Webb I. Vorys* was on the brief, for the appellee.

The arrest is the result of an attempt of the Senate to vest its committee with judicial power in a case which is not among those specifically enumerated. The court must determine the nature of the power which the Senate is attempting to exercise, and is not concluded by any *post litem* avowal made after the summons was issued, served and resisted, and after a court of competent jurisdiction had enjoined the exercise of the power. In *Kilbourn* v. *Thompson,* 103 U. S. 168, *In re Chapman,* 166 U. S. 661, and *Marshall* v. *Gordon,* 243 U. S. 521, this court examined the resolutions under which the investigations were being conducted and found that they were sufficient to exhibit the nature of the investigations and the purpose of the investigators. But the court is not limited to the formal words of this resolution, for it is the fact which is determinative and which this court must find. What the Senate intends to do and in fact is doing determines the character of its proceeding. It can not

be said that, as the Senate has not declared what it intends to do at the conclusion of the investigation, therefore the investigation is not judicial and not executive, and consequently it must be legislative in character. Nor that, as the Senate at the end of the investigation can do nothing in a judicial or executive capacity, therefore it must be assumed that its action, if any, will be in a legislative capacity.

The preamble of Senate Resolution No. 157, which clearly indicates its purpose, was stricken out upon final passage of the resolution, not because the purpose of the Senate had changed in any particular but because the Senate did not desire to condemn the Attorney General without a trial. Throughout the debate upon the resolution the idea recurs constantly that the Attorney General is to be placed on trial. There is no suggestion of legislative action, or in fact of any action other than the ascertainment of facts with respect to the charges of malfeasance in office of Harry M. Daugherty and the publication of the same for the purpose of forcing him to resign. Only twice during the whole debate was there any pretense that the investigators were to engage in anything other than a trial of Mr. Daugherty.

The committee has assumed all of the functions of prosecutor, judge and jury with apparently none of the customary rules governing evidence and procedure. The court, however, need go no further than the resolution which, in apt words, reposes in the investigating committee judicial duties, and judicial duties alone. The personal cast of the resolution, the inability of the committee to do anything except to try the facts concerning the charges contained in the resolution and the total inability of the Senate to use the findings of the investigating committee for any purpose other than to pillory Harry M. Daugherty before the American people, clearly demonstrate that the proceeding is an attempt to usurp the

judicial function. Of most important significance, is the fact that the first hint of any pretense that this inquisition was being conducted for legislative purposes was the *ex post facto* recital of a "basis for such legislation and other action" in the resolution of April 26, 1924, authorizing a warrant for the arrest of the appellee. This afterthought was inserted after the proceeding and injunction in the Fayette County Court and when the Senate knew that the validity of its resolution had been challenged in that proceeding on the ground that it conferred judicial authority. The Senate of the United States cannot override the constitutional rights of a private citizen by a mere additional word or gesture.

The Senate when acting in its legislative capacity has no power to arrest in order to compel testimony; the Senate can compel testimony only in cases where it has judicial power specifically granted by the Constitution. Any argument which begins with an assertion that citizens owe a duty to give testimony and thereupon asserts that Congress, or a branch thereof, may enforce this duty by its own processes, will result in nullifying the express division of powers among the three branches of government.

At the time our Constitution was adopted the process of arrest resided solely in the judiciary. *Marshall* v. *Gordon,* 243 U. S. 521, 533. In England the power to arrest and punish was retained by the House of Commons because of ancient privilege and prescription and not because of legislative right. The power of arrest has never been accorded to inferior legislative or administrative bodies. In the few instances in which such an attempt has been made, the power has been denied whenever it has been challenged in the courts. *Langenberg* v. *Decker,* 131 Ind. 471; *Re Sims,* 54 Kans. 1; *Kielley* v. *Carson,* 4 Moore P. C. 63; *Fenton* v. *Hampton,* 11 Moore

P. C. 347; *Ex Parte Dansereau,* 19 Lower Canada Jurist, 210.

This Court has never decided that the Congress, or either branch of it, has power, in its legislative capacity, to cause the arrest of a witness in order to compel him to testify. The intimations of the learned jurists to the contrary are so plain that it is impossible to piece out what opposing counsel have called " expressions strongly favoring the existence of the power." *Kilbourn* v. *Thompson,* 103 U. S. 168; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; *In re Chapman,* 166 U. S. 661; *Harriman* v. *Interstate Commerce Comm.,* 211 U. S. 407; *Marshall* v. *Gordon, supra; Boyd* v. *United States,* 116 U. S. 616; *Ellis* v. *Interstate Commerce Comm.,* 237 U. S. 434; *Federal Trade Comm.* v. *American Tobacco Co.,* 264 U. S. 298; *Ex parte Nugent,* Fed. Cas. 10375; *Re Pacific Ry. Comm.,* 32 Fed. 250; *Smith* v. *Interstate Commerce Comm.,* 245 U. S. 33.

Congress, under the Federal Constitution, has only those powers which are granted to it, but many of the state legislatures differ from the English Parliament only in the degree of their powers, having all powers not expressly or impliedly denied by the state constitutions. From this it follows that the same canons of interpretation do not apply to the state legislatures and the national Congress. *People* v. *Keeler,* 99 N. Y. 463; *Ex Parte Parker,* 74 S. C. 466; *Burnham* v. *Morrissey,* 14 Gray (Mass.) 226; *Whitcomb's Case,* 120 Mass. 118. Those who have contended that the power to compel testimony is a legislative power have urged it as a necessity. The proponents of this argument resort to the famous definition and amplification of the word " necessary " of Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 306. The reasoning is fallacious and circuitous. Marshall was considering the power of the United States to establish a national bank. He referred to Clause 18

of Article I, § 8 of the Constitution, in which Congress was given power to make laws which shall be necessary and proper for carrying into execution the powers expressly given. He was not implying a grant of power which, because it might be convenient, or appropriate in the exercise of another power, would therefore be permitted to override the constitutional guaranties of the private citizen. In the cases which have followed and adopted Mr. Chief Justice Marshall's definition, no case has implied such a grant from convenience so as to override the express guaranties of the Bill of Rights contained in the first ten Amendments. Not even when Congress is given an express power can that power be exercised in derogation of the express guaranties of individual liberty. *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447. If Congress has no such power where there is a specific grant, certainly Congress cannot destroy personal guaranties through any implied grant incidental to the general power to enact laws. The only satisfactory determination of the substantive question in this case should be that the power to arrest a recusant witness is a judicial process and confined to the jurisdiction of the courts, and that the Senate has no power to arrest a recusant witness except in the cases in which the constitution gives the Senate judicial power.

If Congress has power to compel the production of evidence, to aid Congress in formulating further legislation, then Congress, both Houses concurring, must declare its purpose, and the demand for the information. The Senate cannot legislate, and the Senate cannot compel testimony relating to proposed legislation which the Senate alone has in mind. Const., Art. I, § 1; See *State* v. *Guilbert,* 75 O. S. 1.

If a witness may be compelled to testify in order to aid the Senate in the formulation of legislation, then it must be shown what legislation the Senate has in view

and that the evidence sought is pertinent to the subject-matter of legislation under consideration, and the testimony of the witness can be compelled only through judicial process of the court. In order to justify the compulsory discovery of evidence it must appear for what purpose the testimony is sought and the materiality of the evidence must be affirmatively shown. *Federal Trade Comm.* v. *American Tobacco Co.,* 264 U. S. 298; *Hale* v. *Henkel,* 201 U. S. 43. *Matter of Barnes,* 204 N. Y. 108; *United States* v. *Searles,* 25 Wash. L. Rep. 384.

Senate Resolution No. 157 not only does not show what subjects of legislation were in contemplation, but does show the purpose of the investigation, namely, to determine as to the alleged guilt of Harry M. Daugherty. There is nothing in the record to show what proposed subject-matters of legislation were under consideration, and in no way can it be seen that the testimony of the appellee or the books and records of the bank and the accounts of the bank's customer could furnish information that would be useful in framing any legislation shown to have been in the mind of the Senate or of any member thereof.

The warrant issued by the president *pro tempore* of the Senate was not supported by oath or affirmation as required by the Federal Constitution. Even a bench warrant must be supported by oath. No arrest or attachment for contempt can issue from any court where the contempt is constructive or outside of the presence of the court without a supporting affidavit.

The arrest of Mr. Daugherty is illegal for the reason that it was made under a warrant to bring him forcibly before the Senate to answer the Senate's questions before he had been subpoenaed by the Senate and had refused to obey the Senate.

This Court will respect the jurisdiction and order of the state court, and will make no order which may

effectuate a violation of the injunction or conflict with the purpose and spirit of the injunction.

The law does not provide for any deputy Sergeant-at-Arms. If there were such a officer, this warrant could not be executed by him because it is directed to the Sergeant-at-Arms and not to a deputy.

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

This is an appeal from the final order in a proceeding in *habeas corpus* discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice. A full statement of the case is necessary.

The Department of Justice is one of the great executive departments established by congressional enactment and has charge, among other things, of the initiation and prosecution of all suits, civil and criminal, which may be brought in the right and name of the United States to compel obedience or punish disobedience to its laws, to recover property obtained from it by unlawful or fraudulent means, or to safeguard its rights in other respects; and also of the assertion and protection of its interests when it or its officers are sued by others. The Attorney General is the head of the department, and its functions are all to be exercised under his supervision and direction.[1]

Harry M. Daugherty became the Attorney General March 5, 1921, and held that office until March 28, 1924,

[1] Rev. Stats. secs. 346, 350, 359, 360, 361, 362, 367; Judicial Code, secs. 185, 212; c. 382, secs. 3, 5, 25 Stat. 858, 859; c. 647, sec. 4, 26 Stat. 209; c. 3935, 34 Stat. 816; c. 323, sec. 15, 38 Stat. 736; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278; *Kern River Co.* v. *United States*, 257 U. S. 147, 155; *Ponzi* v. *Fessenden*, 258 U. S. 254, 262.

when he resigned. Late in that period various charges of misfeasance and nonfeasance in the Department of Justice after he became its supervising head were brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated to the end that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil. The Senate regarded the charges as grave and requiring legislative attention and action. Accordingly it formulated, passed and invited the House of Representatives to pass (and that body did pass) two measures taking important litigation then in immediate contemplation out of the control of the Department of Justice and placing the same in charge of special counsel to be appointed by the President [2]; and also adopted a resolution authorizing and directing a select committee of five senators—

"to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal statutes, and his alleged failure

[2] Cong. Rec. 68th Cong., 1st Sess., pp. 1520, 1521, 1728; c. 16, 43 Stat. 5; Cong. Rec. 68th Cong., 1st Sess., pp. 1591, 1974; c. 39, 43 Stat. 15; c. 42, 43 Stat. 16.

to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States."

The resolution also authorized the committee to send for books and papers, to subpoena witnesses, to administer oaths, and to sit at such times and places as it might deem advisable.[3]

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio,—a subpoena commanding him to appear before the committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him the "deposit ledgers of the Midland National Bank since November 1, 1920; also note files and transcript of owners of every safety vault; also records of income drafts; also records of any individual account or accounts showing withdrawals of amounts of $25,000 or over during above period." The witness failed to appear.

A little later in the course of the investigation the committee issued and caused to be duly served on the same witness another subpoena commanding him to appear before it for the purpose of giving testimony relating to the subject under consideration—nothing being

[3] For the full resolution and two amendments adopted shortly thereafter see Cong. Rec., 68th Cong., 1st Sess., pp. 3299, 3409–3410, 3548, 4126.

said in this subpoena about bringing records, books or papers. The witness again failed to appear; and no excuse was offered by him for either failure.

The committee then made a report to the Senate stating that the subpoenas had been issued, that according to the officer's returns—copies of which accompanied the report—the witness was personally served; and that he had failed and refused to appear.[4] After a reading of the report, the Senate adopted a resolution reciting these facts and proceeding as follows:[5]

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed from the terms of the resolution that the warrant was to be issued in furtherance of the effort to obtain the personal testimony of the witness and, like the second subpoena, was not intended to exact from him the production of the various records, books and papers named in the first subpoena.

The warrant was issued agreeably to the resolution and was addressed simply to the Sergeant at Arms. That

[4] Senate Report No. 475, 68th Cong., 1st Sess.

[5] Cong. Rec., 68th Cong., 1st Sess., pp. 7215–7217.

officer on receiving the warrant endorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded; whereupon the witness petitioned the federal district court in Cincinnati for a writ of *habeas corpus*. The writ was granted and the deputy made due return setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate in directing the investigation and in ordering the attachment exceeded its powers under the Constitution, 299 Fed. 620. The deputy prayed and was allowed a direct appeal to this Court under § 238 of the Judicial Code as then existing.

We have given the case earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it, or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose.

Other questions are presented which in regular course should be taken up first.

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the

warrant because it was addressed simply to the Sergeant at Arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the Sergeant at Arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the Sergeant at Arms in person." [6] In actual practice the Senate has given full effect to the order; and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation and by making appropriations to pay them.[7] Thus there was ample provision of law for a deputy.

The fact that the warrant was addressed simply to the Sergeant at Arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate; and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy if the Sergeant at Arms so directed, which he did.

The case of *Sanborn* v. *Carleton,* 15 Gray 399, on which the witness relies, related to a warrant issued to the Sergeant at Arms in 1860, which he deputed another to execute. At that time there was no standing rule or

[6] Senate Journal 47, 51–1, Dec. 17, 1889; Senate Rules and Manual, 68th Cong., p. 114.

[7] 41 Stat. 632, 1253; 42 Stat. 424, 1266; 43 Stat. 33, 580, 1288.

statute permitting him to act through a deputy; nor was there anything in the resolution under which the warrant was issued indicative of a purpose to permit him to do so. All that was decided was that in the absence of a permissive provision, in the warrant or elsewhere, he could not commit its execution to another. The provision which was absent in that case and deemed essential is present in this.

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue but upon probable cause supported by oath or affirmation" and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common law designed to prevent the issue of groundless warrants. In legislative practice committee reports are regarded as made under the sanction of the oath of office of its members; and where the matters reported are within the committee's knowledge and constitute probable cause for an attachment such reports are acted on and given effect without requiring that they be supported by further oath or affirmation. This is

not a new practice but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common law rule and the affirming constitutional provision, and should be given effect accordingly.[8]

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence,[9] and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served.[10] A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation;[11] and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the

[8] *Prigg* v. *Pennsylvania*, 16 Pet. 539, 620–621; *The Laura*, 114 U. S. 411, 416; *McPherson* v. *Blacker*, 146 U. S. 1, 35–36; *Ex parte Grossman*, 267 U. S. 87, 118; *Myers* v. *United States*, 272 U. S. 52.

[9] *Ex parte Terry*, 128 U. S. 289, 307, *et seq.*; *Holcomb* v. *Cornish*, 8 Conn. 375; 4 Blackst. Com. 286.

[10] *Robbins* v. *Gorham*, 25 N. Y. 588; *Wilson* v. *State*, 57 Ind. 71.

[11] *Hale* v. *Henkel*, 201 U. S. 43, 60–62; *Regina* v. *Russell*, 2 Car. & Mar. 247; *Commonwealth* v. *Hayden*, 163 Mass. 453, 455; Decision of Mr. Justice Catron reported in Wharton's Cr. Pl. & Pr., 8th ed., pp. 224–226.

court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.[12]

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

The witness also points to the provision in the warrant and in the resolution under which it was issued requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpoenaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so.

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[12] See *Hale* v. *Henkel, supra; Blair* v. *United States,* 250 U. S. 273; *Nelson* v. *United States,* 201 U. S. 92, 95; Equity Rule 52, 226 U. S. Appendix, 15; *Heard* v. *Pierce,* 8 Cush. 338.

The witness sets up an interlocutory injunction granted by a state court at Washington Court House, Ohio, in a suit brought by the Midland National Bank against two members of the investigating committee, and contends that the attachment was in violation of that injunction and therefore unlawful. The contention is plainly ill-founded. The injunction was granted the same day the second subpoena was served, but whether earlier or later in the day does not appear. All that the record discloses about the injunction is comprised in the paragraph copied in the margin from the witness's petition for *habeas corpus*.[13] But it is apparent from what is disclosed that the injunction did not purport to place any restraint on the witness, nor to restrain the committee from demanding that he appear and testify personally to what he knew respecting the subject under investigation; and also that what the injunction did purport to restrain has no bearing on the power of the Senate to enforce that demand by attachment.

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[13] "On the 11th day of April, 1924, in an action in the Court of Common Pleas of said Fayette County, Ohio, in which said The Midland National Bank was plaintiff and said B. K. Wheeler and Smith W. Brookhart were defendants, upon the petition of said bank said court granted a temporary restraining order enjoining and restraining said defendants and their agents, servants, and employees from entering into said banking room and from taking, examining, or investigating any of the books, accounts, records, promissory notes, securities, letters, correspondence, papers, or any other property of said bank or of its depositors, borrowers, or customers in said banking room and from in any manner molesting and interfering with the business and affairs of said bank, its officers, agents, servants, and the business of its depositors, borrowers and customers with said bank until the further order of said court. The said defendants were duly served with process in said action and duly served with copies of said temporary restraining order on said 11th day of April, 1924, and said injunction has not been modified by said court and no further order has been made in said case by said court, and said injunction is in full force and effect."

In approaching the principal questions, which remain to be considered, two observations are in order. One is that we are not now concerned with the direction in the first subpoena that the witness produce various records, books and papers of the Midland National Bank. That direction was not repeated in the second subpoena; and is not sought to be enforced by the attachment. This was recognized by the court below, 299 Fed. 623, and is conceded by counsel for the appellant. The other is that we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed.

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct

from the other, to have its own officers and rules, and to exercise its legislative function independently.[14] Art. I, secs. 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.[15]

This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition and authorized the committee to send for necessary persons, papers and records. Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted for the inquiry. 3 Cong. Ann. 494. Other exertions of the power by the House of Representatives, as also by the Senate, are shown in the citations already made. Among those by the Senate, the inquiry ordered in 1859 respecting the raid by John Brown and his adherents on the armory and arsenal of the United States at Harper's Ferry is of special significance. The resolution

[14] Story Const., secs. 545, *et seq.*; 1 Kent's Com., p. 222.

[15] May's Parliamentary Practice, 2d ed., pp. 80, 295, 299; Cushing's Legislative Practice, secs. 634, 1901–1903; 3 Hinds' Precedents, secs. 1722, 1725, 1727, 1813–1820; Cooley's Constitutional Limitations, 6th ed., p. 161.

directing the inquiry authorized the committee to send for persons and papers, to inquire into the facts pertaining to the raid and the means by which it was organized and supported, and to report what legislation, if any, was necessary to preserve the peace of the country and protect the public property. The resolution was briefly discussed and adopted without opposition. Cong. Globe, 36th Cong., 1st Sess., pp. 141, 152. Later on the committee reported that Thaddeus Hyatt, although subpoenaed to appear as a witness, had refused to do so; whereupon the Senate ordered that he be attached and brought before it to answer for his refusal. When he was brought in he answered by challenging the power of the Senate to direct the inquiry and exact testimony to aid it in exercising its legislative function. The question of power thus presented was thoroughly discussed by several senators—Mr. Sumner of Massachusetts taking the lead in denying the power and Mr. Fessenden of Maine in supporting it. Sectional and party lines were put aside and the question was debated and determined with special regard to principle and precedent. The vote was taken on a resolution pronouncing the witness's answer insufficient and directing that he be committed until he should signify that he was ready and willing to testify. The resolution was adopted—44 senators voting for it and 10 against. Cong. Globe, 36th Cong., 1st Sess., pp. 1100–1109, 3006–3007. The arguments advanced in support of the power are fairly reflected by the following excerpts from the debate:

Mr. Fessenden of Maine. "Where will you stop? Stop, I say, just at that point where we have gone far enough to accomplish the purposes for which we were created; and these purposes are defined in the Constitution. What are they? The great purpose is legislation. There are some other things, but I speak of legislation as the principal purpose. Now, what do we propose to do here? We

propose to legislate upon a given state of facts, perhaps, or under a given necessity. Well, sir, proposing to legislate, we want information. We have it not ourselves. It is not to be presumed that we know everything; and if any body does presume it, it is a very great mistake, as we know by experience. We want information on certain subjects. How are we to get it? The Senator says, ask for it. I am ready to ask for it; but suppose the person whom we ask will not give it to us: what then? Have we not power to compel him to come before us? Is this power, which has been exercised by Parliament, and by all legislative bodies down to the present day without dispute—the power to inquire into subjects upon which they are disposed to legislate—lost to us? Are we not in the possession of it? Are we deprived of it simply because we hold our power here under a Constitution which defines what our duties are, and what we are called upon to do?

"Congress have appointed committees after committees, time after time, to make inquiries on subjects of legislation. Had we not power to do it? Nobody questioned our authority to do it. We have given them authority to send for persons and papers during the recess. Nobody questioned our authority. We appoint committees during the session, with power to send for persons and papers. Have we not that authority, if necessary to legislation?

* * * * *

"Sir, with regard to myself, all I have to inquire into is: is this a legitimate and proper object, committed to me under the Constitution; and then, as to the mode of accomplishing it, I am ready to use judiciously, calmly, moderately, all the power which I believe is necessary and inherent, in order to do that which I am appointed to do; and, I take it, I violate no rights, either of the people generally or of the individual, by that course."

Mr. Crittenden of Kentucky. "I come now to a question where the coöperation of the two branches is not necessary. There are some things that the Senate may do. How? According to a mode of its own. Are we to ask the other branch of the Legislature to concede by law to us the power of making such an inquiry as we are now making? Has not each branch the right to make what inquiries and investigation it thinks proper to make for its own action? Undoubtedly. You say we must have a law for it. Can we have a law? Is it not, from the very nature of the case, incidental to you as a Senate, if you, as a Senate, have the power of instituting an inquiry and of proceeding with that inquiry? I have endeavored to show that we have that power. We have a right, in consequence of it, a necessary incidental power, to summon witnesses, if witnesses are necessary. Do we require the concurrence of the other House to that? It is a power of our own. If you have a right to do the thing of your own motion, you must have all powers that are necessary to do it.

"The means of carrying into effect by law all the granted powers, is given where legislation is applicable and necessary; but there are subordinate matters, not amounting to laws; there are inquiries of the one House or the other House, which each House has a right to conduct; which each has, from the beginning, exercised the power to conduct; and each has, from the beginning, summoned witnesses. This has been the practice of the Government from the beginning; and if we have a right to summon the witness, all the rest follows as a matter of course."

The deliberate solution of the question on that occasion has been accepted and followed on other occasions by both houses of Congress, and never has been rejected or questioned by either.

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose.

In *Burnham* v. *Morrisey,* 14 Gray 226, 239, the Supreme Judicial Court of Massachusetts, in sustaining an exertion of this power by one branch of the legislature of that Commonwealth, said:

"The house of representatives has many duties to perform, which necessarily require it to receive evidence and examine witnesses. . . . It has often occasion to acquire certain knowledge of facts, in order to the proper performance of legislative duties. We therefore think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to appear and testify. This power to summon and examine witnesses it may exercise by means of committees."

In *Wilckens* v. *Willet,* 1 Keyes 521, 525, a case which presented the question whether the House of Representatives of the United States possesses this power, the Court of Appeals of New York said:

"That the power exists there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation."

In *People* v. *Keeler,* 99 N. Y. 463, 482, 483, where the validity of a statute of New York recognizing and giving effect to this power was drawn in question, the Court of Appeals approvingly quoted what it had said in *Wilckens* v. *Willet,* and added:

"It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon

witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required, and, irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I cannot yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. To await the slow process of indictment and prosecution for a misdemeanor, might prove quite ineffectual, and necessary legislation might be obstructed, and perhaps defeated, if the legislative body had no other and more summary means of enforcing its right to obtain the required information. That the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts." . . . "Throughout this Union the practice of legislative bodies, and in this State, the statutes existing at the time the present Constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute."

Other decisions by state courts recognizing and sustaining the legislative practice are found in *Falvey* v. *Massing,* 7 Wis. 630, 635–638; *State* v. *Frear,* 138 Wis. 173; *Ex parte Parker,* 74 S. C. 466, 470; *Sullivan* v. *Hill,* 73 W. Va. 49, 53; *Lowe* v. *Summers,* 69 Mo. App. 637, 649–650. An instructive decision on the question is also found in *Ex parte Dansereau* (1875), 19 L. C. Jur. 210, where the

legislative assembly of the Province of Quebec was held to possess this power as a necessary incident of its power to legislate.

We have referred to the practice of the two houses of Congress; and we now shall notice some significant congressional enactments. May 3, 1798, c. 36, 1 Stat. 554, Congress provided that oaths or affirmations might be administered to witnesses by the President of the Senate, the Speaker of the House of Representatives, the chairman of a committee of the whole, or the chairman of a select committee, "in any case under their examination." February 8, 1817, c. 10, 3 Stat. 345, it enlarged that provision so as to include the chairman of a standing committee. January 24, 1857, c. 19, 11 Stat. 155, it passed "An Act more effectually to enforce the attendance of witnesses on the summons of either house of Congress, and to compel them to discover testimony." This act provided, first, that any person summoned as a witness to give testimony or produce papers in any matter under inquiry before either house of Congress, or any committee of either house, who should wilfully make default, or, if appearing, should refuse to answer any question pertinent to the inquiry, should, in addition to the pains and penalties then existing,[16] be deemed guilty of a misdemeanor and be subject to indictment and punishment as there prescribed; and secondly, that no person should be excused from giving evidence in such an inquiry on the ground that it might tend to incriminate or disgrace him, nor be held to answer criminally, or be subjected to any penalty or forfeiture, for any fact or act as to which he was required to testify, excepting that he might be subjected to prosecution for perjury committed while so testifying. January 24, 1862, c. 11, 12 Stat. 333, Congress modified the immunity provision in particulars not mate-

[16] The reference is to the power of the particular house to deal with the contempt. *In re Chapman,* 166 U. S. 661, 671–672.

rial here. These enactments are now embodied in §§ 101–104 and 859 of Revised Statutes. They show very plainly that Congress intended thereby (a) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act;[17] (b) to recognize that such inquiries may be conducted through committees; (c) to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry "more effectually";[18] and (d) to open the way for obtaining evidence in such an inquiry, which otherwise could not be obtained, by exempting witnesses required to give evidence therein from criminal and penal prosecutions in respect of matters disclosed by their evidence.

Four decisions of this Court are cited and more or less relied on, and we now turn to them.

The first decision was in *Anderson* v. *Dunn,* 6 Wheat. 204. The question there was whether, under the Constitution, the House of Representatives has power to attach and punish a person other than a member for con-

[17] In construing section 1 of the Act of 1857 as reproduced in section 102 of the Revised Statutes, this Court said in *In re Chapman,* 166 U. S. 661, 667:

"It is true that the reference is to 'any' matter under inquiry, and so on, and it is suggested that this is fatally defective because too broad and unlimited in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion, *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59; and we think that the word 'any,' as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon."

[18] This Court has said of the act of 1857 that "it was necessary and proper for carrying into execution the powers vested in Congress and in each house thereof." *In re Chapman,* 166 U. S. 661, 671.

tempt of its authority—in fact, an attempt to bribe one of its members. The Court regarded the power as essential to the effective exertion of other powers expressly granted, and therefore as implied. The argument advanced to the contrary was that as the Constitution expressly grants to each house power to punish or expel its own members and says nothing about punishing others, the implication or inference, if any, is that power to punish one who is not a member is neither given nor intended. The Court answered this by saying:

(p. 225) "There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate."

(p. 233) "This argument proves too much; for its direct application would lead to annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other. The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state which sent him."

The next decision was in *Kilbourn* v. *Thompson*, 103 U. S. 168. The question there was whether the House of Representatives had exceeded its power in directing one of its committees to make a particular investigation. The decision was that it had. The principles announced and applied in the case are—that neither house of Congress possesses a "general power of making inquiry into the private affairs of the citizen"; that the power actually possessed is limited to inquiries relating to matters of which the particular house "has jurisdiction" and in respect of which it rightfully may take other action; that if the inquiry relates to "a matter wherein relief or redress could be had only by a judicial proceeding" it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse may be had to the resolution or order under which it is made. The court examined the resolution which was the basis of the particular inquiry, and ascertained therefrom that the inquiry related to a private real-estate pool or partnership in the District of Columbia. Jay Cooke & Co. had had an interest in the pool, but had become bankrupts, and their estate was in course of administration in a federal bankruptcy court in Pennsylvania. The United States was one of their creditors. The trustee in the bankruptcy proceeding had effected a settlement of the bankrupts' interest in the pool, and of course his action was subject to examination and approval or disapproval by the bankruptcy court. Some of the creditors, including the United States, were dissatisfied with the settlement. In these circumstances, disclosed in the preamble, the resolution directed the committee "to inquire into the matter and history of said real-estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Co.

were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to the House." The Court pointed out that the resolution contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had; that the bankrupts' estate and the trustee's settlement were still pending in the bankruptcy court; and that the United States and other creditors were free to press their claims in that proceeding. And on these grounds the Court held that in undertaking the investigation " the House of Representatives not only exceeded the limit of its own authority, but assumed power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."

The case has been cited at times, and is cited to us now, as strongly intimating, if not holding, that neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation. There are expressions in the opinion which, separately considered, might bear such an interpretation; but that this was not intended is shown by the immediately succeeding statement (p. 189) that " This latter proposition is one which we do not propose to decide in the present case because we are able to decide the case without passing upon the existence or non-existence of such a power in aid of the legislative function."

Next in order is *In re Chapman,* 166 U. S. 661. The inquiry there in question was conducted under a resolution of the Senate and related to charges, published in the press, that senators were yielding to corrupt influences in considering a tariff bill then before the Senate and were speculating in stocks the value of which would be affected by pending amendments to the bill. Chapman appeared before the committee in response to a subpoena, but refused to answer questions pertinent to the inquiry, and

was indicted and convicted under the act of 1857 for his refusal. The Court sustained the constitutional validity of the act of 1857, and, after referring to the constitutional provision empowering either house to punish its members for disorderly behavior and by a vote of two-thirds to expel a member, held that the inquiry related to the integrity and fidelity of senators in the discharge of their duties, and therefore to a matter "within the range of the constitutional powers of the Senate" and in respect of which it could compel witnesses to appear and testify. In overruling an objection that the inquiry was without any defined or admissible purpose, in that the preamble and resolution made no reference to any contemplated expulsion, censure, or other action by the Senate, the Court held that they adequately disclosed a subject-matter of which the Senate had jurisdiction, that it was not essential that the Senate declare in advance what it meditated doing, and that the assumption could not be indulged that the Senate was making the inquiry without a legitimate object.

The case is relied on here as fully sustaining the power of either house to conduct investigations and exact testimony from witnesses for legislative purposes. In the course of the opinion (p. 671) it is said that disclosures by witnesses may be compelled constitutionally "to enable the respective bodies to discharge their legitimate functions, and that it was to effect this that the act of 1857 was passed"; and also "We grant that Congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; but, because Congress, by the act of 1857, sought to aid each of the houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved." The terms "legitimate functions" and "constitutional functions"

are broad and might well be regarded as including the legislative function, but as the case in hand did not call for any expression respecting that function, it hardly can be said that these terms were purposely used as including it.

The latest case is *Marshall* v. *Gordon,* 243 U. S. 521. The question there was whether the House of Representatives exceeded its power in punishing, as for a contempt of its authority, a person—not a member—who had written, published and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. Power to make inquiries and obtain evidence by compulsory process was not involved. The Court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in *Anderson* v. *Dunn, supra,* but held that its action in this instance was without constitutional justification. The decision was put on the ground that the letter, while offensive and vexatious, was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions—in short, that the act which was punished as a contempt was not of such a character as to bring it within the rule that an express power draws after it others which are necessary and appropriate to give effect to it.

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with "general" power to inquire into private affairs and compel disclo-

sures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. The latter proposition has further support in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, 417–419, and *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 305–306.

With this review of the legislative practice, congressional enactments and court decisions, we proceed to a statement of our conclusions on the question.

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.[19]

[19] *Stuart* v. *Laird,* 1 Cranch 299, 309; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 351; *Ames* v. *Kansas,* 111 U. S. 449, 469; *Knowlton* v. *Moore,* 178 U. S. 41, 56, 92; *Fairbank* v. *United States,* 181 U. S. 283, 306, *et seq.*

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or with-

out due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion (299 Fed. 638, 639, 640):

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit of hostility towards the then Attorney General which they breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought.

"That the Senate has in contemplation the possibility of taking action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem

of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function.

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.

This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the *Chapman* case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said "We cannot assume on this record that the action of the Senate was without a legitimate object"; and also that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." (166 U. S. 669–670.) In *People* v. *Keeler*, 99 N. Y. 463, where the Court of Appeals of New York sustained an investigation ordered by the Senate of that state where the resolution contained no avowal, but disclosed that it definitely related to the administration of a public office the duties of which were subject to legislative regulation, the court said (pp. 485, 487): "Where public institutions under the control of the State are ordered to be investigated it is generally with the view of some legislative action respecting them, and the same may be said in respect of public officers." And again: "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended."

While we rest our conclusion respecting the object of the investigation on the grounds just stated, it is well to observe that this view of what was intended is not new, but was shown in the debate on the resolution.[20]

Of course, our concern is with the substance of the resolution and not with any nice questions of propriety respecting its direct reference to the then Attorney General by name. The resolution, like the charges which prompted its adoption, related to the activities of the department while he was its supervising officer; and the reference to him by name served to designate the period to which the investigation was directed.

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think

[20] Senator George said: "It is not a trial now that is proposed, and there has been no trial proposed save the civil and criminal actions to be instituted and prosecuted by counsel employed under the resolution giving to the President the power to employ counsel. We are not to try the Attorney General. He is not to go upon trial. Shall we say the legislative branch of the Government shall stickle and halt and hesitate because a man's public reputation, his public character, may suffer because of that legislative action? Has not the Senate power to appoint a committee to investigate any department of the Government, any department supported by the Senate in part by appropriations made by the Congress? If the Senate has the right to investigate the department, is the Senate to hesitate, is the Senate to refuse to do its duty merely because the public character or the public reputation of some one who is investigated may be thereby smirched, to use the term that has been used so often in the debate? . . . It is sufficient for me to know that there are grounds upon which I may justly base my vote for the resolution; and I am willing to leave it to the agent created by the Senate to proceed with the investigation fearlessly upon principle, not for the purpose of trying but for the purpose of ascertaining facts which the Senate is entitled to have within its possession in order that it may properly function as a legislative body." Cong. Rec., 68th Cong., 1st Sess., pp. 3397, 3398.

it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might

deem advisable or necessary.[21] It is said in Jefferson's Manual:[22] "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress";[23] and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress."[24] So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers.[25]

[21] Cong. Rec., 68th Cong., 1st Sess., p. 4126.

[22] Senate Rules and Manual, 1925, p. 303.

[23] Vol. 4, sec. 4544.

[24] Vol. 4, sec. 4545.

[25] Hinds' Precedents, Vol. 4, secs. 4396, 4400, 4404, 4405.

This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 514–516, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the *habeas corpus* proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited.

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.

MR. JUSTICE STONE did not participate in the consideration or decision of the case.

GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN.

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

No. 53. Argued December 3, 6, 1926.—Decided January 17, 1927.

1. Stock is presumed to be owned by the person registered as owner on the company's books; and when stated to be held by the registered owner for another named person, the latter is presumed to own the whole beneficial interest. P. 188.
2. A demand of the Alien Property Custodian upon a corporation for transfer to himself of every right, title and interest of an alien enemy in shares of stock, *construed* as a demand for, and as a symbolic seizure of, the shares. P. 188.

3. By the Act of November 4, 1918, it was made the duty of a corporation to cancel old certificates and issue new ones for shares seized by the Custodian before or after the date of the Act. P. 192.
4. Under that Act the right of the Custodian to new certificates did not depend upon surrender of the old ones. P. 192.
5. To require a corporation so to transfer enemy-owned shares, without surrender of the old certificates, was within the war power of Congress, and did not deprive of due process the corporation issuing the shares or the company acting as its registrar, they being protected by § 7(e) of the Trading with the Enemy Act and non-enemy owners by § 9. P. 193.

So *held,* where certificates and by-laws allowed transfer only by the holder or his attorney upon surrender and cancellation of the old certificates—conditions also imposed by the company's charter; and when the company had its transfer office, and its shares listed on an exchange, in New York by the laws of which it need not issue certificates without surrender of old, unless the old were lost or destroyed; and where the company's registrar, a New York Trust Company, as a condition to being accepted by the exchange, was obliged not to register transfers without surrender of outstanding certificates.

Affirmed.

APPEAL from a decree of the District Court, in a suit by the Alien Property Custodian under the Trading with the Enemy Act, requiring the Great Northern Railway Company and the Central Union Trust Company, registrar of its stock, to transfer shares of stock held by aliens, and to issue and countersign new certificates therefor, in the name of certain trust companies as depositaries for the Custodian.

Mr. Walker D. Hines, with whom *Mr. M. L. Countryman* was on the brief, for the appellants.

Assistant Attorney General Letts, with whom *Mr. Dean Hill Stanley,* Special Assistant to the Attorney General, was on the brief, for the appellee.

Mr. Harold W. Bissell filed a brief as *amicus curiae,* by special leave of Court, on behalf of the Deutsche Bank.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a suit under § 17 of Trading with the Enemy Act, October 6, 1917, c. 106, 40 Stat. 411, 425, which confers upon the district courts jurisdiction to enter "such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act." It was brought on February 7, 1925, in the federal court for southern New York. The Alien Property Custodian was the plaintiff; the Great Northern Railway Company and the Central Union Trust Company the defendants. The relief sought is that the Great Northern be ordered to cancel upon its books and records designated certificates for shares of its stock standing in names of or held for enemies; that it issue new certificates therefor in the names of certain trust companies as depositaries for the Custodian; that the Central Union be ordered to countersign the new certificates as Registrar of Transfers; and that the new certificates so countersigned be delivered to the Custodian without his presenting and surrendering the old ones. The defendants entered a general appearance. On the pleadings and facts stipulated, the court entered a final decree, which required the issue, countersigning and delivery of the new certificates without presentation or surrender of those outstanding. Rights arising under the Constitution and treaties are alleged to have been violated. On this ground, a direct appeal was taken to this Court under § 238 of the Judicial Code, as it stood prior to the effective date of the Act of February 13, 1925.

During the war the Great Northern filed with the Custodian, from time to time, the reports required by § 7(a) of the Act. All of these reports except one contained lists of persons who were registered owners of specified numbers of shares and were believed to be ene-

mies. One report stated that Lieber & Co., believed to be an enemy, was believed to be the beneficial owner of shares standing in the name of A. Biederman & Co. All these reports stated that the actual location of the certificates representing said shares was unknown to the company. In consequence of these reports, the Custodian made upon the Great Northern demands in writing in respect to the shares therein referred to. All these demands were made during the war; and all were in substantially the same form. The construction and effect of that document are the principal matters in controversy. The part of it requiring special consideration is this:

"To Great Northern Railway Company, Address 32 Nassau St., New York, N. Y.:

"I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the 'Trading with the enemy Act,' approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and by said executive orders, after investigation do determine that Albertine, Baroness Schauenburg (name of enemy or ally of enemy), whose address is Friedburg, Baden, Germany (last known address), is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to 12 shares of preferred (common, preferred) stock standing on your books in the name of Albertine, Baroness Schauenburg.

"I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign, and deliver to me as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you

to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates.

"I, as Alien Property Custodian, do hereby further require that you note the substance of this demand upon your stock books and/or stock ledger, and that you furnish a copy of this demand to the registrar and/or transfer agent, if any, of the stock in respect to which this demand is made.

"I, as Alien Property Custodian, do hereby further require that within ten days from the service of this demand upon you, you report to me any and all acts which you have done, or omitted to do, pursuant to the requirements of this demand.

"Until otherwise directed, you will remit to the Alien Property Custodian at Washington, by check payable to his order, all payments, whether of capital or income, now or hereafter declared or due on account of such stock, shares, or certificates, and you will direct such notices in respect to the said stock, shares, or certificates to the Alien Property Custodian.

"This demand is supplementary to any demand which may hitherto have been made upon you, accompanied by the presentation of certificates which represent shares or beneficial interests, for the transfer into my name as Alien Property Custodian, of such certificates, or for the transfer thereof into the name of any nominee of me as Alien Property Custodian, and this demand shall not prejudice or affect any demand accompanied by such certificates which has been, or which may hereafter be, made."

The Custodian admitted that, during the war, there was no request specifically for the cancellation of the old

certificates and the issue of new ones. He contended that the President determined, as set forth in the original demand, that the persons in whose names the shares were registered, or those for whom the shares were held, were enemies not licensed, each having a certain right, title and interest in and to the specific shares; that, by the demand, he duly seized these shares and the alien's interest therein; that thereby the Custodian secured legally a control over the shares as complete and effective as the control given the Custodian over chattels physically seized; that this is true although prior to the Act of November 4, 1918, c. 201, § 1, Congress had not provided any method for enforcing the issue of new certificates without surrender of the old; that when the Trading with the Enemy Act was so amended, he became entitled to have new certificates for the shares delivered to him without the presentation or surrender of the old ones; that having thereafter duly requested their issue and delivery to him he was entitled to the relief prayed for.

The companies admitted that, after the war and before institution of the suit, there was a request, appropriate in form. They denied that the determinations and the demands made during the war were duly made. But their defense was rested mainly on the claim that the *corpus* of the shares, as distinguished from an undefined interest therein, was not seized or demanded during the war. They contend that by the original demand the President determined only that the enemy had some interest; that the instrument did not constitute a symbolic seizure of the shares; and, hence, that it did not create such a right as could serve as a basis for compelling their transfer to the Custodian, or the cancellation of the old certificates and the issue of the new ones. They insist that the determination of some interest is not equivalent to determining that the shares belong to or are held for the enemy; that any interest held by the enemy, however

remote or contingent, might satisfy such a determination and yet the shares in fact belong to and be held for another, not an enemy; that a demand upon the corporation to assign such an undefined interest is not a demand that the shares themselves be transferred; and that this interpretation of the document is supported by the fact that the Custodian made, at the time, no effort to obtain a new certificate and in fact expressly indicated that he was not making any such effort. The companies' further contention is that, as applied to the facts stipulated, the Act as amended did not purport to require cancellation of the old and delivery of new certificates; and that, if it did, it denied due process and hence was void under the Fifth Amendment.

It may be assumed that under § 7 recovery by the Custodian of property demanded by him, is limited by the scope of the demand. Compare *Sutherland* v. *Guaranty Trust Co.,* 11 F. (2d) 696; and that the demand made after the war, if it stood alone, would not avail the Custodian. Compare *Miller* v. *Rouse,* 276 Fed. 715, 717.

First. The main question is whether the Custodian had, by the demand above set forth, taken action which could legally serve as a basis for the specific request for the certificates made after the war. The demand must be read in the light of the then existing legislation, of its formal title or designation, of the extracts of the Executive Order embodied in it, and of the reports of the Great Northern out of which it originated. And these reports must be read in the light of the fact that stock is presumed to be owned by the registered owner and that, where stock is stated to be held by the registered owner for another named person, the latter is presumed to own the whole beneficial interest. Compare *Turnbull* v. *Payson,* 95 U. S. 418, 421; *Keyser* v. *Hitz,* 133 U. S. 138, 149; *Finn* v. *Brown,* 142 U. S. 56, 67.

The omission from the demand of the request for a new certificate is susceptible of a simple explanation. At the times of the earlier demands, § 12 of the Act, as amended by Act of March 28, 1918, c. 28, § 1, 40 Stat. 423, 460, made it the duty of corporations to transfer seized shares upon its "books into the name of the alien property custodian" only if his demand was "accompanied by the presentation of the certificates which represent such shares." The Custodian was unable to present the old certificates. Consequently, a request for the new certificates would not have been inserted in the demand, even if the instrument had contained an express recital of the determination that the enemy owned the whole interest in the shares and that the whole interest had been seized. It was not until the amendment of November 4, 1918, that the corporation was required to cancel the old certificates and issue the new ones, whenever enemy property consisted of "shares of stock or other beneficial interest standing upon its . . . books in the name of any person . . . or held . . . for the benefit of any person . . . who shall have been determined by the President, after investigation, to be an enemy . . . and which shall have been required to be conveyed, transferred, assigned or delivered to the Alien Property Custodian or seized by him . . ." It is true that the demands for some of the shares were not made until after November 4, 1918; and that in them the request for the new certificates might have been made. But, in view of war conditions, it is not surprising that the modification of the form in use was not promptly made and that the old form continued in use.

The form used indicated clearly, in parts other than that quoted above, the intention to seize the whole property. It was entitled: "Demand on corporation for stockholders' interest without presentation of certificates. Demand by Alien Property Custodian for property."

Preceding that part of the document addressed specifically to the Great Northern quoted above, were printed the following "Extracts from Executive Order of February 26, 1918."

Sec. 1 (c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority' of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right, of, or for the benefit of, the enemy."

Sec. 2 (a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

Sec. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any order, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

Sec. 3 (d). "The Alien Poperty Custodian may exercise any right, power, or authority of the enemy in, to,

and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy, including (1) the right to receive all notices issued by the corporation, unincorporated association, company, or trustee which issued such stock, shares, or certificates, to the holders or owners of similar stock, shares, or certificates, (2) the right to exercise all voting power appertaining to such stock, shares, or certificates, and (3) the right to receive all subscription rights, dividends, and other distributions and payments, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian and regardless of whether or not such stock, shares, or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same."

Following the provisions of § 3(d) of the Executive Order, the Custodian enumerated in his demand upon the Great Northern substantially every right which the sole owner of shares could exercise, except the right to receive a certificate representing the stock and the right to dispose of the same. His request should be construed as a demand for delivery of the shares, because it extended to everything which the legislation permitted prior to the amendment of November 4, 1918. The Custodian sought possession, not title, *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566, 569. The term seizure as used in this connection connotes merely the taking of possession. Hence there was no occasion to define the extent of the enemy's ownership. The demand operated as a symbolic seizure.

The claim of the Custodian to have the new certificates does not rest, as has been argued, upon post-war action

taken by him; or upon a construction of the Joint Resolution of July 2, 1921, officially declaring the war at an end; or upon any provision of the Treaties of Peace, August 24, 1921, 42 Stat. 1946; August 25, 1921, 42 Stat. 1939. The Custodian's claim and the decree rest wholly upon the demands made during the war. Since the Custodian's possession of the shares was completed before the end of the war, it is immaterial that the demand for new certificates was not made until after the war. The Act of November 4, 1918, had made it the duty of the corporation to cancel the old certificates and to issue new ones, whenever the Custodian had seized shares. Section 5 of the Joint Resolution of July 2, 1921, reserved to the Custodian all property which before that date had come under his control.

The seizures made before November 4, 1918, were equally effective with those made after. It is urged that so to hold gives retroactive effect to the amendment of that date. But this is not true. The amendment does not enlarge the scope of the seizure. No substantive right is thereby affected. The amendment confers merely the adjective right to require of the corporation delivery of the usual evidence of effective possession of shares. The right conferred is comparable to providing a new judicial remedy for an existing substantive right. As was said in *Cox* v. *Hart,* 260 U. S. 427, 435: "A statute is not made retroactive merely because it draws upon antecedent facts for its operation."

Second. The companies contend that, even after the amendment of November 4, 1918, the Act did not purport to confer upon the Custodian the power to demand new certificates without surrender of the old. As seen above, § 12 of the original Act made it the duty of the corporation to transfer shares or certificates into the Custodian's name only if the old certificates were surrendered. It is

true that this condition was never in terms removed from that section. But it was necessarily removed when the Act of November 4, 1918, amended § 7(c) by requiring the corporation to issue new certificates whenever the Custodian had demanded the shares of alien enemies. See *Garvan* v. *Marconi Co.*, 275 Fed. 486; *Garvan* v. *Certain Shares of International Agricultural Corp.*, 276 Fed. 206; *Columbia Brewing Co.* v. *Miller,* 281 Fed. 289; *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746.

Third. The companies contend that the Act, so construed and applied, deprives them of due process, since it confers upon the Custodian rights not possessed even by the owner of the shares. It is urged that the owners of stock in the Great Northern, took it subject to the provision inserted in the certificate that it is " transferable only on the books of the company in person or by attorney upon surrender of this certificate "; that the Great Northern's by-laws provide that its shares " shall be transferred only on the books of the company by the holder thereof in person or by his attorney upon surrender and cancellation of certificates for a like number of shares "; that these conditions were imposed by it under its charter, a special act of the legislature of Minnesota; and that they constitute property attributes inhering in the shares and in the stock certificates which are evidences thereof; that the Great Northern shares are listed upon the New York Stock Exchange and the company maintains in New York an office for transferring certificates of its stocks; that § 17 of the Personal Property Law of New York provides that, except where a certificate is lost or destroyed, the corporation shall not be compelled to issue a new certificate until the old certificate is surrendered to it; and that the Central Union, Registrar of Great Northern stock, is under agreement with the New York

Stock Exchange, whereunder such Registrar, as a condition of being accepted by the New York Stock Exchange, is obligated not to register the transfer of certificates of Great Northern without surrender of the certificates outstanding therefor.

The decisions of this Court and provisions made in the Act dispose of this contention. Protection to the rights of owners other than enemies was provided for by § 9. *Stoehr* v. *Wallace,* 255 U. S. 239, 243–246; *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 567–569. Neither the Railway nor the Registrar has any interest in the shares. They are protected in making delivery of the new certificates by § 7(e) of the Act which provides:

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same."

The requirement that the Company make complete delivery to the Custodian of the possession of the shares including the usual indicia was well within the war powers of Congress. See also *Garvan* v. *Certain Shares of International Agricultural Corporation,* 276 Fed. 206; *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746.

Affirmed.

Mr. Justice Sutherland, Mr. Justice Sanford and Mr. Justice Stone, dissent.

JONES ET AL., TRUSTEES, *v.* PRAIRIE OIL AND GAS COMPANY.

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

No. 109. Argued January 11, 1927.—Decided January 24, 1927.

1. Notice of an application of a mother to be appointed guardian of the estate of her child, an infant under twelve in the mother's custody, is not required by the Fourteenth Amendment. P. 198.
2. A clerical error in the posted notice of such an application will not invalidate the proceedings if not misleading. P. 198.
3. A state statute permitting a guardian to make oil and gas leases lasting beyond the minority of the ward cannot, in view of the fugitive subject-matter, be deemed unconstitutional. P. 198.
4. Congress has power to remove a restriction against alienation of a patented homestead allotment of a minor Creek Indian. P. 199.
5. A state statute governing the procedure for leasing a ward's real estate is to be taken by this Court as construed by the state courts, even when such construction supplants an earlier one relied on as a rule of property. P. 199.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill to set aside oil and gas leases, and for an account.

Messrs. J. Alston Atkins and *Carter Walker Wesley* for the appellants.

The sale of an oil and gas lease on a ward's land should be governed by the law providing for the sale of real property.

The appointment of the guardian was void under the laws of Oklahoma for want of notice. *Cummings* v. *Landes,* 140 Iowa 80; *Spence* v. *Morris,* 28 S. W. 405; *Lyon* v. *Vanatta,* 35 Iowa 521; *Beachy* v. *Shomber,* 73 Kans. 62; *Ross* v. *Breene,* 88 Okla. 37; *Mullin* v. *Hawkins,* 97 Okla. 30.

The state constitution and statutes do not give the county court power, through a guardian, or otherwise,

to lease a ward's land beyond minority. *Strawn* v. *Brady,* 84 Okla. 66; *Byerly* v. *Eadie,* 95 Kans. 400; *Cochran* v. *Teehee,* 40 Okla. 388; *Haddock* v. *Bronaugh,* 92 Okla. 197; *Carlile* v. *Nat. Oil Co.,* 83 Okla. 217; §§ 4951, 4952, Comp. Laws of Okla. If the law of Oklahoma attempts this, it takes property without due process. *Tiernay Coal Co.* v. *Smith's Guardian,* 180 Ky. 815; on rehearing, 181 Ky. 764; *Cabin Valley Mining Co.* v. *Hall,* 53 Okla. 760; *Mallen* v. *Ruth Oil Co.,* 231 Fed. 845; *Ricardi* v. *Gaboury,* 115 Tenn. 485; *Beaucamp* v. *Bertig,* 90 Ark. 350; *McCreary* v. *Billing,* 176 Ala. 314. There is no distinction here between an oil and gas lease and a coal lease. *Appeal of Stroughton,* 88 Pa. St. 198.

The Oklahoma law which authorizes the appointment of a guardian for the person and property of an individual who is alleged to be a minor, without any notice or opportunity to be heard, is not due process of law. That these laws do not require notice to the alleged minor, see *Crabtree* v. *Bath,* 102 Okla. 1. It is to be remembered that a finding of minority is conclusive against collateral attack. *Johnson* v. *Johnson,* 60 Okla. 206; *Johnson* v. *Furchtbar,* 96 Okla. 114; *Bank* v. *Dresia,* 103 Okla. 166; *Lowery* v. *Parton,* 65 Okla. 232.

To constitute due process, the notice and opportunity to be heard must be required by the state law. *Coe* v. *Armour,* 237 U. S. 413. It is immaterial that there would have been no defense if notice had been given. *Rees* v. *Watertown,* 19 Wall. 107; *Coe* v. *Armour, supra.*

The Act of Congress purporting to allow leasing contrary to the restriction in the homestead patent, is void. *Choate* v. *Trapp,* 224 U. S. 665; *English* v. *Richardson,* 224 U. S. 680. Distinguishing *Williams* v. *Johnson,* 239 U. S. 414.

Mr. Joseph L. Hull, with whom *Messrs. T. J. Flannelly, Paul B. Mason,* and *Nathan A. Gibson* were on the brief, for the appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity seeking the cancellation of oil and gas leases to, or held by, the Prairie Oil and Gas Company, and for an account. The fundamental facts are as follows. Leonard D. Ingram was a member of the Muskogee (Creek) Nation and as such on July 1, 1907, received patents of homestead and other land, the homestead patent expressing the conditions provided by Act of Congress, that the land should be inalienable, &c., for twenty-one years. On January 3, 1911, the County Court of Wagoner County, Oklahoma, made an order appointing Minerva Ingram, now Minerva Jones, guardian of Leonard D. Ingram. On January 24, 1911, March 28, 1911, and December 18, 1911, Minerva Ingram, acting as guardian, made the leases in question, covering the above lands and running for as long after the minority of Leonard Ingram as oil or gas should be found in paying quantities. The defendant company began to remove oil and gas in 1920 and is continuing to do so still. The leases are said to be invalid for several reasons: It is alleged that the appointment of Minerva Ingram as guardian was void under the Fourteenth Amendment of the Constitution because no notice of the application for appointment was given. It is alleged further that the guardian had no power to execute leases that would or might outlast the minority of the ward, as that again is thought to be contrary to the Fourteenth Amendment. Thirdly it is urged that the inclusion of the homestead was invalid because of the condition against alienation in the patent under the Act of Congress, notwithstanding the later Act of May 27, 1908, c. 199; 35 Stat. 312, which is admitted to apply, but is said to be ineffective under the Fifth Amendment, as depriving the minor of his property without due process of law. Finally, it is averred that the leases were not executed in manner and form required by

law. On motion the District Court dismissed the bill and the plaintiffs appealed to this Court. *Lipke* v. *Lederer,* 259 U. S. 557, 560.

The averment that the guardian was appointed without notice was qualified by an amendment showing an order for a hearing on January 3, 1911, and for notice by posting in three public places, one being the door of the Court House. The notice was posted as directed but although dated December 15, 1910, states January 3, 1910, instead of 1911, as the time for the hearing. It was also sent by mail to the minor, to Minerva Ingram and three others, stated to be next of kin and persons having the care of the minor. It is admitted that Minerva Ingram was the mother of the minor, and the record indicates that the latter was of tender years, or at least under twelve, which is not denied. The mother seems to have had him in her custody. The Oklahoma statutes only require such notice as the judge deems reasonable to be given to the relatives residing in the county and to any person having the care of such minor. Compiled Oklahoma Statutes, 1921, § 1431. In the circumstances stated, unqualified, the requirement of notice is merely formal, if it exists. *Lester* v. *Smith,* 83 Okla. 143. *Gibson, Appellant,* 154 Mass. 378, 379–381. Certainly there is nothing in the Constitution of the United States that requires it. See *Hoyt* v. *Sprague,* 103 U. S. 613. The clerical error in the notice would mislead no one and did not invalidate the proceedings. The mother was the petitioner and no one but the mother and son were concerned. We see nothing to overcome the presumption if any presumption were needed, in favor of the validity of the appointment, declared to exist by the Supreme Court of the State. *Baker* v. *Cureton,* 49 Okla. 15.

The Oklahoma statutes are held to give to guardians the power to execute oil and gas leases that may last beyond the minority of their wards. *Cabin Valley Min-*

ing Co. v. *Hall,* 53 Okla. 760. *Mallen* v. *Ruth Oil Co.,* 230 Fed. 497; affirmed, 231 Fed. 845. The fugitive character of the subject-matter makes it necessary in the ward's interest that guardians should have that power, and it appears to us that it would be an extravagant interpretation of the Constitution to hold that the ward's interest must be sacrificed on the ground of the absolute character of his title when adult. He takes that title subject to such qualifications as the law reasonably allows to be imposed for his good. The denial of the power as to agricultural (*Haddock* v. *Bronaugh,* 92 Okla. 197) or coal lands (*Tierney Coal Co.* v. *Smith,* 180 Ky. 815) whether right or wrong on constitutional grounds, cannot be extended to this case.

It is not open to dispute that the removal by the later Act of Congress that we have cited of the restriction upon alienation previously imposed is valid. *Williams* v. *Johnson,* 239 U. S. 414, 420. *Egan* v. *McDonald,* 246 U. S. 227, 229. *Fink* v. *County Commissioners,* 248 U. S. 399, 404.

It is admitted that if we follow the decisions of the Supreme Court of Oklahoma, both those that we have cited and others, the guardian did not have to follow the procedure prescribed for the sale of a ward's real estate. *Duff* v. *Keaton,* 33 Okla. 92. *Papoose Oil Co.* v. *Swindler,* 95 Okla. 264. See also *Jackson* v. *Gates Oil Co.,* 297 Fed. 549. *Clayton* v. *Tibbens,* 298 Fed. 18, affirming 288 Fed. 393. But it is argued here that under *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, this Court is not bound by the State decisions and may judge for itself, inasmuch as, whatever may be the rule of property now, *Duff* v. *Keaton* was decided after these leases were made. It would seem from the cases cited that the present rule had been followed and great interests established on the faith of it before *Duff* v. *Keaton.* But apart from that consideration no case yet has gone to the length of undertaking

to correct the construction of State laws by State courts. The exclusive authority to enact those laws carries with it final authority to say what they mean. The construction of those laws by the Supreme Court of the State is as much the act of the State, as the enactment of them by the legislature. If we thought the decisions cited far more questionable than we do, we nevertheless should bow to them as binding upon a matter of local administration and of only local concern. The counsel for the appellants presented a very thorough and well stated argument, but failed to make us doubt that the decree must be affirmed.

Decree affirmed.

JACOB REED'S SONS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 63. Argued January 6, 1927.—Decided January 24, 1927.

The Dent Act (March 2, 1919) gave no cause of action on contracts made without authority, or on dealings which did not ripen into a contract. P. 202.

60 Ct. Cls. 97, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for actual loss suffered by the claimant in renting and equipping a factory, during the World War, to make uniforms for the Government.

Mr. Frank Davis, Jr., for the appellant.

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

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal under § 242 of the Judicial Code from a judgment for the United States entered by the Court

of Claims, before the effective date of the Act of February 13, 1925, c. 229, 43 Stat. 936. The suit was brought under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, by a manufacturer of clothing to recover the actual loss incurred in renting and equipping a factory required, during the World War, in order to make uniforms for the Government, and for which factory there was no use after the armistice. The claim, as alleged in the petition, is that the depot quartermaster at Philadelphia agreed that if the plaintiff would rent and equip the factory, "the United States, through the Secretary of War, and the contracting officer, the Depot Quartermaster, would award sufficient contracts to plaintiff, which, at a fair margin over cost, would enable it to amortize the cost of said lease, machinery and equipment," and that if sufficient contracts were not awarded to amortize the plant, the United States would save plaintiff harmless from any loss.

The Court of Claims did not find as a fact that any such contract express or implied was made. It found that the depot quartermaster, while urging plaintiff to rent and equip the factory, "stated [orally] that contracts would be placed with plaintiff which would fully reimburse it for the proposed expenditure." The court concluded, as matter of law, that there was no contract; that, if the contract had in fact been made as alleged, it would not have bound the Government, because, so far as the record disclosed, the depot quartermaster had no authority so to bind it; and that, as there was no agreement, and also because such authority was lacking, the Dent Act did not afford a remedy, 60 Ct. Cls. 97.

The contracts for uniforms given the plaintiff were cancelled by the Government. The right to cancel these is not questioned; and no claim is made here for compensation for cancelling them. Compare *Russell Motor Car Co.* v. *United States,* 261 U. S. 514; *College Point Boat Co.* v. *United States,* 267 U. S. 12, 15. The argu-

ment here consisted mainly of an effort to show, by reference in the brief to portions of the evidence introduced before the Court of Claims, that the contract sued on was made as alleged and that authority to make it had been conferred upon the depot quartermaster. The evidence is not before us; and we must accept the findings of the Court of Claims. *Rogers* v. *United States,* 270 U. S. 154, 162. Moreover, it is doubtful whether even express authorization could, under the then existing statutes, have conferred upon anyone the power to make the contract which the plaintiff has attempted to prove. See Rev. Stat. § 3732, as amended by Act of June 12, 1906, c. 3078, 34 Stat. 240, 255; Rev. Stat. § 3709, Act of July 5, 1884, c. 217, 23 Stat. 107, 109; Act of March 2, 1901, c. 803, 31 Stat. 895, 905.

The decision of the lower court was clearly correct. The Dent Act gave a remedy upon contracts irregularly made, not upon contracts made without authority. Nor did it give a cause of action on dealings which did not ripen into a contract. *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 385; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592, 596. Compare *Price Fire & Waterproofing Co.* v. *United States,* 261 U. S. 179; *United States Bedding Co.* v. *United States,* 266 U. S. 491, 492; *Merritt* v. *United States,* 267 U. S. 338, 340.

Affirmed.

UNITED STATES *v.* NOVECK.

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

No. 395. Argued January 5, 1927.—Decided January 24, 1927.

Section 253 of the Revenue Act of 1918 (*id.* Rev. Act of 1921) by making it an offense wilfully to attempt in any manner to defeat or

evade an income tax, did not repeal the general perjury statute (Crim. Code § 125) as applied to income tax returns. P. 206.
Reversed.

ERROR to a judgment of the District Court sustaining a motion in arrest and vacating a sentence for perjury. See also 271 U. S. 201.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Sewall Key,* Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Ben A. Matthews for the defendant in error.

Perjury is one method—perhaps the most obvious—of defeating or evading the tax.

The language of the earlier revenue statutes is significant. They condemn one method of defeating or evading the tax, namely, the delivery or disclosure to the collector of any false or fraudulent return. The Act of 1918, extended the prohibition to "any manner" of defeating or evading the tax, clearly intending to embrace all methods.

The fact that Congress, in subsequent acts (Act of 1924, c. 234, 43 Stat. 253, § 1017; Act of 1926, c. 27, 44 Stat. 9, § 1114), while including § 253 (in sub-division [b]), has, in an additional and closely associated provision (sub-division [c]), grouped "preparation" and "presentation" of the return in the disjunctive shows that Congress has not at all times had in mind the strict distinction, for which the Government argues, between the making and the filing of a return.

The determining factor as to whether § 253 repeals *pro tanto* § 125 of the Criminal Code, is whether the perjury here charged amounted to an attempt to defeat or evade the tax. The very history of the law against evasions or attempted evasions cited by the Government indicates that even false entries were so regarded by Congress. Act of 1909, § 35.

This case would, therefore, seem to fall within the doctrine laid down in *United States* v. *Tynen,* 11 Wall. 88; *United States* v. *Yuginovich,* 256 U. S. 450; and *Grogan* v. *Walker & Son,* 259 U. S. 80. Distinguishing *Morgan* v. *Devine,* 237 U. S. 632; *Steinberg* v. *United States,* 14 Fed. (2d) 564. The authorities upon which the court relied are almost entirely concerned with perjury at common law. The making of a false affidavit is perjury at common law only when it is made in a judicial proceeding or court of justice. No such restriction is imposed by § 125, which may be said, for convenience of phraseology, to create the crime of false swearing as distinguished from the narrower one of common law perjury.

Mr. Justice Brandeis delivered the opinion of the Court.

Noveck was indicted in two counts under § 125 of the Criminal Code, in the federal court for southern New York, for perjury in making returns for the purpose of taxation.[1] To the first count he pleaded the statute of limitations. The District Court sustained the plea; and its judgment was affirmed in *United States* v. *Noveck,* 271 U. S. 201. To the second count he filed both a demurrer and a motion to quash on the ground that it did not state facts sufficient to constitute an offense. The objection was overruled. Thereupon, Noveck pleaded guilty. He

[1] Section 125: "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, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

was sentenced to a fine of $2,000 and to imprisonment for four months. He paid the fine and was taken into custody.

While Noveck was still in prison, the United States Circuit Court of Appeals for the Second Circuit held in *Steinberg* v. *United States,* an unreported opinion, that § 125 of the Criminal Code had been repealed, so far as concerns perjury on tax returns, by § 253 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 268, which makes it an offense willfully to attempt in any manner to defeat or evade a tax.[2] The term of the District Court at which Noveck was sentenced not having ended, he moved immediately to vacate the sentence. The motion was granted; a motion in arrest of judgment was sustained; and the court allowed this writ of error under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246. After the docketing of the case in this Court, the Court of Appeals withdrew its unreported opinion in the *Steinberg* case and, reversing itself, held that the Revenue Act of 1921 did not repeal § 125 of the Criminal Code as applied to perjury on tax returns, 14 F. (2d) 564. The Government, deeming it impossible to reinstate Noveck's

[2] Section 253 provides: "That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution." The wording follows exactly that of § 253 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1085, under which Noveck made the return in question.

sentence by any proceeding in the District Court, continues to prosecute the writ of error. Compare *Keyser* v. *Farr,* 105 U. S. 265.

The jurisdiction of this Court is conceded. The sole question requiring discussion is whether § 253 of the Revenue Act of 1918 (re-enacted as § 253 of the Revenue Act of 1921) repeals, as to false tax returns, § 125 of the Criminal Code. There was confessedly no express repeal; and it is clear that the two sections are not inconsistent. Noveck's contention is that a repeal was effected, because Congress manifested the intention of supplanting the provision of the Criminal Code, in so far as it relates to perjury in income tax returns, by embodying in the Revenue Act all provisions dealing with the various methods of defeating or evading taxes therein imposed. The argument is that § 253 of the Revenue Act includes within its condemnation anyone "who willfully attempts in any manner to defeat or evade the tax imposed by this title;" that perjury to an income tax return is one manner or method of defeating or evading the tax; and that, since all methods are made punishable under § 253, Congress must have intended that perjury in making false returns should no longer be punishable under § 125.

The conclusion stated does not follow. The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. Each involves an element not found in the other. Compare *Morgan* v. *Devine,* 237 U. S. 632. The crime of perjury is complete when the oath is taken with the necessary intent, although the false affidavit is never used. *Noah* v. *United States,* 128 Fed. 270; *Berry* v. *United States,* 259 Fed. 203. Compare *United States* v. *Rhodes,* 30 Fed. 431, 433. The making of a false affidavit, without presentation thereof, does not constitute an attempt to evade the tax law. See *United States* v. *Rachmil,* 270 Fed. 869, 871. The crime of at-

tempting to defeat or evade the Revenue Law may be committed without verification of a false tax return. *Emmich* v. *United States,* 298 Fed. 5, 10. Congress, having power to make both the false swearing and the use of the false affidavit punishable, *Albrecht* v. *United States, ante,* p. 1, did so. Compare *United States* v. *Rabinowich,* 238 U. S. 78; *Kennedy* v. *United States,* 265 U. S. 344. The fact that perjury is a felony, while filing a false return is only a misdemeanor, presented no obstacle. Compare *United States* v. *Lawrence,* 26 Fed. Cas. No. 15,572. There is nothing in the history of the revenue legislation which should lead us to a different conclusion. Our decision is in accord with the view taken by those circuit courts of appeals which have dealt with the question. *Levin* v. *United States,* 5 F. (2d) 598, 600; *Steinberg* v. *United States,* 14 F. (2d) 564.

Reversed.

HARTFORD ACCIDENT & INDEMNITY COMPANY *v.* SOUTHERN PACIFIC COMPANY ET AL.

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

No. 45. Argued December 2, 1926.—Decided February 21, 1927.

1. Where a shipowner sues in admiralty to limit his liability from negligent management of his vessel to the value of the vessel and pending freight, the proceeding does not necessarily terminate if his prayer is denied, but the Court may thereupon proceed to adjudicate all the claims coming from the accident, whether independently cognizable in admiralty or not, after the manner of a court of equity, and render judgment both *in rem,* and against the owner *in personam.* P. 213.
2. A stipulation *ad interim* in such proceedings takes the place of the vessel and freight, and even when the shipowner's application to limit liability is denied, the stipulator may be required to pay their value into court for application to allowed claims and costs. P. 218.

3 F. (2d) 923, affirmed.

CERTIORARI (267 U. S. 590) to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court requiring a stipulator for value in a limitation of liability proceeding to pay into court the value of its principal's vessel and pending freight.

Mr. John Neethe, with whom *Mr. Edwin C. Brandenburg* was on the brief, for petitioner.

The Act was passed for the purpose of encouraging ship owners and should be liberally construed in their favor. *La Bourgoyne,* 210 U. S. 95. In *Norwich* v. *Wright,* 13 Wall. 104, it was held to apply to collision cases. In *Providence S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, it was extended to cover loss by fire. In *Butler* v. *Boston S. S. Co.,* 130 U. S. 527, it was extended to personal injuries, as well as to injuries of property.

The *Bolikow* was sold after the disaster for the sum of $250. This was the *res* against which the appellee and other claimants intervening could have proceeded by a libel *in rem.* It was all that was within the jurisdiction of the court. Believing that it was not liable at all, the Oil Company filed its petition and the *ad interim* stipulation adding to the $250 the freight earned on the last voyage, amounting to about $11,000.

The precise question now before this Court has never been determined. Distinguishing *The Virginia,* 266 Fed. 437. A proceeding for limitation of liability is a proceeding *in rem;* or an equitable proceeding *in rem.* After limitation of liability is denied, there ceases to be a *res* in court and the proceeding should either be dismissed or cease to be one *in rem* and become a proceeding *in personam,* with no more jurisdiction left in the court than to ascertain, as in a libel *in personam,* the amount due each claimant, or to have the court refer this question to a commissioner for a like purpose. *In re Smith & Sons, Inc.,* 193 Fed. 395; *In re Pacific Mail S. S. Co.,*

130 Fed. 76; *The Santa Rosa,* 249 Fed. 160; *The Titanic,* 204 Fed. 295.

To hold that the court could still proceed to adjudicate the rights of the various parties would necessitate a holding that the rights of the intervening claims against the ship owner, whether sounding in contract or tort, and whether arising in admiralty or not, can be adjudicated in a federal court, though they may arise between citizens of the same State. Such holding would mean that, though each claimant as against the owner is entitled to a jury, the limitation of liability act would deprive him of such privilege.

Mr. Roscoe H. Hupper, with whom *Messrs. W. T. Armstrong* and *W. E. Cranford* were on the brief, for respondents.

The court has the right to decree the payment into court of the appraised value of the barge and her pending freight for such disposition of it as the court could legally have made of it had it originally been paid into the registry of the court and not been bailed out. *The Benefactor,* 103 U. S. 239; Rev. Stats. §§ 4282–4285 inc. The principle that there occurs a complete and irrevocable surrender of the actual property to the court is frequently expressed. *Prov. S. S. Co.* v. *Hale Mfg. Co.,* 109 U. S. 578; *Re Morrison,* 147 U. S. 14; *The H. F. Dimock,* 52 Fed. 598; *The Wanata,* 95 U. S. 600; *United States* v. *Ames,* 99 U. S. 35; *The City of Norwich,* 118 U. S. 468.

It is true that in the earlier cases, such as *The Republic* and *The Eureka,* as stated in *The Titanic,* 204 Fed. 295, the doctrine " is assumed," though not asserted; but when the question came up squarely it was definitely decided by the lower courts that in a limitation proceeding where exemption from liability as well as a right to limit liability is asserted, the court has complete

and exclusive jurisdiction of the entire controversy and may proceed to render a final decree for the full amount of damages in favor of the claimant even though limitation of liability is denied. The court, continuing to have jurisdiction over the proceeding for the purpose of doing justice by the claimants, does not lose control of the *res,* that is, the vessel and its pending freight, which has been placed in court by the petitioner in order to secure the proceeding. Benedict, Admiralty, 4th ed., § 527. *The Lydia,* 1 Fed. (2d) 69.

It is an action in the nature of a creditor's bill for the purpose of securing a concourse of the creditors on account of a particular accident in which the vessel and her pending freight are impounded for the purpose of being surrendered to such creditors in the event they establish claims against the owner of the impounded fund. The owner of the fund makes the issues to be litigated in the action by his petition and consequently defines the measure of possible recovery against the fund and against himself. It would seem that the right against the fund should be held to be co-extensive with the limits of possible recovery fixed by the petition. *The Garden City,* 26 Fed. 771; *Dowdell* v. *District Ct.,* 139 Fed. 445; *Providence S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578; *Black* v. *S. P. R. Co.,* 39 Fed. 565; *Oregon R. R. & Nav. Co.* v. *Balfour,* 90 Fed. 295; *Butler* v. *Boston S. S. Co.,* 130 U. S. 527.

The whole proceeding is in reality an equitable action *in rem* and *in personam*—an equitable suit to the extent that the admiralty court, having the broadest of powers to do exact justice between the parties, may take any such action in the case as justice demands,—an action *in rem* in so far as the judgments reach the fund placed in court by the petitioner, and *in personam* in so far as the personal liability of the petitioner is established or found not to exist. *Re Morrison, supra; Dowdell* v. *Dist.*

Ct., supra; Re Pacific Mail S. S. Co., 130 Fed. 76; *The Annie Faxon,* 75 Fed. 312; Benedict, Admiralty, 4th ed., § 519.

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

The National Oil Transport Company, the owner of wooden oil tank barge *Bolikow,* filed a libel in the United States District Court for the Southern District of Texas against the Southern Pacific Company, alleging: that the *Bolikow,* made fast to a dock in the harbor of the city of Galveston, was laden with a cargo of crude oil from which a large part had been discharged; that an explosion took place in one of her tanks, causing fire; that *El Occidente,* a steamer of the Southern Pacific Company, was injured by the fire; that the value of the barge after the explosion and fire was $250 and her pending freight at the time did not exceed $11,076.85; that the damage to the *Occidente* was due not to the *Bolikow* but to her own negligent management and the lack of power of the tug which attempted to take her to a safe place; that the claims of the owners of the *Occidente* were in excess of $484,000; and that there were claims by persons on the barge for death and injuries from the fire, amounting to $50,000 in one case, and $15,000 in another. The owner contested its liability and that of its barge *Bolikow* to any extent whatever; but in case its liability were established, claimed and sought the benefit of the statutory limitation of its liability. R. S. 4283, 4284, and 4285.

Pursuant to the court's order, the National Oil Transport Company and the Hartford Accident & Indemnity Company executed an *ad interim* stipulation that the former, as principal, and the latter, as surety, undertook in the sum of $11,326.85, with interest, that the Transport Company would file a bond or stipulation for the limitation of its liability as owner of the barge *Bolikow,* exe-

cuted in due form of law for the value of the Transport Company's interest in the barge and her pending freight, with six per cent. interest thereon from December 23, 1920, within ten days after such values were determined by appropriate proceedings in the court and an order fixing such value was entered therein, and that pending the filing of the formal stipulation, the *ad interim* undertaking should stand as security for all claims in the proceeding.

The court then made an order directing the issuing of a monition to claimants against the vessel and her owner growing out of the explosion, and an injunction. Without further action as to fixing the value of the barge or its pending freight, the claimants came in, the cause proceeded to a final decree, after a report by a commissioner, the petition for limitation of liability was denied, the claims in whole or in part were allowed, and the decree proceeded:

"And it further appearing to the Court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them or caused any order to be entered by the Court fixing such value except as was done by the approval and filing of said *ad interim* stipulation as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the Court that no bond for value other than said *ad interim* stipulation has been filed herein by the petitioner and it appearing from the evidence introduced on the trial hereof and the Court here and now finding that the value of the petitioner's interest in said barge at the termination of her voyage is $250, and that the value of the petitioner's interest in the pending freight of said barge at the termination of said voyage is $11,076.85, and that the total value of said petitioner's interest in said barge and her

pending freight at the termination of her said voyage is $11,326.85; it is therefore ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this Court, the stipulator for value will cause the said petitioner to pay into Court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and pending freight at the termination of her said voyage, with 6 per cent. interest from December 23, 1920, to be applied in payment of the costs of Court, the remainder to be pro-rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein, or show cause why execution should not issue therefor, against goods, chattels and lands of the stipulator for value."

The Hartford Indemnity Company, the stipulator, appealed from this decree, which the Circuit Court of Appeals of the Fifth Circuit affirmed. 3 Fed. (2nd) 923. We brought the case here by certiorari. 267 U. S. 590.

The contention of the petitioner is, that it could become liable only in the event limitation of liability was granted, and, as that relief was denied, the stipulation ceased to be effective; that upon a denial of a limitation of liability there ceased to be a *res* in court; that the proceeding was no longer one *in rem;* and that suits for the claims against the ship owner must be conducted in a court having jurisdiction on other grounds.

It is surprising that no case has ever arisen in which the question here mooted has been directly decided, though the effect of a decision refusing limitation has been the subject of discussion in *The Titanic,* 204 Fed. 295, and in *The Virginia,* 266 Fed. 437, 439. See also *Dowdell* v. *U. S. District Court,* 139 Fed. 444; *In re Jeremiah Smith & Sons,* 193 Fed. 395; *The Santa Rosa,* 249 Fed. 160.

The history and proper construction of the Limitation of Liability Act of 1851, 9 Stat. 635, now embodied in

Revised Statutes, §§ 4282 to 4287, are shown in a series of cases in this Court, the chief of which is the *Norwich Company* v. *Wright,* 13 Wall. 104. Further consideration to this subject was given by the Court in *The Benefactor,* 103 U. S. 239; in the *Providence & New York Steamship Company* v. *Hill Manufacturing Company,* 109 U. S. 578; in the *City of Norwich,* 118 U. S. 468, 503; in *The Scotland,* 118 U. S. 507; in *Butler v. Boston & Savannah Steamship Company,* 130 U. S. 527; in *In re Morrison,* 147 U. S. 14, 34; in *The Albert Dumois,* 177 U. S. 240; in *The Hamilton,* 207 U. S. 398, and in the *La Bourgogne,* 210 U. S. 95.

These decisions establish, first, that the great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong, happening without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law, differing from the English maritime law; and that such a proceeding is entirely within the consitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction, *Norwich* v. *Wright,* 13 Wall. 104; that to effect the purpose of the statute, Admiralty Rules Nos. 54, 55, 56 and 57 (now 51–54; see 254 U. S. Appendix, p. 25,) were adopted, by which the owner may institute a proceeding in a United States District Court in admiralty against one claiming damages for the loss, in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel, as appraised after the occurrence of the loss, and the pending freight for the voyage; that these damages shall include, damages to

goods on board, second, damages by collision to other vessels and their cargoes, and, third, any other damage or forfeiture done or incurred; that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding, by monition, and enjoined from suing the owner and vessel on such claims in any other court; that the proceeding is equitable in its nature and is to be likened to a bill to enjoin multiplicity of suits, *Providence Steamship Co.* v. *Hill Manufacturing Company,* 109 U. S. 578; that, by stipulation after appraisement, the vessel and freight may be released and the stipulation be substituted therefor; that, on reference to a commissioner and the coming in of his report, it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants. The cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the substituted fund, *City of Norwich,* 118 U. S. 468, 503; that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not, *The Hamilton,* 207 U. S. 398, 406; and that they may include damages from a collision, from personal injuries, *Butler* v. *Boston Steamship Co.,* 130 U. S. 527, or for wrongful death, if arising under a law of Congress, a State of the Union or a foreign state, which is applicable to the owner and the vessel. *The Bourgogne,* 210 U. S. 95, 138.

It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within

it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell* v. *United States District Court,* 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person. *The City of Norwich,* 118 U. S. 468, 503.

With this general view of the statute, we come to the contention of the petitioner in this case. It says that the owner only brings the suit to limit his liability, if it exists, to the vessel and the freight for the voyage. If he fails in his purpose and does not establish the limitation, no progress can be made in behalf of the defendant or the claimants in the collection of what has been found due them; and, because he has lost that feature of his suit against them, the case must be dismissed. This is said to follow, even though it is apparent that by virtue of the owner's suit and the injunction he secured he has delayed and prevented his creditors from resorting to any other forum to vindicate their rights against him. In this view the defendant and the claimants thus may not thereafter share in the fund or *res,* the deposit of which for the benefit of the defendants and the claimants was the principal ground and the indispensable condition of the proceeding. The parties, it is argued, must thereafter be remitted to a common law or equity court of the State to secure their rights, unless diverse citizenship or the admiralty character of their claims entitles them to resort to, or remain in, a federal court.

Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so help-

less as this. So to hold would be to hold that, unless the petitioner wins, the court does not have power to administer justice. There is nothing in the statute, nor in the rules, that requires so feeble a conclusion. The jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner into its hands. The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owners, so far as the court may decree. It would be most inequitable if parties and claimants, brought in against their will and prevented from establishing their claims in other courts, should be unable to perfect a remedy in this proceeding promptly, and should be delayed, until after the possible insolvency of the petitioner, to seek a complete remedy in another court, solely because the owner can not make his case of personal immunity. 1 Benedict's Admiralty, 5th ed., 488. If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute.

Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of the kind

which might be conferred by a court of law. 1 Pomeroy's Equity Jurisdiction, 4th ed., §§ 181 and 231; *United States* v. *Union Pacific Railway,* 160 U. S. 1, 52. See also Equity Rule 10, amended May 4, 1925, 268 U. S. 709, Appendix. Of course, this equitable rule enlarging the Chancellor's jurisdiction, in order to completely dispose of the cause before him, does not usually apply in an admiralty suit. *Grant* v. *Poillon,* 20 How. 162; *Turner* v. *Beacham,* Taney's Reports 583, Federal Case No. 14252; *The Pennsylvania,* 154 Fed. 9; *The Ada,* 250 Fed. 194. But this limitation of liability proceeding differs from the ordinary admiralty suit, in that, by reason of the statute and rules, the court of admiralty has power (*Providence Steamship Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578) to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court. Benedict on Admiralty, 5th ed., § 70, note 97. There necessarily inheres, therefore, in the character of the limitation of liability proceeding, in reference to such non-admiralty claims, the jurisdiction to fulfil the obligation to do equitable justice to such claimants by furnishing them a complete remedy.

The indemnity company seeks in this review to avoid its liability under an *ad interim* stipulation having a provision that such stipulation, if not changed to a formal stipulation, shall stand as security for all claims in the limitation proceeding. The stipulation is a substitute for the vessel itself and the freight which was released by reason thereof. The effect of such a stipulation in admiralty is set forth by Mr. Justice Story in *The Palmyra,* 12 Wheat. 1, where he says:

"Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of

all those authorities on the part of the court, which it could properly exercise if the thing itself were still in its custody. This is the known course in admiralty. It is quite a different question whether the court will, in particular cases, exercise its authority where sureties on the stipulation may be affected injuriously; that is a question addressed to its sound discretion."

In *The Oregon,* 158 U. S. 186, 210, after reference to *The Palmyra* and an examination of the English authorities, it was held that the use of bail as a substitute for the property itself is confined to " all points fairly in adjudication before the Court." In that case a stipulator for the release of a vessel libeled for a collision was held not to be responsible to interveners in the suit, intervening after the release of the vessel, in the absence of express agreement to that effect. In reversing the court below, this Court said, through Mr. Justice Brown:

" We think the court must have confounded a stipulation given to answer a particular libel with a stipulation for the appraised value of the vessel, under the limited liability act, which by general admiralty rule 54, is given for payment of such value into court whenever the same shall be ordered, and in such case the court issues a monition against all persons claiming damages against the vessel, to appear and make due proof of their respective claims. And by rule 55, after such claims are proven and reported, ' the moneys paid, or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight shall be divided pro rata amongst the several claimants, in proportion to the amount of their respective claims.' By rule 57, if the ship has been already libelled and sold, the proceeds shall represent the same for the purpose of these rules. In all cases cited, in which it has been said that the stipulation is a substitute for the thing itself, the remark has been made either with reference to the particular suit in which the stipulation is given, or with reference to a stipulation for the appraised value of the ves-

sel, where the stipulation stands as security for any claim which may be filed against her up to the amount of the stipulation."

It is quite evident from this that the stipulation under Rule 51 (formerly 54), *et seq.*, is to be treated as a substitute for the vessel itself for all claims that may normally arise out of the character of litigation carried on under such rules. That litigation, as we have seen, may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not. The stipulator must, therefore, pay in full on his undertaking to enable the court to pay the costs and make the pro rata distribution.

Judgment affirmed.

CHARLESTON MINING COMPANY *v.* UNITED STATES.

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

No. 93. Argued January 10, 1927.—Decided February 21, 1927.

1. A finding of fraud in fact which is not clearly erroneous will not be disturbed when concurred in by two federal courts below. P. 223.
2. The Act of March 3, 1845, granting to the State of Florida "section numbered 16 in every township or other land equivalent thereto" for school purposes, was not self-executing in the indemnity provision, but left the grant dependent, in that regard, upon future action of Congress. P. 224.
3. Assuming that under the Act of 1845 there was an equitable obligation in fulfillment of the grant to provide for selection of mineral as well as non-mineral indemnity lands, yet the only actual provision (Rev. Stats. §§ 2275 and 2276, as amended February 28, 1891) limits selection to land not mineral in character; and consequently a certification of mineral land is unauthorized, and, when procured upon false representation that the land is non-mineral, is voidable at the suit of the United States. P. 225.

3 Fed. (2d) 1019, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court (298 Fed. 127) setting aside, in part, a certification of indemnity school land, in a suit by the United States based on fraudulent representations.

Messrs. Edwin C. Brandenburg and *William Wade Hampton,* with whom *Messrs. Fred J. Hampton, E. B. Hampton,* and *Louis M. Denit* were on the brief, for the appellant.

Solicitor General Mitchell, with whom *Assistant Attorney General Parmenter* and *Messrs. E. O. Patterson, O. H. Graves,* and *Perry C. Michener* were on the brief, for the United States.

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

This was a bill in equity brought by the United States in the District Court for the Southern District of Florida, by direction of the Attorney General, against the Charleston, South Carolina, Mining and Manufacturing Company, to have declared void the approval and certification by the Secretary of the Interior and the Commissioner of the General Land Office of 320 acres of the public lands of the United States in Polk County, Florida, to the State of Florida, title to which was transferred by mesne conveyances from the State of Florida to defendant Mining Company. The bill averred that the selection, approval and certification had been procured from the Government Land Officials upon fraudulent representations with reference to the non-mineral character of the land, the representations having been made in an affidavit at the instance of the defendant company and with its knowledge, for the purpose of securing such conveyance to the State and through the state authorities to the defendant.

The prayer was that the title or conveyance be held for naught and be deliverd up and surrendered for cancellation, that the described lands be adjudged the property of the United States, that the defendants be enjoined from setting up any claim thereto or creating any cloud upon the title of the United States, and that the possession be restored to the United States. An answer was filed by the defendant denying the averments of the bill; and there was a full hearing upon evidence. The District Court held that the evidence of fraud was established in reference to 280 of the 320 acres described in the bill; and, as to that, the relief prayed for was granted; but the bill was dismissed as to the remaining forty acres. 298 Fed. 127. On appeal of the defendant, the Circuit Court of Appeals of the Fifth Circuit affirmed the decree of the District Court. The case came to this Court on appeal taken on February 7, 1925, under § 241 of the Judicial Code, as a suit to which the United States was a party which was not made final by the other provisions of the Judiciary Title.

The evidence for the Government tended to show the following: In 1906, Singleton, acting for and in the employ of the appellant, prospected for phosphate deposits in the vicinity of these lands. He explored by making borings in a tract of 360 acres adjacent to the one in suit, which on his recommendation was purchased by the appellant for $40,000. The 280 acres here restored to the Government by the lower courts contained, according to borings and tests made in 1910, phosphates which ran from 61 to 66.84 per cent., and it appeared that at that time phosphate at 60 per cent. could be profitably mined. The land belonged to the United States. Singleton's plan was to secure the 320 acres in question as indemnity for school sections 16 conveyed by the United States to Florida under the Act of March 3, 1845, c. 75, 5 Stat. 788. Singleton arranged with one Stewart to induce the state

land agent, Hampton, to make the selection. Stewart in turn procured one Hollingsworth to make an affidavit that the land was non-mineral. Hollingsworth made a superficial inspection of the lands in company with Singleton, but obtained no information sufficient to disclose whether the lands contained phosphates or not. Singleton knew that Hollingsworth was to make the affidavit without any real knowledge as to the character of the lands, which, so far as Singleton and defendant were concerned, made the affidavit false. With this affidavit, and at the instance of the defendant's agent, Hampton innocently applied to the United States to make the selection and cause the lands to be certified to the State as indemnity lands selected under statute.

There was a conflict of evidence, but the District Court found the facts as above, and that the defendant was guilty of fraud in procuring a false affidavit upon which the selection and certification of the lands was secured. The Circuit Court of Appeals sustained the finding of the lower court.

The rule is well established that this Court will not disturb a finding of fact made by a District Court, in equity, concurred in by the Circuit Court of Appeals, except in case of the clearest error. *United States* v. *State Investment Company,* 264 U. S. 206, 211; *Brewer Oil Company* v. *United States,* 260 U. S. 77, 86; *Bodkin* v. *Edwards,* 255 U. S. 221, 233; *National Bank of Athens* v. *Shackelford,* 239 U. S. 81, 82; *Wright-Blodgett Company* v. *United States,* 236 U. S. 397, 402; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78; *Texas & Pacific Company* v. *Louisiana Railroad Commission,* 232 U. S. 338, 339; *Chicago Junction Railway Company* v. *King,* 222 U. S. 222, 224; *Page* v. *Rogers,* 211 U. S. 575, 577; *Dun* v. *Lumbermen's Credit Association,* 209 U. S. 20, 24.

We therefore are limited in this cause to the question of law which is raised,—whether the indemnity selection

here made was valid even if it was for known mineral land. The grant of March 3, 1845, to Florida, read as follows:

"That in consideration of the concessions made by the State of Florida in respect to the public lands, there be granted to the said state eight entire sections of land for the purpose of fixing their seat of government; also section numbered 16 in every township or other land equivalent thereto for the use of the inhabitants of such township for the support of public schools . . ."

It is said that this constitutes a binding compact between the State and the United States, which can not be abrogated, and that the State was entitled to every section 16, whether mineral or agricultural, and that, in case of loss, the State had the specific right to select from vacant lands of the United States in that State other lands, without reference to the character of the lands so selected, whether mineral or otherwise.

The District Judge expressed himself as impressed with this argument, but said that he was bound by the decision of this Court in *United States* v. *Sweet,* 245 U. S. 563, in which this Court held that under § 6 of the Utah enabling act of July 16, 1894, 28 Stat. 107, a grant of section 16, in place, for school purposes, in view of the settled policy of Congress to dispose of mineral lands only under laws specially including them, was not intended to embrace lands known to be valuable for coal. It is urged that the District Judge erred in applying the *Sweet* case to the case here, because the decision of this Court in *Work* v. *Louisiana,* 269 U. S. 250, shows that the *Sweet* case did not apply to a construction of the Swamp Land grants made in 1849 and 1850, and that if the Act enacted then contained no exception or reservation of mineral land, none was to be implied, since the policy of withholding mineral lands from disposition, except under law specially including them, was not then established.

It is to be observed that the case of *Work* v. *Louisiana* applied to a grant of swamp lands, and did not refer to indemnity lands thereafter to be selected. The phrase in the original grant of 1845, in this case, " or other lands equivalent thereto," was not self-executing. It could not and did not confer on the beneficiary of the grant the right to make indemnity selections, except as Congress should provide for the exercise of that right.

The only authority conferred by Congress for selection and certification of indemnity lands for a failure of the grant of a school section No. 16, applicable to the Act of 1845, is found in § 2275 of the Revised Statutes, as amended by the Act of February 28, 1891, c. 384, 26 Stat. 796, and § 2276 of the Revised Statutes, as amended by the same Act. These sections are as follows:

" Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen to thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States, Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced

within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

"Section 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies for school land in fractional townships."

The lands here in question were selected by the State by lists filed on February 12 and February 19, 1906, pursuant to these sections, and the selections were supported by an affidavit that the lands were not mineral in char-

acter. They were approved December 11, 1907, and were certified to the State December 18, 1907, and were thereupon conveyed by the State to one who took title for the appellant, who had procured the selection and the certification. These sections require that the indemnity lands to be conveyed thereunder shall not be mineral in character. Only Congress can convey title to the land of the United States, and it makes no difference what was its equitable obligation to convey title under the original grant of 1845 in respect of indemnity lands. Congress certainly intended to convey as indemnity lands only those described in the Act of 1891. There was no power in anyone representing the United States, therefore, to convey indemnity land which was mineral in character; and any scheme by which conveyance of such land was obtained was a fraud upon the United States.

The decree of the Circuit Court of Appeals is

Affirmed.

BARRETT COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 105. Submitted January 7, 1927.—Decided February 21, 1927.

1. After cancellation of a contract under which supplies were to be manufactured for the Government in a plant to be built with government funds and to belong to the Government, the making of a supplemental agreement by which the contractor bought the plant for a price stated did not affect the contractor's claims growing out of the termination of the original contract, when the later agreement was expressly without prejudice to them. P. 232.
2. The just compensation to which a claimant is entitled upon cancellation of a contract by the Government, under the Act of June 15, 1917, is not to be measured by the profit that would have accrued under the contract, but must embrace that value which was taken from the contractor by the termination of the contract. The contractor is to be credited with his outlays reasonably made for the fulfillment of the contract. P. 235.

3. In this case, where the obligation of the contractor was to manufacture and furnish to the Government a definite quantity of xylol monthly, up to a specified amount, in a plant which was to be erected by the contractor with government funds and belong to the Government, just compensation, upon cancellation of the contract, must include what the contractor expended on the plant in excess of the cost as estimated and adopted in the contract and paid by the Government, in so far as such additional expenditure was required to fit the plant for production of the xylol as the contract contemplated. P. 234.

60 Ct. Cls. 343, reversed.

APPEAL from a judgment of the Court of Claims in an action to recover under an agreement with the Government for the manufacture of xylol.

Messrs. George A. King and *William B. King,* with whom *Mr. Francis H. McAdoo* was on the brief, for the appellant, submitted.

Solicitor General Mitchell for the United States, submitted.

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

This is an appeal from the Court of Claims under §§ 242 and 243 of the Judicial Code from a judgment of February 16, 1925, before the effective date of the Act of February 13, 1925, § 14, c. 229, 43 Stat. 936.

The findings of fact by the Court of Claims show that the Barrett Company, the claimant and appellant, a corporation under the laws of New Jersey, entered into a contract with the United States by which it undertook, with funds provided by the Government, to erect a plant at Frankford, Pennsylvania, for the distillation of xylol at the rate of 225,000 gallons per month, and, after completion, to operate the plant until a total of 2,700,000 gallons of xylol had been produced. The xylol was to be distilled and refined from special solvent naphtha fur-

nished by the Government, and was at all times to belong to the Navy. The by-products, except what the Navy wished to retain, were to belong to the Barrett Company as part of its profit, but not to be sold without the Navy's written consent. Ninety per cent. of the by-products sold by the company was to be credited to the account of the Navy, less one cent a gallon for rental of containers used for shipment.

The price to be paid by the Navy to the company was to be determined monthly for the preceding month by the actual deliveries, first, by a charge per gallon of xylol prorating the total approved estimated cost of the new plant against the 2,700,000 gallons to be made under the contract. At the same time, the account of the Navy was to be credited with this charge, as the total approved estimated cost would have been advanced by the United States to the company before the production of the xylol would begin. To cover operating cost, there was to be a charge of 3 cents per gallon of naphtha distilled, and an additional charge for redistillation of fractions. These charges were to be multiplied by the gallons of naphtha distilled, and the resulting aggregate was to be divided by the number of gallons produced monthly, to which 6.6 cents per gallon was to be added to cover overhead, profit and use of patents.

The new plant was to be an annex to the appellant's existing distillation plant and equipment. The estimated cost to be furnished by the Government, was to be exhibited to the authorities of the Navy Department for approval, prior to the execution of the contract, and was to consist of two parts. First, there was to be an itemized estimate to cover the cost of the separate unit plant and equipment, and, second, an itemized estimate to cover the cost of parts of the plant and equipment needed for the supply of electric power, steam, water, and light, which would not be distinctly separate from the existing

plant and equipment of the company. One-half of the sum to be advanced for construction was to be paid by the Government at the time of the execution of the contract, and the balance in two months. Plant and equipment were to be ready for operation within five months from the date of the contract, and to be continued in operation until the company had delivered the full amount of 2,700,000 gallons of xylol to E. I. du Pont de Nemours and Company. The xylol provided for in the contract was to be employed in the manufacture of trinitroxylol, for use in mine barrage in the North Sea, and was a new product requiring knowledge and skill in its manufacture. The plant, when completed, was to belong to the Government. The company agreed to offer and to pay 25 per cent. of the approved estimated cost for it if accepted, after the contract was performed; but the Government could dispose of it as it chose.

It was stipulated in the contract that the Barrett Company should furnish a bond for the faithful performance of the contract, equal to the approved estimate of the cost of construction; that time was an essential element in the contract; that, by failure to make delivery in conformity with the requirements of the contract and within the times prescribed, the United States would be damaged; that the damage should be liquidated for each day's delay at the rate of a certain per cent. of the contract price; and that legal excuse for delays was to be determined by the United States.

The company's estimate for the separate unit and equipment was $192,547.80, and that for the plant for supplying electric power, steam, water and light was $60,-773.32,—a total of $253,321.12. These estimates were approved by the Navy Department, and one-half of the cost, $126,660.56 was advanced to the plaintiff on the execution of the contract, and the remainder was paid two months thereafter.

On May 18th, 1918, the Navy Department gave notice to the company that it might proceed immediately upon the construction of the plant. It did so, and completed the separate plant at a cost of $284,882.66. The electric, steam, water and light plant had been, at the time of the armistice, about half constructed, at a cost of $52,897.53. The total expenditure on plant and equipment, by the company, was thus $337,780.19, or $84,459 more than the estimates submitted by the plaintiff. The increased cost of construction was due to the increases in the cost of labor and materials, and to a change in construction from steel and brick to reinforced concrete and brick, due to inability to secure steel, and to certain changes in the tanks as originally proposed, in order to increase their capacity. None of these changes was either directly authorized or approved by the Navy Department; but it does appear that the Department had knowledge of the changes and made no objection thereto.

After the armistice, November 18, 1918, the Navy Department notified the plaintiff that the manufacture of xylol under the contract should be discontinued; that construction work remaining to be completed under the contract would not be undertaken, and that the fact that the Navy would receive a partly finished plant would be considered in the final adjustment to be made with regard to the contract. The Navy thereafter discontinued further supply of naphtha, and work under the contract was terminated.

The Navy Department, on December 1, 1918, made a supplementary agreement with the company, by which the company bought the whole plant for $110,000. This supplemental contract contained the following: "It is further agreed that this supplementary contract does not prejudice the right of the contractor to secure payment of claims in settlement for the termination of the original contract No. 38925 by the Government."

From the xylol produced and delivered for three months, the company made a profit of $7,195.59. It was testified by accountants that the profits to the company on the undelivered part would have been $73,792.66, and that its profits from the future by-products would have been $8,237; but these results were uncertain and problematical.

The Court of Claims allowed four items claimed by the appellant, amounting in all to $10,995.08, and for this amount gave judgment.

The statute under which this contract was cancelled by authority of the President, and under which this suit was brought, provides that " whenever the United States shall cancel, suspend or requisition any contract . . . it shall make just compensation therefor to be determined by the President," and, if the amount determined by him is unsatisfactory to the claimant, he may sue the Government to recover such sum as, added to that which he may have already received, will be just compensation therefor. Act of June 15, 1917, c. 29, 40 Stat. 183.

The appellant makes but three assignments of error.

1. That the court held that the supplemental contract of December 1, 1920, was a bar to reimbursement of claimant for expenditures in connection with the erection of the plant.

2. That it failed to allow claimant as just compensation for cancellation $84,459.07 expended for construction of plant over and above the approved estimate.

3. That it did not allow interest on the sum included in the judgment.

First. The Court of Claims seems to have held that the supplemental contract by which the company purchased the plant for $110,000 operated as a final settlement of all claims it had against the Government. In its opinion, speaking of the purchase, it said:

" In many respects, this transaction alone would be sufficient to preclude recovery claimed for this item of

loss; it was a final adjustment of losses with respect to this particular controversy."

We are unable to see that the supplemental agreement could have any such effect, in view of the specific clause of the supplemental contract stipulating that the claims of the contractor should not be prejudiced thereby.

Second. The Solicitor General tenders to the Court the opinion of the Court of Claims, and an extract from the brief of the United States in that court, to show the argument there made against including in the recovery of the plaintiff, as part of just compensation, the amount expended by it in excess of the estimate it made for the cost of the plants to be erected. The Solicitor General, however, finds himself obliged to assist the Court (and in this we think he is to be commended) in presenting a view adverse to the conclusion of the Court of Claims and to the contention of the United States in that court.

The Court of Claims in its opinion said upon this point:

"It is true the plaintiff, because of emergency conditions, determined to go beyond its express warrant of authority and incur added expense in the construction of the desired plant, but the contract itself contemplated no such increased expense, and there were manifestly no contractual obligations imposed upon the plaintiff to do what it did do. But, says the plaintiff, except for the exercise of the right of termination, the additional expense of construction would have been amortized in the total profits received upon completion, and therefore becomes a sum indispensably necessary to make the plaintiff whole. Apparently, a sufficient answer is the assumption of such a risk by the plaintiff. The right to terminate under the statute was part of the contract, and an unauthorized expense incurred depended for reimbursement upon the contingency of its exercise. What the plaintiff did, over and above the limitations of its contractual obligations and rights, it did of its own free will

and assumed the hazards of recouping the same out of its final profits, in the event the contract proceeded to conclusion. It is not asserted that the contract supports the plaintiff's contention. The contention is predicated entirely upon the theory of just compensation. We have been unable to resolve the issue in plaintiff's favor. The just compensation to which the plaintiff is entitled, under the cases heretofore considered by the court, is limited to the stipulations of the contract, which by its terms imposed obligations and reciprocal rights and privileges upon the parties to the contract. The contract fixed the status of the parties thereunder. If one goes beyond its terms it is difficult to perceive how financial obligations to pay more than is agreed to be paid can be inferred on the single theory that the defendant in the exercise of a lawful right terminated all further proceedings under the same and is held thereafter to account for no more than just compensation. In view of the cases cited the just compensation to be awarded must be a loss lawfully resulting from a performance of the contract according to its terms, and may not embrace one occasioned by the contractor's departure from the contract, although considered by the contractor at the time as expedient and in promotion of the rapid completion of the whole contract."

We can not concur in this view of the effect of cancellation, under the circumstances and the terms of the contract. We think, with the Solicitor General, that the provisions for the construction of the plant and the production and payment for the product and the disposition of the by-products are all to be construed together as one contract. The main obligation of the Company, and the chief purpose of the contract, was to furnish to the Government 2,700,000 gallons of xylol at 225,000 gallons monthly. All else was incidental and ancillary to that. It was obliged to distill 225,000 gallons monthly in the months required. The money to be advanced by

the Government was doubtless an indispensable aid to the company's fulfillment of its contract. The estimates limiting the amount were in the interest of the Government. But the possibility that the estimates might not furnish a plant of sufficient capacity to do the work within the time mentioned did not relieve the company; and if it thought a larger expenditure necessary for this, it must make it. Just compensation for cancelling the contract requires that the contractor shall be made whole and recover the expenditures necessary to perform the contract. It would have been no defense, had the company failed to perform and the Government had sued for a breach, that the plant erected upon the estimate was not sufficient to do what was agreed. That was the contractor's risk.

The contract in fixing the elements of the price per gallon of xylol speaks of adding 6.6 cents to cover overhead, profit and use of patents; but we are not concerned with profits in this case. *Russell Motor Car Company* v. *United States,* 261 U. S. 514; *College Point Boat Corporation* v. *United States,* 267 U. S. 12.

What the company is entitled to is just compensation for the contract which was taken from it, and under the cases just cited it should certainly be credited with the outlay which it can show there was reasonable ground for making in order to fulfill its engagements. On the other hand, the Government may show, without regard to the estimates, that the actual additional expenditures were really not required for the fulfillment of the contract, or if less than what was spent was needed, then how much less. The case must be remanded for new evidence and new findings on this issue.

The other assignment of error is to the failure of the Court of Claims to allow interest on that which was or should be recovered. In support of this assignment of error, the appellant contends that, as prospective profits

can not be calculated as part of the recovery in a cancellation case, and as just compensation, under the decision in the *Seaboard Air Line* case, 261 U. S. 299, must include interest on the amount due from the time of cancellation, interest must be allowed here. The Government argues that, as this contract was made after the power of cancellation was given by the statute, its provision for the cancellation must be regarded as written into the contract, *Russell Motor Car Company* v. *United States,* 261 U. S. 514; *College Point Boat Corporation* v. *United States,* 267 U. S. 12; that, when so written in, cancellation is part of the risk run under the contract, and, therefore, that interest on the amount due under the contract can not be collected, because of lack of specific agreement for it under § 177 of the Judicial Code. This exact point has never been decided by the Court. Several especially set cases are now pending in which this is the sole issue raised. As the case must go back for further consideration, we prefer to leave the point undecided and to await the argument in those cases, which will probably be disposed of before the issue here will be ready for further consideration by the Court of Claims in this case.

The judgment of the Court of Claims is reversed and remanded for further proceedings.

Reversed.

DE FOREST RADIO TELEPHONE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 142. Argued January 20, 1927.—Decided February 21, 1927.

A license to make and use a patented article does not depend on formal language, and, as a defense to a subsequent suit for infringement, a license may be inferred from the patent owner's words and acts indicative of his consent, with a reservation of his right to compensation. P. 241.

60 Ct. Cls. 1034, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition in a suit to recover damages for alleged unlawful use of patented articles by the United States.

Mr. Samuel E. Darby for the appellant.

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

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

This is an appeal from a judgment of the Court of Claims dismissing the petition of the appellant, on the 4th of May, 1925. This was before the effective date of the Act of February 13, 1925, c. 229, 43 Stat. 936, by which direct appeals from the Court of Claims under §§ 242 and 243 of the Judicial Code were repealed and the review by certiorari was substituted.

The De Forest Radio Telephone & Telegraph Company filed its petition in the Court of Claims against the United States, seeking to recover for an alleged unlawful use by the Government of certain patented vacuum tubes or audions, used in radio communication. The suit was brought under the Act of June 25, 1910, c. 423, 36 Stat. 851, as amended by the Act of July 1, 1918, c. 114, 40 Stat. 704, 705. The Act of 1910 provided that whenever an invention described in and covered by a patent of the United States should thereafter be used by the Government without license of the owner or lawful right to use it, the owner could recover reasonable compensation for the use in the Court of Claims, provided that the United States could avail itself of all defenses, general or special, which might be pleaded by any other defendant charged with infringement. The amending Act of 1918 enlarged the scope of the Act by providing that the recovery by the

owner should include compensation for patented inventions used or made by or for the United States.

The petition showed, that the two patents involved in the suit were granted to De Forest and by him were duly assigned to the appellant, the company bearing his name, and that that company executed and delivered to the Western Electric Company a written instrument conveying certain rights in the patents, which were subsequently conveyed to the American Telephone & Telegraph Company. This contract was set out in the petition. In consideration of one dollar and other good and valuable considerations, it granted a license to make, use, install, operate and lease, and to sell or otherwise dispose of to others for sale, installation and operation, apparatus and systems embodying or made or operating in accordance with the invention. It purported to give this license for the full terms of the patents and for all transferable rights of the De Forest Company in the inventions, except such as were expressly reserved by that company. The reservations included nonassignable rights for the purpose of making the articles in question for, and selling them to, the United States Government for its use. The instrument further provided that the Western Company and the De Forest Company might respectively institute and conduct suits against others for any of the patents within the fields in which each respectively possessed rights, but that all such suits should be conducted at the expense of the party bringing them, that party to retain any judgment recovered in any such suits.

Paragraph 12 of the instrument provided that the Western Company might transfer to others, in whole or in part, the rights granted by the instrument, and might assign rights thereunder, or grant licenses, to various persons, firms or corporations for the several uses to which the inventions were applicable. The petition further

alleges that the United States, being engaged in war, informed the American Telephone & Telegraph Company that it desired to have large numbers of the audions made promptly for it by the General Electric Company and others; and that the American Telephone & Telegraph Company replied by writing to the Chief Signal officer of the Army that it would not do anything to interfere with the immediate manufacture of the audions, provided it were understood and agreed that the Telephone & Telegraph Company "waived none of its claims under any patents or patent rights owned by it on account of said manufacture, and that all claims under patent rights and all patent questions be reserved and later investigated, adjusted and settled by the United States." The plan was accepted by the United States, and the orders for said audions were thereafter given by the United States to the General Electric Company and the Moorhead Laboratories, Inc., who made them and delivered them to the Government, which used them.

The petition further alleged, that, for the purpose of assisting the United States to obtain said audions promptly, pursuant to the orders given, the American Telephone & Telegraph Company furnished information, drawings and blueprints to the General Electric Company, and permitted representatives and experts of the United States and of said General Electric Company to witness and study the manufacture of said audions by the Telephone & Telegraph Company, all to the end that the audions might be the more promptly made and delivered to the United States for use in the war in which it was then engaged.

After the filing of the petition in the suit, it was amended by an averment that, after the audions were made and used by the United States, negotiations were carried on between it and the American Telephone Company, and that the latter company executed a release to

the United States and all manufacturers acting under its orders of all claims for compensation for the making and use of the audions, and that the release included "all claims which had arisen or might thereafter arise, for royalties, damages, profits or compensation for infringement of any or all letters patent owned or controlled by the Telephone & Telegraph Company, whether expressly recited therein or not, for the manufacture or use prior thereto, and for use by the United States occurring thereafter."

The petition was demurred to, the demurrer was sustained and the petition dismissed. It is conceded by the parties that, on the face of the petition, with the contracts which were made exhibits, the De Forest Company and the American Telephone & Telegraph Company had each the right to license to the United States the making and use of these audions, and that, if either did so license them, it would be a complete defense to a claim by the other for damages for the tort of infringement.

The sole question, therefore, which the Court of Claims considered, and decided against the appellant, was whether on the facts recited in the petition the American Telephone & Telegraph Company had in fact given a license to the United States to have made and to use these audions, covered by the patents. In other words, was the claim which the American Telephone & Telegraph Company had against the United States for the manufacture and use of the audions, based on a contract, or was it based on a tort? If it was the former, it was a full defense to any claim by the De Forest Company. If it was the latter, the De Forest Company was entitled to recover under the Act of 1918.

The appellant says that the necessary effect of the allegations of its petition is, that the Telephone Company said to the United States, in answer to the United States' notice that it wished to make and use the audions, "You

will be infringing my rights. I shall not stop you but I notify you that I shall hold you for such infringement," and therefore that the subsequent acts of the United States and its manufacturers were torts. We think a different construction should be given the allegations. The agreement by the Telephone Company that it would not do anything to interfere with the immediate making of the audions for the United States, interpreted in the light of its subsequent action in assisting the United States to a prompt making of the audions for its use, in furnishing the needed information and drawings and blueprints for such manufacture, and in giving to the experts of the United States and its manufacturers the opportunity to witness and study the manufacture of audions by the Telephone Company, to the end that the audions might be more promptly manufactured and delivered to the United States for use in the war, made such conduct clearly a consent to their manufacture and use, and a license, and this without any regard to the effect of the subsequent release by the Telephone & Telegraph Company of compensation for such manufacture and use. No formal granting of a license is necessary in order to give it effect. Any language used by the owner of the patent, or any conduct on his part exhibited to another from which that other may properly infer that the owner consents to his use of the patent in making or using it, or selling it, upon which the other acts, constitutes a license and a defense to an action for a tort. Whether this constitutes a gratuitous license, or one for a reasonable compensation, must of course depend upon the circumstances; but the relation between the parties thereafter, in respect of any suit brought, must be held to be contractual and not based on unlawful invasion of the rights of the owner. Concede that if the owner had said, "If you go on and infringe my patent, I shall not attempt to enjoin you, but I shall subsequently sue you for infringement," the tort would not be waived—

that is not this case. Here the circumstances show clearly that what the Company was doing was not only fully consenting to the making and using by the United States of the patent, but was aiding such making and using and, in doing so, was licensing it, only postponing to subsequent settlement what reasonable compensation, if any, it might claim for its license. The case of *Henry* v. *Dick*, 224 U. S. 1, in its main point was overruled in the *Motion Picture Patents Company* v. *Universal Film Company*, 243 U. S. 502; but that does not shake the authority of the language of the Court in the following passage (p. 24):

"If a licensee be sued, he can escape liability to the patentee for the use of his invention by showing that the use is within his license. But if his use be one prohibited by the license, the latter is of no avail as a defense. As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee," citing Robinson on Patents, §§ 806 and 808.

In this case the language used certainly indicated the purpose of the Telephone Company not to seek an injunction against infringement, and not to sue for damages therefor, but only to sue or seek for an amicable settlement by payment of just compensation. Such action by the Telephone Company was a license, and constituted a complete defense against a suit for infringement by the De Forest Company.

Judgment affirmed.

HELLMICH, COLLECTOR, *v.* MISSOURI PACIFIC RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 507. Argued January 18, 1927.—Decided February 21, 1927.

1. Messages transmitted for a railroad company by a telegraph company under a contract entitling each, in its business, to the "free"

services of the other up to a stated value each year, as gauged by their respective public tariff rates, or on a cost-plus basis where the tariffs are inapposite, are subject to Revenue Acts, 1918 and 1921, §§ 500, 501, imposing taxes on telegraph messages according to the amounts charged therefor and payable by the person paying for the service. *Postal Telegraph Co.* v. *Tonopah R. Co.,* 248 U. S. 471, distinguished. P. 251.

2. Paragraph (c) of § 501, of the Revenue Act of 1918, has no application to taxes on telegraph messages but relates to taxes on transportation of commodities or materials by carriers. P. 255.

12 F. (2d) 978, reversed.

CERTIORARI (*post,* p. 678) to a judgment of the Circuit Court of Appeals which reversed in part a judgment of the District Court in favor of Hellmich, Collector, in a suit by the Railroad Company to recover taxes, assessed on telegraph messages, and paid under protest.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Messrs. Sewall Key,* Attorney in the Department of Justice, *A. W. Gregg,* and *Charles T. Hendler* were on the brief, for petitioner.

The error lies in the conclusion that the telegraph messages transmitted for the Railroad were, under the terms of the contract, free. While the compensation was not in money, it was in money's worth. This is shown not only by the terms of the contract itself, but from the nature of such contracts generally, as recognized by enactments of Congress and by the opinion of this Court in *Postal Tel. Co.* v. *Tonopah R. R. Co.,* 248 U. S. 471. The language of the revenue acts is sufficiently broad in scope to include telegraph messages so paid for. Respondent's efforts to interpret the revenue acts in the light of the interstate commerce acts must fail, for the reason that the two classes of laws are not *in pari materia.* The correct principle for decision of the question involved is to be found in *Western Union Tel. Co.* v. *D. L. & W. R. R. Co.,* 282 Fed. 925, and *D. L. & W. R. R.*

Co. v. *Bowers,* decided January 22, 1926 (D. C. N. Y. S.), unreported.

Mr. Edward J. White, with whom *Mr. James F. Green* was on the brief, for respondent.

The amount of telegrams sent each year under the terms of the contract up to $75,000 was exempt from taxation, because there was no "charge" for such service within the meaning of the Act, it being necessary to the accrual of a tax that there should be a "charge." There is no "charge" for services when the creditor has no right to demand payment in money. *L. & N. Ry. Co.* v. *Mottley,* 219 U. S. 467; *Tex. & P. Ry. Co.* v. *Mugg,* 202 U. S. 242; *C. I. & L. Ry. Co.* v. *United States,* 219 U. S. 486. Subdivision (f) of § 500 does not impose a tax where there is no right of the Telegraph Company to demand payment for the telegrams sent.

All the telegrams sent by the Telegraph Company for the Railroad upon which the tax was attempted to be collected were exempt from the tax. Secs. 500, 501(a), Revenue Act, 1918; secs. 500, 501, 502(a), Revenue Act, 1921. Article 46(c) of Regulations 49, promulgated by the Commissioner of Internal Revenue, admits that on a proper and fair construction of the statute there is no "charge" on any of the service rendered by the Telegraph Company to the Railroad up to the amount of $75,000, provided for in the contract.

As the tariffs, rates and charges established under the Interstate Commerce Act do not apply under an agreement for an exchange of service between common carriers, the "charge" which is attempted to be taxed under § 500 does not exist. Sec. 4563[3] Comp. Stats. 1916.

The other subdivisions of § 500 of the Act of 1918 imposing a tax upon the amount "paid" are associated with subdivision (f) imposing a tax upon the amount of the "charge," and this association of subdivisions requires

that that meaning of the word "charge" be accepted which is closest to the meaning of the word "paid." *Gould* v. *Gould,* 245 U. S. 153; *United States* v. *Field,* 255 U. S. 257; *Smietanka* v. *Bank,* 257 U. S. 602; *United States* v. *Salen,* 235 U. S. 237; *United States* v. *Weitzel,* 246 U. S. 533.

In attempting to tax services which the Railroad Company was authorized to exchange with the Telegraph Company and to asssess such tax upon "all such messages whether 'on line or off line' and whether 'free or dead-head rates,'" the Commissioner of Internal Revenue was, in effect, repealing the provisions of the Act to Regulate Commerce authorizing such free exchange of services and the decision of this Court that such free exchange of services whether on or off the line of the Railroad Company was proper. *Postal Tel. Co.* v. *Tonopah R. R. Co.,* 248 U. S. 471.

Messrs. Kingman Brewster and *James S. Y. Ivins* filed a brief, as *amici curiae,* by special leave of Court.

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

The Missouri Pacific Railroad Company brought this suit in the United States District Court for the Eastern District of Missouri, against Hellmich, U. S. Collector of Internal Revenue, to recover taxes amounting to $14,792.95, paid by it under protest, for the transmission of telegraph messages from March, 1920, to January, 1923, inclusive. The messages in question were transmitted under the terms of a contract dated October 24, 1911, for the exchange of services between the Western Union Telegraph Company, on the one part, and the Missouri Pacific Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company, on the other part. To the rights and obligations of these two railway com-

panies the respondent company, the Missouri Pacific Railroad Company, succeeded. The question of the legality of the taxes arises under two acts of Congress. The first is the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1101 and 1102, which provides in its section 500,

"That from and after April 1, 1919, there shall be levied, assessed, collected and paid, in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917—

. . . . . .

"(f) In the case of each telegraph, telephone, cable or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents, and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents; Provided, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation.

"Section 501 (a). That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

The second is the Revenue Act of 1921, c. 136, 42 Stat. 227, 284, §§ 500 and 501 of which contain exactly the same language as that just quoted from the Act of 1918.

The District Court held that the messages here in question came within these sections, and gave judgment for the Government. The Circuit Court of Appeals of the Eighth Circuit reversed the District Court, holding that the telegraph messages, up to the amount of $75,000 annually thus taxed, were exempt, but that those in excess of that amount were subject to the tax.

The point in the case is to determine whether these messages can be construed to be messages for the transmission of which there can be said to be a charge. The contention of the railroad company is that, in the sense

of this § 500, the messages in question are not charged for at all, and that they can not be fitted into the section, so that it can be construed to cover them. We must, therefore, consider the contract under which the messages for the railroad company were sent by the telegraph company. It was dated October 24, 1911, and is of indefinite duration. By its fourth paragraph, the telegraph company agrees to perform, for the railway companies, telegraphic service between points on its lines in the United States, either on or off the lines of the railways covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, under franks issued to their officers and agents permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company. The railway companies agree to perform promptly such transportation and distribution service over their railroads as the telegraph company may require for its employees, supplies, and material, whether for work or use along the railroads or beyond or off their lines, and to furnish special trains, engines, crews and equipment for distribution service, and outfit, boarding and tool cars for work on their lines, whenever required by the telegraph company. The transportation of employees is to be authorized by passes to be issued by the railway companies on authorized request. The service performed by either party for the other is to be charged for at its regular current telegraph rates, or its through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, are to be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding 25 per cent. of such cost. At the close of each contract year, bills are to be rendered by each party to the other for all services performed by

each party for the other during such year. If the bill therefor rendered by either party to the other exceeds the sum of $75,000 in any contract year, the party receiving such service is to pay to the party rendering the same the amount of such excess, provided that in the event the services of both are in excess of $75,000 in any contract year, the party in arrears is to pay to the other party the difference between the amounts of such accounts; and if the bills rendered by each party to the other for such services in any contract year do not exceed $75,000, there is to be no payment by either party to the other therefor.

By the fifth paragraph of the contract, it is provided that the telegraph or telephone operators of the railway companies at stations where the messages are less in number than 3,000 a year, are to act as the agents of the telegraph company and receive and transmit them, charging the tariff rates and rendering to the telegraph company monthly statements of the business, and are to pay the receipts therefor to the telegraph company, but the railway companies are not to be liable for receipts thus to be received and paid over. The railway operators and employees in such service are to conform to the rules and regulations of the telegraph company. They are not to transmit over the wires of either party any free messages except those of the railway company's business. For messages transmitted for it by the employees of the railway company the telegraph company agrees to pay the railway companies 10 per cent. of the gross cash receipts, except on ocean cable messages, receipts for which are to be retained in full by the telegraph company.

Pursuant to the authority vested in him by the Revenue Acts, the Commissioner of Internal Revenue, with the approval of the Treasury, promulgated Article IX of Regulation No. 57 of the Treasury Department, as to the proper construction of this section 500 (f) of the Act of 1918, as follows:

"Messages transmitted under contract.—Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500 (f)) of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of a common carrier and whether they are 'on line' or 'off line' are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its line off the railroad lines 'free' to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on line' or 'off line,' and whether 'free' or at half rates, are subject to the tax provided by this section (500 (f)) of the act. The tax must be computed, collected, and paid upon each such message."

The case was heard upon a stipulation of facts, with some short additional testimony furnished by the officers of the railway company, as to the actual business transactions between the railway company and the telegraph company during the years in question.

The evidence shows that, so far as the transportation of men and material was concerned, the railroad company kept a record of all transportation furnished to the telegraph company at tariff rates. At the end of the contract year, statements setting forth the transportation and the

charges were furnished to the Western Union. After they were verified by the Western Union they became the basis for settlement under the contract. A similar arrangement was made by the Western Union, as to the messages which it charged at its regular public rates.

For the contract year ending August 31, 1920, the total amount of business handled by the Missouri Pacific Railroad Company for the Western Union amounted to $80,721.72, or $5,721.72 in excess of the $75,000 allowance under the contract. During the same year the amount of business handled by the Western Union for the Missouri Pacific Railroad Company in telegraph messages was $71,815.17. That was $3,184.83 less than the amount provided for under the contract; and for that year no payment was made by the Missouri Pacific to the Western Union Telegraph Company for such messages. For the year ending August 31, 1921, the net amount of business done by the railroad company in the way of transportation, etc., for the telegraph company was $144,023.95. This was $69,023.95 in excess of the $75,000. During the same year the business handled by the telegraph company in messages for the railroad company amounted to $86,221.92, or $11,221.92 in excess of the contract allowance. During that year the Western Union Telegraph Company paid the railroad company the difference between $69,023.95, and $11,221.92, or $57,802.03. For the year ended August 31, 1922, the net amount of business handled by the railroad company for the telegraph company in the way of transportation was $132,349.02, or $57,349.02 in excess of the $75,000 limit, while the amount of business in messages handled by the telegraph company for the railroad company was $83,342.17, or $8,342.17 in excess of the same limit; and that year the telegraph company paid the railroad company the difference between $57,349.02 and $8,342.17, or $49,006.85. It further appeared that the taxes which accrued under

the construction imposed by the Commissioner of Internal Revenue, from August, 1922, to January, 1923, were as follows:

August, 1922	$647.62
September, 1922	604.55
October, 1922	885.30
November, 1922	797.25
December, 1922	937.80
January, 1923	883.60
Total	$4,756.12

Upon these facts we think that the telegraph messages were subject to the tax imposed by § 500 in each law. We think that the messages were charged for, in the sense of that section, and that Article IX of the regulations No. 57 of the Treasury Department was a proper regulation to carry out the statute with reference to such a contract as this. The method adopted for the mutual charges was an agreement between the companies that, up to a certain amount, they were willing to run the risk that the compensation to be paid by each for the service of the other would not average more than the same sum. The contract was a contract for many years, the amount of the service on the one hand and on the other might vary from year to year; but, year in and year out, the two companies felt that $75,000 would be a safe sum for both. In exceptional years, if either had the advantage beyond $75,000, this should be made up for by the actual payment of cash for the excess to the party earning it.

In argument, extreme instances for a single year were supposed, such that, as between the two contracting parties, no transportation would be furnished and so no compensation would be received by the telegraph company for the messages actually sent by it. Such a hypothesis is not a test of the actual equilateral character of the contract in its reciprocal obligations. $75,000, in the experience and judgment of the parties, measured the probable

annual need of each for the service of the other. This was deemed a fair balance between the two—agreed upon for their mutual convenience of settlement. The contract was made long before the tax was imposed, and we must treat it as having been the result of transactions of previous years, and justified by similar experiences of other railroads and telegraph companies. Such contracts between railroads and telegraph lines were and are very frequent. *Postal Telegraph Co.* v. *Tonopah Railroad Co.*, 248 U. S. 471. The payment of charges for telegrams or shipments, or other services, was a mere substitute for the payment of the money down, at the time each message was sent or each shipment made, or other service was performed. Certainly no one would say that, because a patron of the telegraph company paid his bills once a year, it rendered them free from taxation. The arrangement here is not substantially different. The payment for the messages, i. e., the charge for them, to satisfy the statute, should be money or money's worth; and that is what we think this contract in its ultimate and general result amounted to.

Some elaborate arguments have been made against this conclusion. The Circuit Court of Appeals' view was that this was a mere swapping of free privileges and was not a service for a money charge. We do not think the privileges were free. We think that the one for messages was set off against the one for transportation, and that the one paid for the other.

The counsel for the respondent insist that our decision in *Postal Telegraph Co.* v. *Tonopah Railroad Co., supra,* is inconsistent with our present conclusion. That case concerned the right of telegraph companies to recover against railroad companies for telegraph messages, on contracts like the one here in question. The defense was, that such contracts for an exchange of service, while valid

under the Interstate Commerce law for messages and transportation on or along the line, were invalid as to messages or transportation service beyond the railway lines. The Interstate Commerce Commission had held that such extras must be charged for by the railroad upon the basis of its published rates, and by the telegraph company upon reasonable rates as charged to other customers for similar service. It arose under the amendment to the Interstate Commerce Act of June 18, 1910, c. 309, § 7, which, in bringing in under the interstate commerce law telegraph and telephone and cable companies, provided "that nothing in the act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services." It was held that this proviso was general enough to allow an exchange of services off the lines as well as services on them. The Court said that the railroad and telegraph had grown together in mutual dependence, and that contracts of this sort for long terms had been nearly universal for fifty years; that as it was feared that such contracts would be unlawful if the telegraph companies were brought within the law, the amendment of 1910 was passed. This Court's conclusion was that, under the contract, all the great benefits on one side were consideration for all those conferred upon the other, and that Congress probably allowed the exchange because it had been frequently advised by the Commission that full performance of the exchange would not affect any public or private interest adversely. Speaking of the meaning of exchange, the Court said (p. 474):

"But 'exchange' is a barter and carries with it no implication of reduction to money as common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever

services can be exchanged, can be exchanged in the same way."

This language is thought to show that the use of transportation service as a consideration for telegraphic messages could not properly be regarded as the equivalent of a money payment necessary to meet the requirement of § 500 as a basis of taxation. We do not think the case or the language quoted apposite. The Court in the opinion cited was merely deciding what the general expression "exchange of services" meant, and whether it must be narrowly, meticulously and rigidly construed, exactly to conform to the general rule that all rates of tariff on the same class of service should be uniform. The Court was merely pointing out that in allowing a general exchange of service between two such partners as a railroad and a telegraph company, Congress did not intend to enforce the uniformity rule strictly and require a nice mathematical or monetary equivalence between the exchanged services. The issue here is different. It concerns a tax upon telegraph messages paid for by transportation, and the question is whether such payment is a charge which can be measured, or measures itself, in money. The most significant evidence that it is, appears in the conduct of the parties themselves, for in their exchange of such services they make actual payments to each other in money above a certain amount of business, which amount itself they determine by a carefully kept account of actual services in money figures.

A lengthy argument is made that the Revenue Act and the Interstate Commerce Act are *in pari materia,* and therefore that the word "charge" in the Revenue Act should be controlled by the meaning of the same word in interstate commerce legislation, which it is said could not be satisfied by a mere exchange of service. We think this is a far cry to the proper meaning of § 500 in imposing a tax, and do not think its correct interpretation is thus assisted.

Then it is said that paragraph (c) of § 501 of the Act of 1918 prevents the imposition of this tax. That paragraph is as follows:

"(c) The Taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods, if the carrier received payment for such transportation, such tax, if it can not be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders service for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system."

Regulation No. 49 issued by the Internal Revenue Department to carry out this paragraph was as follows:

" If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under con-

tract transports commodities necessary to maintain or operate such telegraph or telephone line or lines along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation are exempt from the tax."

Paragraph (c) of § 501 is only to be found in the Revenue Act of 1918, and could not affect the validity of any taxes at issue in this case after August, 1922, when the Revenue Act of 1921 became applicable. In the next place, paragraph (c), with the enforcing regulation No. 49, has no application to the payment of taxes on telegraph messages. It is dealing with the transportation of goods and commodities by common carriers and the tax on rates received from their carriage. The words used make this interpretation necessary, and it is supported by the fact that, when in the Revenue Act of 1921 the taxes on freight and express shipments were repealed, this paragraph (c) was also repealed, though the tax on telegraph messages was retained.

It is true that this result leaves a tax on the telegraph messages in the exchange of services, and exempts receipts on the transportation side of the exchange. But Congress did not fix its taxes with reference to the particular phase of this contract by which charges for messages are balanced against those for transportation, and doubtless had satisfactory reasons for exempting the one and not the other. The difference furnishes no ground for varying the meaning and scope of § 500 (f), or its application to the telegrams which were exchanged for the exempted transportation.

For the reasons given, the judgment of the Circuit Court of Appeals is reversed and the judgment of the District Court is restored.

Reversed.

Counsel for Parties.

OKLAHOMA NATURAL GAS COMPANY *v.* OKLAHOMA.

SAME *v.* SAME ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Nos. 154, 187. Submitted January 3, 10, 1927.—Decided February 21, 1927.

1. At common law, and by the rule in the federal courts, dissolution of a corporation abates a litigation in which it is a necessary party. P. 259.
2. A motion to substitute one corporation for another on the ground that the latter has been dissolved and that its assets and obligations have devolved upon the other, should not be allowed, though consented to by the opposite party to the suit, in the absence of a full showing of the facts relating to the dissolution, its purpose and effect. P. 261.
3. Liquidating trustees, if appointed under the state statute governing the dissolution of the corporation, should appear on the motion for substitution in this court. P. 261.

Motions denied.

MOTIONS to substitute the Oklahoma Natural Gas Corporation for the plaintiff in error, the Oklahoma Natural Gas Company.

Mr. Lawrence H. Cake, in behalf of *Mr. David A. Richardson,* for the plaintiff in error, in support of the motion.

Messrs. George F. Short, Attorney General, and *J. Berry King,* Assistant Attorney General, for the State of Oklahoma.

Mr. E. S. Ratliff for the Corporation Commission of Oklahoma.

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

These are motions for substitution of a new party appellant in each cause. The motions are joined in by the counsel of record for the defendants in error and by the plaintiff in error. They show that the Oklahoma Natural Gas Company was a corporation of the State of Oklahoma organized in the Indian Territory in October, 1906, to have existence for twenty years, and that its charter would have expired by legal limitation in October, 1926; that about September 15, 1926, after the writs of error in these cases were allowed, the Oklahoma Natural Gas Company was reorganized, the resulting corporation being named the Oklahoma Natural Gas Corporation, organized and existing under the laws of the State of Delaware; that the reorganized corporation took over all the contracts, franchises, property and assets of the Oklahoma Natural Gas Company and assumed all the debts, liabilities and obligations of that company, including the liability and obligation to make the refund to the patrons of the Oklahoma Natural Gas Company involved in this action if it should finally be held that the Oklahoma Natural Gas Company itself had been obligated to make such refunds; that the Oklahoma Natural Gas Corporation assumed the performance of the public service theretofore performed by the Oklahoma Natural Gas Company; that the new corporation became and is the successor in law and in fact of the Oklahoma Natural Gas Company; that the latter company was by decree of the District Court of Tulsa County, Oklahoma, duly and legally dissolved as a corporation, and that, even if the decree had not been rendered, it would have been dissolved by expiration of the time limit in its charter in October, 1926. It is said that the reorganized corporation both by its assumption

thereof and by law is liable for the refunds or discounts involved herein, if the order requiring them is valid, and that the State of Oklahoma looks to and will look to the reorganized corporation for the payment of the same if the order is finally affirmed. The counsel for the old company, the Attorney General of Oklahoma and the counsel for the Corporation Commission of Oklahoma, all sign the motion.

There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. *Mumma* v. *Potomac Company,* 8 Pet. 281; *National Bank* v. *Colby,* 21 Wall. 609; *Pendleton* v. *Russell,* 144 U. S. 640; *Bank of United States* v. *McLaughlin,* Fed. Case No. 928; *Greeley* v. *Smith,* Fed. Cases 5748; *Walters* v. *Western & Atlantic Railroad Co.,* 69 Fed. 679; *Marion Phosphate Company* v. *Perry,* 74 Fed. 425; *Board of Councilmen of the City of Frankfort* v. *Deposit Bank of Frankfort,* 120 Fed. 165; *United States* v. *Spokane Mill Company,* 206 Fed. 999. See also *Edison Co.* v. *Westinghouse,* 34 Fed. 232 and *Edison Co.* v. *United States Lighting Co.,* 52 Fed. 300. It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice.* But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is

really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.

This corporation is said to have been created before Oklahoma became a state by the law of Indian Territory, so we may presume that the corporation law of the State of Oklahoma since enacted, Oklahoma Statutes, 1921, c. 34, Article V, sec. 5361, has full application. *Shulthis* v. *McDougal,* 225 U. S. 561, 571–572. It provides:

" Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and to collect and pay debts and divide among the stockholders the property which remains after the payment of debts and necessary expenses; and for such purposes may maintain or defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action whereto any such corporation is a party shall abate by reason of such dissolution."

We have found no Oklahoma case that construes this provision with reference to the question now before the Court. The language of the section would seem to indicate that as there is to be no abatement the Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court.

The showing made for the motion is that the Oklahoma Natural Gas Company was by a decree of the district court of Tulsa County, Oklahoma, duly and legally dissolved as a corporation. There is nothing to indicate why the company was dissolved. We may assume but we do not know that it was in anticipation of its dissolution by force of law and that the proceeding was undertaken in order to transfer its assets, its obligations and its liabilities to another corporation which is averred to be a corpora-

tion of another State, to wit, of Delaware, although the seal which is attached to the consent of the Oklahoma Natural Gas Corporation by its president and secretary and accompanies the motion, shows that it was incorporated not in Delaware but in Maryland.

The motion is signed by counsel for the plaintiff in error, the Oklahoma Natural Gas Company. He does not explain how he continues to represent plaintiff in error, if in fact it has ceased to be, as he represents to this Court.

In the absence of a fuller showing as to just what the proceeding was in the district court of Tulsa County in respect to the dissolution of the old company, and in view of the provisions of the Oklahoma statute, we think it unwise to grant the motion for substitution, even though with the consent of the defendants in error. It may be that with the disclosure of all the facts and circumstances we may find that what was done with the consent of all the parties to this suit is in fact a novation which we can make effective. *United States* v. *City Bank,* 19 How. 385; *Ex parte Railroad,* 95 U. S. 221, 222.

We are not advised as to whether, at the time of the dissolution of the corporation by time, liquidating trustees of the old company were appointed under the statute. If they were, then they should appear in this proceeding. The motions to substitute are denied, without prejudice to a renewal on a fuller showing.

Motions denied.

UNITED STATES v. RITTERMAN.

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

No. 669. Argued January 19, 1927.—Decided February 21, 1927.

1. The crime of smuggling as defined by § 593(a) of the Tariff Act of 1922 is consummated if dutiable merchandise is clandestinely

brought into the United States concealed in the owner's baggage after the owner has fraudulently procured a waiver of inspection in the United States by false statements to a customs officer stationed abroad. So *held* where the waiver was rescinded after the owner and baggage had crossed the international boundary, and the owner, upon arrival at the first port of entry, fraudulently failed to declare dutiable articles when called upon. *Keck* v. *United States,* 172 U. S. 434, distinguished. P. 268.

2. Confession in the customs house when the dutiable articles were about to be discovered did not purge the owner of the offense. P. 269.

3. Under the above stated circumstances, the owner was not entitled to forty-eight hours, or any time, to change his mind and make entry of the goods. P. 269.

12 F. (2d) 849, reversed.

CERTIORARI (*post,* p. 685) to a judgment of the Circuit Court of Appeals which reversed a conviction of the respondent for smuggling diamonds into the United States from Canada.

Solicitor General Mitchell, with whom *Messrs. J. Kennedy White* and *Harry B. Amey* were on the brief, for the United States.

The clause "without paying or accounting for the duty," contained in the statute considered in the *Keck case,* 172 U. S. 474, was omitted in the reënactment by § 593 (a). Stress is laid in that case on the fact that the goods "before or at the time when the obligation to pay the duty arose, were surrendered to the customs authorities," and on the fact that the antecedent acts outside of the country preparatory to the commission of the overt act of smuggling "were not followed by the introduction of the goods into the United States" (p. 443). It is evident that the basis of the decision in the *Keck case* was that the mere bringing of the merchandise past the three-mile limit, and therefore technically within territorial waters, did not constitute smuggling, for the very moment occasion arose to surrender the mer-

chandise for inspection and declare it, the goods were produced and declared.

The case falls more nearly within the facts of *Newman* v. *United States,* 276 Fed. 798. Petition for certiorari denied, 258 U. S. 623.

The decision in the *Keck case* was also influenced to some extent by the fact that at common law in England the offense of smuggling involved "landing" the goods and not merely bringing them inside the three-mile limit, and in the *Keck case* the diamonds had not been landed.

Mr. Albert MacC. Barnes, Jr., with whom *Mr. James M. Snee* was on the brief, for the respondent.

The administrative provisions of the Tariff Act of 1922 were an attempt to consolidate and re-enact all prior statutes governing the enforcement of the Customs laws. § 2865 R. S. was the smuggling statute. It had been construed by this court in *Keck* v. *United States,* 172 U. S. 474. It was re-enacted with some omissions as § 593a of the Tariff Act of 1922, as a part of that consolidation plan. The *Keck case* produced two conclusions. First, that the statute does not include attempts to smuggle. Second, that there can be no crime of smuggling until the obligation to pay duties arises. Although the second conclusion is based partly on the phraseology of the statute, i. e., "without paying or accounting for the duty," which words have been omitted from the present statute, the action of the Government in the case at bar in charging this very omission in the indictment, creates the same question as that passed on in the *Keck case.* The second conclusion, however, is based upon the definition of "smuggling" as including within it the avoidance of the obligation to pay or account for duties, and the phraseology used in § 2865, R. S., is cited by this Court only as corroborative of the definition which the Court adopted.

The Tariff Act of 1922 and the Customs Regulations promulgated thereunder show a pronounced line of demarcation between ordinary commercial merchandise shipments and passengers' baggage. They make a further distinction between passengers' baggage from contiguous territory and from all other places. All merchandise shipped in the ordinary commercial way must be invoiced and must also be declared in writing on entry. Passengers' baggage need not be invoiced and the declaration thereof may be oral. All baggage or other articles from Canada must be unladen and inspected at the first port of arrival in the United States. There, only, the obligation to enter, which has been defined in the Customs Regulations as " the transaction of passing merchandise through the Customs," can arise. In the case at bar respondent at that time was deprived of his baggage.

Customs Regulations of 1923, Articles 205 and 395, provide that customs officers shall not open the baggage of passengers. Neither of these regulations was regarded by the officers in this case, who, without the respondent's knowledge and consent removed the bag from the baggage car and concealed it in a room in the Customs House at St. Albans, other than that in which the respondent was being examined, and later, after asking respondent for the key, proceeded to this other room and opened the bag with the key supplied. The law contemplates examination of baggage in the presence of the passenger, and this right of the passenger was totally disregarded. During the search of his person, without referring to the bag, before any obligation arose to pay the duty, respondent mentioned to the collector that in his bag, the key to which was shortly before that time requested, were certain diamonds. Under these circumstances, and on the authority of the *Keck case* and the various decisions of the Circuit Courts of Appeals, the respondent made due entry of the

diamonds and did not commit the crime of smuggling under § 593(a) of the Tariff Act of 1922.

Under § 593 the indictment as drawn is fatally defective in that it fails to charge that the diamonds were merchandise "which should have been invoiced." This is not merely descriptive but is one of the essential averments which must be proved. The averment "without causing said diamonds to be invoiced" is not equivalent to the clause "which should have been invoiced."

Section 593(a) is distinctly a commercial merchandise provision which has no relation to passengers' baggage brought in from Canada. *Keck* v. *United States, supra; Latimer* v. *United States,* 223 U. S. 501; *United States* v. *One Pearl Chain,* 139 Fed. 510; affirmed 139 Fed. 513; *United States* v. *One Trunk,* 184 Fed. 317; *Newman* v. *United States,* 276 Fed. 798; *Dodge* v. *United States,* 131 Fed. 849; *United States* v. *Smith,* 27 Fed. Cas. No. 16319; *United States* v. *Nolton,* 27 Fed. Cas. No. 15897.

Mr. Justice Holmes delivered the opinion of the Court.

The respondent was indicted for smuggling and clandestinely introducing into the United States from Canada, merchandise, viz., 1022.85 carats of unset cut diamonds, without making any declaration to enter the same, and without causing them to be invoiced for the purpose of ascertaining the duties upon them, and without paying or accounting for the duties to which they were subject, although he had an opportunity to do so, with intent to evade payment of such duties. He was convicted in the District Court but the judgment was reversed by the Circuit Court of Appeals. 12 F. (2d) 849. A writ of certiorari (*post,* p. 685) was granted by this Court under the Act of February 13, 1925, c. 229, amending § 240(a) of the Judicial Code. 43 Stat. 936, 938.

On January 28, 1926, the respondent bought a ticket in Montreal for New York and sought to have a Gladstone bag that he carried checked through to New York. A customs inspector, sent there by the United States for the convenience of travellers, asked him about the contents and he answered, 'Just my own personal wearing apparel.' Such examination as the inspector made disclosed nothing but clothing and personal effects. The inspector thereupon tied and sealed the bag and attached the requisite manifest. In the ordinary course of events the strings would have been cut after crossing the boundary line and the bag would have gone on to New York and then would have been delivered to the owner, without more. Some suspicion was felt, however, and the respondent was again questioned after entering the United States and repeated that he had nothing to declare. On the train's arrival at St. Albans, Vermont, which is the port of entry, he was called into the custom house and there again stated that he had nothing, and more specifically, no diamonds, to declare, and on the suggestion that he had a quantity in his possession the day before, in Montreal, said that he had, but placed them in a bank there, named. An examination of his person was begun and, while he was removing his clothes, he was asked for the key to the Gladstone bag and handed it over. The respondent continued undressing, but, before finishing, said to the assistant collector, 'I haven't any diamonds on my person; they are in my grip.' Within a few minutes officers who had been examining the bag in another room reported that diamonds had been found hidden there. They were of the amount alleged, were valued at $122,492.43, United States valuation, and were subject to a duty of twenty per cent. Act of 1922, c. 356, Title I, Schedule 14, Par. 1429, 42 Stat. 858, 917. It does not appear that the discovery was brought about by the confession. It seems to have been the result of search alone.

The Tariff Act of 1922, c. 356, § 593(a); 42 Stat. 858, 982, is as follows:

"*Smuggling and clandestine importations.*—(a) If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisonment for any term of time not exceeding two years, or both, at the discretion of the court."

The Judge gave the following instructions to the jury:

"If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag.

"If the defendant intended to smuggle the merchandise in question, he had an opportunity to change his mind up to the time when the obligation to pay or account for duties arose, and if you believe that the defendant did so change his mind and did so declare then it is your duty to find him not guilty.

"If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him, and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed;

if you believe that he then availed himself of this opportunity then your verdict should be not guilty."

The first paragraph of the charge was excepted to and was held erroneous by the Circuit Court of Appeals. It was held that the respondent could not be convicted under § 593. *Keck* v. *United States,* 172 U. S. 434, was taken to establish that smuggling could not be committed before the moment when the obligation to pay arose, that is, after the duty was established at the custom house.

Keck v. *United States* did not decide that a man who wishes to smuggle must wait until he can find a custom house. Its effect is simply that the customs line is not passed by goods at sea when they pass the three-mile limit and have not yet been landed. The statute then in force (R. S. § 2865) after the words 'which should have been invoiced' added 'without paying or accounting for the duty.' The omission of the later words is explained in different ways by the two sides, but for the purposes of this decision we treat it as immaterial. Here diamonds were clandestinely introduced upon the soil of the United States, and although they would pass a point at which they ought to be examined, they would not have been, but on the contrary would have been secure from further inspection, had the trick succeeded. If they had been carried across the boundary in such a way as to avoid a port of entry, we suppose that the offence of smuggling would have been complete when they passed the line, although the smuggler might repent and afterwards report for payment of duties. We perceive no difference because of the accident that the goods had to pass a custom house which the respondent's fraud had deprived of further function if it had not been found out.

It does not appear to us to need argument that the diamonds were 'merchandise which should have been invoiced' and appeared to be such on the face of the

indictment. The respondent could not get rid of the duty by hiding them in his stockings and other personal luggage. He could not purge himself of the consequences of his fraud by confessing when he saw that he was on the point of being discovered or, as might have been found, after he had been. The argument that in such circumstances he was entitled to forty-eight hours, § 484(a), or any time to change his mind and make entry of the goods, seems to us extravagant. Repentance came too late.

Judgment reversed.

AMERICAN RAILWAY EXPRESS COMPANY *v.* KENTUCKY.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 5. Argued January 29, 1925; reargued November 17, 18, 1925.—Decided February 21, 1927.

1. Upon review of a judgment of a state court, not explained by any opinion, grounds of decision involving constitutional questions but not appearing in the record can not be merely assumed. P. 272.
2. Save in exceptional circumstances, decisions of state courts on questions of common law as locally applicable are binding in this Court. P. 272.
3. A judgment pronounced by a state court, with jurisdiction, after a fair hearing, is not violative of due process under the Fourteenth Amendment, even if erroneous, if it is not evasive of a constitutional issue or a result of arbitrary or capricious action. P. 273.
4. Petitioner, a Delaware corporation, was organized under agreement of the interested parties, during the War, to take over the business and operative properties of all the principal express companies; which it did, paying them with shares of its capital stock issued for the purpose. No provision was made for paying obligations of the old companies. *Held* that indebtedness in Kentucky of one of the old companies, which arose previously from its express business there, could constitutionally be enforced by the Kentucky

courts against the new company, the old one not being dissolved or insolvent but retired to another State where it still had the stock received from the new company and other valuable property. P. 274.

Affirmed.

CERTIORARI (264 U. S. 579) to a judgment of the Court of Appeals of Kentucky, which affirmed a judgment against the American Railway Express Company for the aggregate of numerous judgments previously recovered against the Adams Express Company by the Commonwealth of Kentucky.

Mr. Kenneth E. Stockton for the petitioner on the original argument; *Mr. Branch P. Kerfoot* on the reargument. *Mr. Charles W. Stockton* was also on the brief. See the brief in the next case.

Mr. Frank E. Daugherty, Attorney General of Kentucky, for the Commonwealth of Kentucky.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Without opinion the Kentucky Court of Appeals affirmed a judgment by the Harlan Circuit Court against petitioner and in favor of the Commonwealth for the aggregate sum of forty-four judgments against the Adams Express Company theretofore granted on account of alleged defaults during 1916.

The Adams Company is a "joint stock association," organized under the laws of New York. For many years it operated as a common carrier of goods in Kentucky and other States and owned therein valuable property essential to the conduct of this business. In Kentucky it owned no other property.

The petitioner is a Delaware corporation, organized under an agreement of the interested parties for the purpose of taking over the business and operating property

of all the principal express companies of the country by issuing stock to the several owners. Directly after its organization, and on July 1, 1918, it acquired the entire express business and all property connected therewith of the Adams Company and issued therefor several million dollars of its capital stock. (Like transfers were made by the other express companies.) The seller immediately ceased to operate in Kentucky and the purchaser continued the business. Neither company made any provision for paying the outstanding obligations of the Adams Company contracted in Kentucky; but the latter held in its treasury at New York the stock received from the purchaser, possessed other valuable property located there, and was solvent.

Respondent claimed that petitioner became liable for unsatisfied obligations of the Adams Company. After a full and fair hearing upon pleadings and proof, the Court of Appeals sustained this theory but assigned no reason. That court, it is said, determined the same issues as here presented in *American Railway Express Co.* v. *Commonwealth of Kentucky,* 190 Ky. 636, and supported the judgment by an elaborate opinion. But the record now before us fails to show any reference whatever to that opinion when the present cause was decided.

The petition for certiorari affirmed that the cause involved the following questions of constitutional law and because of them asked a review. We go no further than their consideration requires.

(1) Whether it is a lack of due process of law for the Kentucky Court to deprive the petitioner of its property on the following assumptions which are unsupported by the record and contrary to fact; (a) that the Adams Express Company is a corporation; (b) that the State of Kentucky was a creditor of the Adams Express Company on June 30, 1918; (c) that the stock issued to the Adams Express Company was distributed by it among its shareholders.

(2) Whether petitioner is denied the equal protection of the laws by a decision of a state court which holds that a corporation which pays cash for property is a holder for value but that a corporation which issues less than a controlling interest of its own stock for property is a donee, and takes such property subject to existing claims of the vendor's creditors.

(3) Whether it is lack of due process for the state of Kentucky to enforce a rule that a *bona fide* purchaser for value of all the Kentucky property of a solvent vendor is liable to Kentucky creditors of the vendor to the extent of the value of the property acquired.

(4) Whether a decision of a state court which is contrary to the common law, and justifiable only as an exercise of the state's police power, can be retroactively applied to affect vested rights.

The grounds upon which the Court of Appeals rested its judgment are not revealed—there was no opinion. Consequently, petitioner's argument which rests upon alleged assumptions is impertinent.

The record discloses no ruling that a corporation which pays cash for property holds for value but if property is acquired by issuing less than a controlling interest of stock it takes subject to claims of the seller's creditors.

As there was no controlling statute the state court necessarily determined the rights and liabilities of the parties under the general rules of jurisprudence which it deemed part of the law of Kentucky and applicable in the circumstances. It went no further. No earlier opinion was overruled or qualified and no rule was given any retroactive effect. Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor

does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 165, 166.

The Kentucky court had jurisdiction and has determined only that under common law principles in the peculiar circumstances above narrated, where the facts were or might have been known to the purchasing corporation, it became liable for claims against the vendor resulting from transactions within the State. The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Booth* v. *Illinois*, 184 U. S. 425, 429; *Truax* v. *Corrigan*, 257 U. S. 312, 329.

It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *Tracy* v. *Ginzberg*, 205 U. S. 170, 177; *Bonner* v. *Gorman*, 213 U. S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.*, 233 U. S. 665, 669.

Considering the circumstances disclosed by the record, there was nothing arbitrary or obviously contrary to the fundamental principles of justice in requiring the petitioner, organized for the purposes shown, to satisfy claims against the Adams Company which arose out of business within the State. The transfer of all the latter's property located in the State materially interfered with the ability of Kentucky creditors to enforce their claims, and,

as to them, might have been declared fraudulent. It seems clear that the State, without conflict with the Fourteenth Amendment, might have enacted through its legislative department a statute of precisely the same effect as the rule of law and public policy declared by the Court of Appeals, and its decision is just as valid as such a statute would have been. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 548.

The above-expressed view is sufficiently confirmed by what this Court said in *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147, 158, 159, which upheld the validity of a statute providing for service of process after a corporation had ceased to do business within and had withdrawn all agents from the State; and *Lemieux* v. *Young, Trustee*, 211 U. S. 489, 492, 495, and *Kidd, Dater Co.* v. *Musselman Grocer Co.*, 217 U. S. 461, 472, *et seq.*, which sustained the power of a State to impose liability for the seller's debts upon a purchaser of merchandise in bulk.

The judgment of the court below must be

Affirmed.

Mr. Justice Sutherland and Mr. Justice Butler, dissent.

AMERICAN RAILWAY EXPRESS COMPANY *v.* ROYSTER GUANO COMPANY.

CERTIORARI TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 116. Argued November 17, 18, 1925.—Decided February 21, 1927.

1. Judgment holding petitioner liable in Virginia for local debts of a corporation whose business it took over, upheld on authority of *American Ry. Express Co.* v. *Kentucky*, *ante* p. 269. P. 280.
2. A state statute constitutionally may require a foreign corporation to appoint a local agent and, in case of its default, may itself

designate an official, to receive service of process in actions to collect local debts of the corporation left unsettled when it withdrew from the State. P. 280.

141 Va. 602, affirmed.

CERTIORARI (268 U. S. 687) to a judgment of the Special Court of Appeals of Virginia which affirmed a judgment recovered against the petitioner by the respondent, based on a judgment previously recovered against the Southern Express Company, whose express business and operating property the petitioner took over.

Mr. Branch P. Kerfoot, with whom *Mr. Charles W. Stockton* was on the brief, for petitioner.

The basis of fact upon which the Special Court of Appeals of Virginia rests its decision denying the asserted federal right has no support in the record.

The proof shows that the Southern Express Company did not sell its business nor did the petitioner undertake to carry on its business in Virginia or elsewhere, and that, independently of the stock of petitioner received by the Southern Express Company, it had approximately $1,000,000 in assets which were amply sufficient to meet all of its legal liabilities. The court held that the law in Virginia in reference to the merger of the Southern Express Company and others into the petitioner as a consolidated company liable for the debts of the constituent companies had already been settled by the case of *American Ry. Exp. Co.* v. *Downing,* 132 Va. 139.

The capital stock becomes a trust fund only where the corporation is insolvent or in process of dissolution. *Hollins* v. *Brierfield Co.,* 150 U. S. 371; *Wabash Ry. Co.* v. *Ham,* 114 U. S. 587; *Fogg* v. *Blair,* 133 U. S. 534; *Pusey & Jones* v. *Hanssen,* 261 U. S. 491; *Graham* v. *LaCrosse R. R. Co.,* 102 U. S. 148; *McDonald* v. *Williams,* 174 U. S. 397.

To hold the petitioner liable for debts of the Southern Express Company, it would be necessary for the record

to show (1) that there was an actual consolidation or merger under which the Southern Express Company became extinguished and the petitioner either expressly or by necessary implication of law undertook to pay its debts or liabilities; or (2) that the Southern Express Company was insolvent and that the transfer of the property to the petitioner was a fraudulent conveyance without consideration to defeat the creditors of the Southern Express Company.

It is true that where stock given for the property has been distributed to the stockholders of the debtor corporation, and no other assets were found to meet its liabilities, the courts have held that creditors were not obliged to pursue their remedy against the individual stockholders, but might follow the property. But this comes back to the proposition that in every such case there was no *bona fide* sale or purchase, but a fraudulent transfer to distribute corporate assets among shareholders in fraud of creditors. In the case at bar payment in stock, instead of cash, for the property bought by petitioner did not in any way affect the rights or even the convenience of Virginia creditors. Neither the buyer nor the seller was a Virginia corporation and the contract was made in New York. If the petitioner had paid for the property in cash, there would have been no more assets in Virginia for the convenience of Virginia creditors than there were under the actual conditions of the sale. The Virginia court, therefore, did not have before it in the record, nor were there in existence, the facts necessary to support its decision, and it is the duty of this Court to review and correct the error. *Postal Tel. Co.* v. *Newport,* 247 U. S. 473; *Sou. Pac. Co.* v. *Schuyler,* 227 U. S. 611; *N. C. Ry. Co.* v. *Zachary,* 232 U. S. 248; *Carlson* v. *Curtis,* 234 U. S. 103; *Norfolk & W. R. Co.* v. *Conley,* 236 U. S. 605; *Interstate A. Co.* v. *Albert,* 239 U. S. 560.

The decision of the state court is not based upon principles of common law but is an attempt at judicial legislation under the police power of the State which can not be applied retroactively to affect vested rights. *Blake* v. *McClung,* 172 U. S. 239; *Crutcher* v. *Kentucky,* 141 U. S. 474.

If the rule announced would have been unconstitutional as a statute, it seems clear that this Court can review it if its effect is to deny petitioner the equal protection of the law and deprive it of property without due process of law. *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 529.

The amendment of February 17, 1922, to § 237 of the Judicial Code, clearly indicates that a change in a rule of law established in a State by judicial decision may violate rights under the Federal Constitution. It is the duty of federal courts to determine for themselves questions of commercial law, general jurisprudence, and of rights under the Constitution of the United States. *Oates* v. *Bank,* 100 U. S. 246; *Swift* v. *Tyson,* 16 Pet. 1; *Guernsey* v. *Bank,* 188 Fed. 300; *Bank* v. *Liewer,* 187 Fed. 16; *Grt. Southern Hotel Co.* v. *Jones,* 193 U. S. 532; *Shaw* v. *R. R. Co.,* 173 Fed. 750; *Brewer-Elliott Oil Co.* v. *United States,* 270 Fed. 104. To make the decisions of the state court obligatory on the federal court, the right must have accrued after the rule was established. *Murray* v. *Wilson Dist. Co.,* 213 U. S. 157; *Grt. Southern Hotel Co.* v. *Jones, supra.*

The general rule of the common law is that a corporation which purchased all the property of another corporation is not *ipso facto* liable for the debts of the latter. *Postal Tel. Co.* v. *Newport, supra; Gray* v. *Nat. S. S. Co.,* 115 U. S. 116; *Fogg* v. *Blair,* 133 U. S. 534; *Koch* v. *Speedwell,* 140 Pac. 598; *Hageman* v. *Southern Ry. Co.,* 202 Mo. 249; *Swing* v. *Lumber Co.,* 105 Minn. 356; Cook, Corporations, 8th ed., vol. 3, § 673.

The judgment against the Southern Express Company is null and void. *Phil. & R. Co.* v. *McKibbin,* 243 U. S. 264; *Gray* v. *Stuart,* 74 Va. 351; *Haddock* v. *Haddock,* 201 U. S. 562; *Knapp* v. *Wallace,* 50 Ore. 348. The statute in question must be construed as affecting only such corporations as are still doing business within the State, since to construe it otherwise would be to extend the laws of Virginia beyond her borders. *St. Clair* v. *Cox,* 106 U. S. 350.

The petitioner was a *bona fide* purchaser for value under circumstances which exclude any suggestion of fraud either actual or constructive, and was entitled to purchase the property it obtained from the Southern Express Company without regard to the latter's creditors. *Hollins* v. *Briarfield Coal Co.,* 150 U. S. 371; *McDonald* v. *Williams,* 174 U. S. 397.

Mr. Cadwallader J. Collins for the respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Following an agreement of June, 1918, by the Adams Express Company, American Express Company, Southern Express Company (a Georgia corporation) and Wells Fargo & Company, the principal concerns then engaged in express transportation throughout the Union, the American Railway Express Company was incorporated under the laws of Delaware and, by issuing its capital stock, acquired, July 1, 1918, all property of those carriers theretofore utilized in connection with such business. The Southern Express Company owned no other property located in Virginia. After this transfer it retired from the State; but in New York continued to hold valuable assets, including the stock of petitioner so received, and was solvent.

September 15, 1919, respondent sued the Southern Company in the Norfolk Circuit Court for the value of goods intrusted to it in 1917 for transportation from Richmond to Norfolk, Va., and lost. Summons was executed by delivering a copy to the Chairman of the State Corporation Commission and transmitting another to the defendant by mail. A special plea challenged the validity of the service upon the ground that the defendant had withdrawn from the State and was no longer a foreign corporation doing business there within the meaning of the Code provisions printed in the margin.* This special plea was overruled; defendant failed to plead further, and judgment went by default May 15, 1920.

July, 1922, respondent here sued petitioner for the amount of the above-described judgment upon the theory

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* Section 1294g, subsec. 2–3, Virginia Code 1904—

(2) Every such corporation, company, association, person or partnership shall, by a written power of attorney, appoint some person residing in this State its agent, upon whom may be served all lawful process against such corporation, company, association, person or partnership, and who shall be authorized to enter an appearance in its or his behalf. A copy of such power of authority, duly certified and authenticated, shall be filed with the State Corporation Commission, and copies thereof, duly certified by the clerk of the said commission, shall be received as evidence in all courts of this State.

(3) If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of such corporation, company, association, person, or partnership, to appoint another agent in his place, as prescribed by the preceding section. And until such appointment is made, or during the absence of such agent of any such corporation, company, association, person or partnership, from the State, or if no such agent be appointed as prescribed by the preceding section, service of process may be upon the chairman of the State Corporation Commission, with like effect as upon the agent appointed by the company. The officer serving such process upon the chairman of the State Corporation Commission shall immediately transmit a copy thereof, by mail, to such corporation, company, association, person, or partnership, and state such fact in his return.

that under the narrated circumstances the latter became liable for outstanding obligations of the Southern Company contracted in Virginia. After a full and fair hearing the trial court gave judgment therefor. The Special Court of Appeals affirmed this action. 141 Va. 602.

What we have said in *American Railway Express Co.* v. *Commonwealth of Kentucky, ante,* p. 269, is enough to dispose of all material points raised here except the claim that the judgment against the Southern Express Company was void because not based on proper service of process; and that is without merit. Evidently the statute might reasonably be construed as intended to designate an agent upon whom process should be served in suits growing out of transactions within the State where the corporation had failed so to do. The state court gave the statute that effect, and we are bound by the result. *Mutual Reserve Association* v. *Phelps,* 190 U. S. 147, 158; *Hunter* v. *Mutual Reserve Life Insurance Co.,* 218 U. S. 573.

The judgment of the court below must be

Affirmed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER, dissent.

LOUISIANA & WESTERN RAILROAD COMPANY *v.* GARDINER.

ERROR AND CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF LOUISIANA, FIRST CIRCUIT.

No. 120. Argued January 12, 1927.—Decided February 21, 1927.

1. Cause held reviewable by certiorari, not error. P. 281.
2. A provision in an interstate bill of lading attempting to restrict the institution of damage suits to two years and one day after delivery of the property is bad under Transportation Act, 1920,

which declares unlawful any limitation shorter than two years from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. P. 284.

3. Neither the Cummins Amendment nor the Transportation Act operates, itself, as a statute of limitation upon a suit by a shipper against a carrier for damage to goods. P. 284.
4. In the absence of a federal statute of limitations the local one is applicable to such actions. P. 284.

Reversed.

CERTIORARI to a judgment of the Court of Appeal of Louisiana which affirmed with a modification a judgment against the Railroad recovered by Gardiner for damage to freight. The Supreme Court of the State refused certiorari.

Mr. Harry McCall, with whom *Messrs. Philip S. Pugh, George Denegre, Victor Leovy, Henry H. Chaffe,* and *Jas. H. Bruns* were on the brief, for the petitioner.

No appearance for the respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

After the record came here under writ of error the Railroad Company presented a petition for certiorari. The cause is reviewable by certiorari, and the application therefor is granted. The writ of error will be dismissed.

April 3, 1920, the petitioner received from respondent Gardiner at Crowley, Louisiana, various articles consigned to himself at Murray, Kentucky, and issued to him two bills of lading which contained this clause: "Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property." The goods were delivered at Murray in bad condition April 15, 1920. He sued to recover for the damage in a Louisiana state court, April 12, 1922. The Company success-

fully relied upon the local statute of limitation—"All actions for loss of or damage to shipments of freight shall be prescribed by two years, said prescription to run from the date of shipment" (Act 223 of 1914).

The Court of Appeal declared: "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damages under an interstate contract of shipment . . . The validity of any stipulation in such a contract which involves the construction of the statute and the validity of the limitation thereby imposed, is a federal question, to be determined under the general law, and as such is withdrawn from the field of state law or legislation. . . . State laws limiting time for bringing suit on interstate shipments are superseded by Carmack Amendment." And it accordingly held the plea of prescription insufficient, reversed the judgment of the trial court and remanded the cause for further proceedings.

On the second trial judgment went for respondent for the full amount claimed. The Court of Appeal reduced this by the amount of the Company's claim for an undercharge and the war tax. The Supreme Court refused a writ of certiorari.

Petitioner maintains that the federal statutes prescribe no limitation and that the state law controls. We think this is the correct view. The court below wrongly construed the federal statutes.

The Carmack Amendment to the Hepburn Act, June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595, added the following provision to Section 20, Act to Regulate Commerce, Feb. 4, 1887, c. 104, 24 Stat. 379, 386.

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier,

railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

This Court held that bills of lading for interstate shipments issued after the Carmack Amendment must be construed according to rules approved by the federal courts and upheld provisions therein which required claims to be filed within any specified time if reasonable. *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 505; *Missouri, Kansas & Texas Ry.* v. *Harriman,* 227 U. S. 657, 672; *Missouri, Kansas & Texas Ry.* v. *Harris,* 234 U. S. 412, 420; *Atchison & Topeka Ry.* v. *Harold,* 241 U. S. 371, 377, 378; *St. Louis, I. Mt. & So. Ry. Co.* v. *Starbird,* 243 U. S. 592, 604; *Erie R. R. Co.* v. *Shuart,* 250 U. S. 465, 467; *American Ry. Exp. Co.* v. *Levee,* 263 U. S. 19, 21.

The Cummins Amendment, March 4, 1915, c. 176, 38 Stat. 1196, 1197, modified the Carmack Amendment and directed—

" That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years."

The Transportation Act, 1920, c. 91, 41 Stat. 456, 494, provides—

" That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant

that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The bills of lading issued by petitioner undertook to restrict the institution of suits for loss to two years and one day after delivery of the property. This restriction does not accord with the Transportation Act which declared unlawful any limitation shorter than two years from the time notice is given of the disallowance of the claim, and is therefore ineffective. See *Chicago & N. W. Ry.* v. *Brewsher,* 6 Fed. (2d) 947. But neither the above-quoted provision from the Cummins Amendment nor the one from the Transportation Act was intended to operate as a statute of limitation. They restricted the freedom of carriers to fix the period within which suit could be brought—prohibited contracts for any shorter period than the one specified.

Here, although the rights of the parties depended upon instruments the meaning and effect of which must be determined according to rules approved by the federal courts, there was no federal statute of limitations and the local one applied. *Campbell* v. *Haverhill,* 155 U. S. 610, 613, *et seq.; Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397; *Meeker & Co.* v. *Lehigh Valley R. R.,* 236 U. S. 412, 423.

The judgment of the Court of Appeal must be reversed, and the cause will be remanded there for further proceedings not inconsistent with this opinion.

Reversed.

FARRINGTON, GOVERNOR OF HAWAII, ET AL. *v.* TOKUSHIGE ET AL.

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

No. 465. Argued January 21, 1927.—Decided February 21, 1927.

1. Acts of the Legislature of Hawaii "relating to foreign language schools and the teachers thereof," and regulations adopted there-

under by the Department of Public Instruction, taken as a whole appear to infringe rights, under the Fifth Amendment, of owners of private Japanese schools, and the parents of children attending them; and in granting an interlocutory injunction against enforcement of the Acts and regulations the United States District Court of Hawaii did not abuse its discretion. P. 298.

2. Upon the present record and argument, the Court cannot undertake to consider the constitutional validity of the provisions separately. P. 298.
3. The due process clause of the Fifth Amendment affords the same protection to fundamental rights of private school owners, parents and children against invasion by the Federal Government and its agencies (such as a territorial legislature) as it has been held the Fourteenth Amendment affords against action by a State. P. 299.

11 F. (2d) 710, affirmed.

CERTIORARI (*post,* p. 677) to a decree of the Circuit Court of Appeals which affirmed an interlocutory decree of the United States District Court of Hawaii enjoining the Governor, Attorney General and Superintendent of Public Instruction of the Territory from enforcing the provisions of the Hawaiian Foreign Language School Law, and regulations. The plaintiffs were members of numerous voluntary associations conducting foreign language schools for instruction of Japanese children.

Mr. William B. Lymer, Attorney General of the Territory of Hawaii, with whom *Marguerite K. Ashford,* First Deputy Attorney General, was on the brief, for the petitioners.

These laws do not violate the Constitution. *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390; and *Bartels* v. *Iowa,* 262 U. S. 404, concern prohibitory legislation alone, and not purely regulatory measures such as those involved in this case, which attempt rather to supervise and control than to abolish foreign language schools.

It would be a sad commentary on our system of government to hold that the Territory must stand by, impo-

tent, and watch its foreign-born guests conduct a vast system of schools of American pupils, teaching them loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of the home language in the public schools,—to hold that the Territory could not by mere regulatory measures even alleviate these evils to a moderate extent while not interfering in the least with the proper maintenance of these schools or the teaching of foreign languages in them, but on the contrary making them more efficient for this their declared object.

The State has authority over such schools for at least two reasons: (1) that as *parens patriae* it has extensive power with respect to infants; and (2) that it is vitally interested in the quality of its citizenship.

An act may go far in prohibitory form and yet be regulatory. *McCluskey* v. *Tobin,* 252 U. S. 107. That regulation, as distinguished from prohibition, may extend to all occupations and professions, is shown by *Gundling* v. *Chicago,* 177 U. S. 183. See also, *Adams* v. *Tanner,* 244 U. S. 590; *Dent* v. *West Virginia,* 129 U. S. 114; *Ex parte McManus,* 151 Cal. 331; *Mutual Film Corp.* v. *Ohio Indus'l. Comm.,* 236 U. S. 230.

This is not a question of whether the court may disagree with the legislature on the question of advisability, or policy, or reasonableness; it is a question of whether the legislation is arbitrary or unreasonable in the established legal sense. *Lindsley* v. *Nat. Gas Co.,* 220 U. S. 61; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129; *Armour & Co.* v. *North Dakota,* 240 U. S. 510; *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Territory* v. *Takanabe,* 28 Haw. 43; *Patsone* v. *Pennsylvania,* 232 U. S. 138.

Private schools are a proper subject of regulation. *State* v. *Bailey,* 157 Ind. 324. Compulsory education statutes do not require attendance at public schools

alone, but at either public or private schools. Necessarily, in order to meet the requirements in respect of the period of years and the field of knowledge to be covered, it must be within the power of the legislature to regulate within reasonable limits the qualifications of the teachers, the subjects to be covered, the instruction to be given and how and to what extent—within the limits of the power—other instruction should be forbidden. The right to regulate private schools in Hawaii has long been unquestioned.

See *Barbier* v. *Connolly,* 113 U. S. 27; *Interstate Ry. Co.* v. *Massachusetts,* 207 U. S. 79.

Even if one or more of the provisions of the Act be unconstitutional, the remainder, if found constitutional, should be declared valid. In no event could the plaintiff schools complain on behalf of the teachers or as to the provisions relating to the teachers, for they are not the parties hurt by those provisions. *In re Craig,* 20 Haw. 483; *Territory* v. *Field,* 23 Haw. 230; *Milton Dairy Co.* v. *Great Nor. Ry. Co.,* 124 Minn. 239; *Nor. Pac. R. R.* v. *Whalen,* 149 U. S. 157; *Mut. Film Corp.* v. *Kansas,* 236 U. S. 248; *McCabe* v. *Ry. Co.,* 235 U. S. 151; *Davis Mfg. Co.* v. *Los Angeles,* 189 U. S. 207. Furthermore, it is probable that those teachers who have availed themselves of the law, and taken out permits, have waived the right to question the constitutionality of the legislation.

The issuance of a permit, which is in the nature of a license, is mandatory on the Department, if the applicant has complied with the prescribed conditions, *In re Kalama,* 22 Haw. 96; *Tai Kee* v. *Minister of Interior,* 11 Haw. 57; and if in such case a permit should be refused, the applicant could either compel its issuance by mandamus or else proceed with immunity to act as if he had a permit, *Territory* v. *Kua,* 22 Haw. 307; *Royall* v. *Virginia,* 116 U. S. 572. No permit can be revoked with-

out giving the holder an opportunity to be heard, *Wilson* v. *Lord-Young Eng. Co.*, 21 Haw. 87; and, even if the provisions as to permits and pledges were invalid, that would not affect the validity of the remaining portions of these Acts. *Territory* v. *Apa*, 28 Haw. 222.

Teachers of American citizens in this extensive system of schools should know at least the elements of the history, institutions, ideals and language of the country in which they are teaching and of which their pupils are citizens.

Mr. Joseph Lightfoot, with whom *Mr. Joseph B. Poindexter* was on the brief, for respondents.

The statute unreasonably interferes with the fundamental right of parents and guardians to direct the upbringing and education of children under their control. *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Pierce* v. *Society of Sisters,* 268 U. S. 510.

No attempt was made in the Nebraska, Iowa, or Ohio statutes to control the course of study, text books, entrance requirements or qualifications of teachers, nor was there any interference whatsoever with the conduct of private schools except that the English language should be the medium of instruction and that foreign languages as such should not be taught below certain grades. These were declared unconstitutional by this Court as such laws plainly interfere with the right of a parent to direct and control the education of his child.

The Hawaiian statute goes far beyond these statutes in every essential particular; it takes from the parent of a child attending a foreign language school, all control and direction of the education of his child. Complete control of these schools is given to the Department of Education. The effect is to make them public schools in all but the name, though the public contributes nothing to their support. They are prohibited from employing a teacher, teaching a subject, using a book, admitting a pupil, or

engaging in any activity of any nature, unless approved by the Department of Education. Nor can such a school be conducted until a permit is granted and an exorbitant fee paid—a condition not imposed on any other private school in the Territory.

In the public schools all are taught the same lessons of Americanism and democratic ideals, which are considered sufficient for a majority of the pupils, yet the minority of the pupils, whose parents desire to fit them for the battle of life by teaching them a language which will be of great benefit to them in their after careers, attend the foreign language schools where they are further regulated, controlled, taxed, and this, too, in the face of the admitted fact that nothing un-American is taught in the foreign language schools, and the Americanism of the pupils is advanced, not retarded in them.

The sole purpose of the law is the Americanization of the pupils of these schools, though it is admitted that nothing un-American is taught in them. Where a system infringes on the Constitution, a part of the system, though unobjectionable in itself, falls with the system. *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 552; *Meyer* v. *Nebraska,* 262 U. S. 390. Where one provision of a statute is invalid, the whole must fall, where it is evident that the legislature would not have enacted the one without the other. *Connolly* v. *Pipe Co.,* 184 U. S. 540; *Little Rock Ry.* v. *Worthen,* 120 U. S. 907; *Spraigue* v. *Thompson,* 118 U. S. 90. A subject may be clearly within the police powers, but the enactment may be so unreasonable or inappropriate for the accomplishment of ostensible purposes that the court will declare it null and void. *Dobbins* v. *Los Angeles,* 195 U. S. 223.

The Hawaii law is unconstitutional in that it delegates police power to the Board of Education to be exercised at its discretion, *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Noel* v. *People,* 187 Ill. 587; and no standard is furnished by the

statute for the guidance of the Board, *Adkins* v. *Children's Hospital*, 261 U. S. 525.

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals affirmed [11 Fed. (2d) 710] an interlocutory decree rendered by the United States District Court of Hawaii July 21, 1925, which granted a temporary injunction forbidding petitioners—Governor, Attorney General and Superintendent of Public Instruction of that Territory—from attempting to enforce the provisions of Act 30, Special Session 1920, Legislature of Hawaii, entitled, "An Act relating to foreign language schools and teachers thereof," as amended by Act 171 of 1923 and Act 152 of 1925, and certain regulations adopted by the Department of Public Instruction June 1, 1925. The interlocutory decree was granted upon the bill and affidavits presented by both sides. No answer has been filed. In these circumstances we only consider whether the judicial discretion of the trial court was improperly exercised.

Respondents claimed below and maintain here that enforcement of the challenged Act would deprive them of their liberty and property without due process of law contrary to the Fifth Amendment. Petitioners insist that the entire Act and the regulations adopted thereunder are valid; that they prescribe lawful rules for the conduct of private foreign language schools necessary for the public welfare; also that if any provision of the statute transcends the power of the Legislature it should be disregarded and the remaining ones should be enforced.

If the enactment is subject to the asserted objections it is not here seriously questioned that respondents are entitled to the relief granted.

There are one hundred and sixty-three foreign language schools in the Territory. Nine are conducted in the

Korean language, seven in the Chinese and the remainder in the Japanese. Respondents are members of numerous voluntary unincorporated associations conducting foreign language schools for instruction of Japanese children. These are owned, maintained and conducted by upwards of five thousand persons; the property used in connection therewith is worth two hundred and fifty thousand dollars; the enrolled pupils number twenty thousand; and three hundred teachers are employed. These schools receive no aid from public funds. All children residing within the Territory are required to attend some public or equivalent school; and practically all who go to foreign language schools also attend public or such private schools. It is affirmed by counsel for petitioners that Japanese pupils in the public and equivalent private schools increased from one thousand, three hundred and twenty in 1900 to nineteen thousand, three hundred and fifty-four in 1920, and that out of a total of sixty-five thousand, three hundred and sixty-nine pupils of all races on December 31, 1924, thirty thousand, four hundred and eighty-seven were Japanese.

The challenged enactment declares that the term, "foreign language school," as used therein, "shall be construed to mean any school which is conducted in any language other than the English language or Hawaiian language, except Sabbath schools." And, as stated by the Circuit Court of Appeals, the following are its more prominent and questionable features.

"No such school shall be conducted in the territory unless under a written permit therefor from the Department of Public Instruction, nor unless the fee therefor shall have been paid as therein provided, and such permit shall be kept exposed in a prominent place at the school so as to be readily seen and read by visitors thereat.

"The fee prescribed is one dollar per pupil on the estimated average attendance of pupils at the school during

the period during which such school was conducted during the next preceding school year, or if such school was not conducted during any part of such preceding school year, then at the same rate at the estimated average attendance during the school year or unexpired part thereof in question, in which latter case the amount shall be adjusted to conform to the estimated average attendance during such year or part thereof.

"The amount of the fee shall be estimated and determined by the department from such information as it may have, and shall be payable by any person, persons or corporation conducting or participating in conducting such school; and all officers, teachers and all members of any committee or governing board of any such school, and in case such school is conducted by or for a corporation or voluntary association or other group of persons, all members or associates of such corporation, association or group shall be deemed to be participants in conducting such school. Provision is then made for the collection of the fees by suit, but that provision is not deemed material here.

"All permits must be renewed annually on the first day of September of each year and a similar fee must be paid, provided the department shall not be required to renew a permit for conducting any foreign language school, in the conducting of which there has been a violation of the terms of the Act.

"All fees collected by the department under the Act shall be paid over to the Treasurer of the Territory and the moneys so paid are appropriated to the department to be expended in enforcing and carrying out its provisions. If at any time the funds at the disposal of the department from fees previously collected or from royalties, commissions or other moneys received in connection with the publication or sale of foreign language school text-books shall make it possible to fully and effectively

carry out the provisions of the Act with the permit fees payable by the schools based on a lower rate than one dollar per pupil, the department is authorized to make such a reduction in that rate as it may deem reasonable and expedient.

"Every person conducting a foreign language school shall, not later than June 15, of each year, file with the department on forms prescribed or furnished by it a sworn list of all pupils in attendance at such school during the current school year, showing the name, sex, parents or guardians, place of birth and residence of each child.

"No person shall teach in a foreign language school unless and until he shall have first applied to and obtained a permit so to do from the department and this shall also be construed to include persons exercising or performing administrative powers at any school. No permit to teach in a foreign language school shall be granted unless and until the department is satisfied that the applicant for the same is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language.

"It is the declared object of the Act to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils may be promoted, and the department is directed to carry out the provisions of the Act in accordance with its spirit and purpose.

"Before issuing a permit to conduct a foreign language school or to teach in any such school the department shall require the applicant for such permit to sign a pledge that the applicant will, if granted a permit to teach in such a school, abide by and observe the terms of the Act, and the regulations and orders of the department, and will, to the best of his ability, so direct the minds and studies of pupils in such schools as will tend to make them

good and loyal American citizens, and will not permit such students to receive instructions in any way inconsistent therewith.

"No foreign language school shall be conducted in the morning before the school hours of the public schools or during the hours while the public schools are in session, nor shall any pupil attend any foreign language school for more than one hour each day, nor exceeding six hours in any one week, nor exceeding thirty-eight weeks in any school year; provided, however, the department may in its discretion and with the approval of the Governor, modify this provision.

"The department shall have full power from time to time to prescribe by regulations the subjects and courses of study of all foreign language schools, and the entrance and attendance prerequisites or qualifications of education, age, school attainment, demonstrated mental capacity, health and otherwise, and the text-books used in any foreign language school.

"Until otherwise provided by the department, the following regulations are in effect: Up to September 1, 1923, every pupil shall have first satisfactorily completed the American public school first grade, or a course equivalent thereto, before attending or being allowed to attend any foreign language school. Beginning September 1, 1923, and thereafter, every pupil shall have satisfactorily completed the American public school first and second grades, or courses equivalent thereto, before attending or being allowed to attend any foreign language school. Beginning September 1, 1923, and thereafter, for grades one, two and three, and beginning September 1, 1924, and thereafter, for grades four and above, all new text-books used in elementary foreign language schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms.

" The department is authorized to prepare, or cause to be prepared, or procure or arrange for procuring suitable text-books for the teaching of foreign languages in the foreign language schools and to enter into an agreement or agreements for the publishing and sale of the same.

"All royalties, commissions and moneys received by or on behalf of the department in connection with the publication or sale of such text-books shall be paid over to the treasurer of the territory and shall be appropriated to the department to be expended for the purposes of the Act.

" In every foreign language school no subjects of study shall be taught, nor courses of study followed, nor entrance, nor attendance qualifications required, nor text-books used, other than as prescribed or permitted by the department. The latter regulations were only effective until superseded in whole or in part by others made by the department, and some such were thereafter made, but they are not deemed material to our present inquiry.

" The department has power to appoint one or more inspectors of foreign language schools and to pay the salary and necessary expenses therefor; such inspectors and other duly authorized agents of the department shall have the right freely to visit such foreign language schools and to inspect the buildings, equipment, records and teaching thereof and the text-books used therein.

" If the department shall at any time become satisfied that any holder of a permit to conduct a foreign language school or to teach therein does not possess the qualifications required by the Act, or shall have violated or failed to observe any of the provisions of the Act or of the regulations or orders of the department, the department may then and thereupon revoke the permit theretofore granted and the same shall thereupon be and become null and void.

"Any person who shall conduct or participate in conducting a foreign language school or who shall teach in

a foreign language school contrary to the provisions of the Act, or who shall violate or participate in violating any of the provisions thereof, or any of the regulations or orders of the department, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed $25, and each day's violation shall be deemed a separate offense.

"The Act further provides that if any section or part thereof is declared unconstitutional or invalid by the courts, the same shall not affect the validity of the Act as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid."

On June 1, 1925, the Department of Public Instruction adopted, and the Governor approved, certain regulations which undertook to limit the pupils who might attend foreign language schools to those who regularly attended some public school or approved private school, or had completed the eighth grade, or were over fourteen years of age. Also, to designate the text-books which foreign language schools should use in their primary grades.

The affidavit of T. Iwanaga, in support of motion for temporary injunction, states—

"That in the schools referred to in said bill, which are conducted for each grade for one hour for each school day, nothing contrary to American history and American institutions and principles of democracy is taught, the instruction being confined to the speaking, reading and writing of the Japanese language; . . .

"That in the schools represented by plaintiffs there are about twelve thousand four hundred pupils and said schools employ about one hundred ninety-two teachers; that said teachers are paid and said schools are maintained from voluntary contributions and from the fees of the children attending said schools; that the provi-

sions of said Act 152 of the Session Laws of 1925 are so drastic that the parents of children will be afraid to pay tuition fees and other persons will be afraid to contribute to the funds of said schools lest they be subjected to the pains and penalties provided in said Act, and that, therefore, unless immediate relief is afforded by this Honorable Court, the said schools will be unable to pay the teachers' salaries and the expenses of conducting said schools and the property of plaintiffs in said schools will be utterly destroyed."

An affidavit of the Attorney General describes the litigation which has arisen under the legislation concerning foreign language schools. He does not disavow purpose to enforce all provisions of the challenged Act and regulations. An affidavit by the Superintendent of Public Instruction advances the opinion that respondents could pay the prescribed fees, that compliance with the foreign language school laws would not prevent the operation of schools which conduct kindergartens, and that elimination of the kindergartens would not materially affect them. Also, he says—

"That instruction in said Japanese Language Schools is not and cannot be confined to the speaking, reading and writing of the Japanese language, but extends to many subjects and even in so far as it is intended to have for its object the speaking, reading and writing of said language, the teaching of that is and must be largely through the medium of stories whether of history or fiction and in other ways than the mere teaching of letters and words and sentences. . . .

"That, in the opinion of this affiant, the parents of children will not because of the provisions of said Act 152 be afraid to pay tuition fees nor will other persons be afraid to contribute to the funds of such schools and this affiant denies that said schools will, unless immediate relief is afforded by this Honorable Court, be unable to

pay the teachers' salaries and the expenses of conducting said schools, and denies that the property of plaintiffs in said schools will be utterly or at all destroyed."

The foregoing statement is enough to show that the school Act and the measures adopted thereunder go far beyond mere regulation of privately-supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books. Enforcement of the Act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.

Upon the record and the arguments presented, we cannot undertake to consider the validity of each separate provision of the Act and decide whether, dissociated from the others, its enforcement would violate respondents' constitutional rights. Apparently all are parts of a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason. Here, the enactment has been defended as a whole. No effort has been made to discuss the validity of the several provisions. In the trial court the cause proceeded upon the theory that petitioners intended to enforce all of them.

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools has been announced

in recent opinions. *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa, id.* 404; *Pierce* v. *Society of Sisters,* 268 U. S. 510. While that amendment declares that no *State* shall " deprive any person of life, liberty or property without due process of law," the inhibition of the Fifth Amendment—" no person shall . . . be deprived of life, liberty or property without due process of law "—applies to the federal government and agencies set up by Congress for the government of the Territory. Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States, are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers.

We of course appreciate the grave problems incident to the large alien population of the Hawaiian Islands. These should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended.

It seems proper to add that when petitioners present their answer the issues may become more specific and permit the cause to be dealt with in greater detail.

We find no abuse of the discretion lodged in the trial court. The decree of the Circuit Court of Appeals must be

Affirmed.

UNITED STATES ET AL. *v.* LOS ANGELES & SALT LAKE RAILROAD COMPANY.

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

No. 414. Argued January 3, 4, 1927.—Decided February 21, 1927.

1. A " final " valuation of the property of a railroad by the Interstate Commerce Commission, pursuant to § 19a of the Act to Regulate

Commerce as amended, is merely the statement of the result of an investigation, and is not such an order as may be reviewed by a suit against the United States to annul and enjoin the use of such valuation or "order," under the Act of October 22, 1913, or under the general equity powers of the District Court. Pp. 308, 314.

2. The statutory provision making such valuations *prima facie* evidence in all proceedings under the Act to Regulate Commerce, and in all judicial proceedings to enforce that Act or to enjoin, set aside, annul, or suspend, any order of the Commission, is not a violation of the due process clause of the Fifth Amendment justifying proceedings to annul the valuation order. P. 311.
3. Paragraph (j) of § 19a, providing that "if upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting the value," the proceedings shall be stayed so as to permit the Commission to consider the same and fix a final value different from that fixed in the first instance and to "alter, modify, amend or rescind any order which it has made involving such final value," does not refer to so-called orders fixing only valuations. P. 312.

4 F. (2d) 736; 8 F (2d) 747, reversed.

APPEAL from a decree of the District Court, annulling and enjoining the use of a valuation of a railroad property made by the Interstate Commerce Commission. The suit was by the railroad against the United States. The Commission intervened.

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

The rule of *prima facie* evidence "is simply a rule changing the burden of proof." The legislature has absolute control over such rules. *Mobile R. R. Co.* v. *Turnipseed,* 219 U. S. 35; Wigmore, vol. 2, 2d ed., § 1356. Sec. 16 of the Interstate Commerce Act provides for the use of the rule in reparation cases and this Court has sustained it. *Meeker* v. *Lehigh Valley,* 236 U. S. 412; *Mills* v. *Lehigh Valley,* 238 U. S. 473; *Spiller* v. *A. T. & S. F.,*

253 U. S. 117; *St. Louis S. W.* v. *Commission,* 264 U. S. 64; *Pittsburgh & W. Va.* v. *United States,* 6 Fed. (2d) 646; Commerce Court Act, June 18, 1910, § 13.

The Commerce Court Act and the Urgent Deficiencies Act do not confer the jurisdiction of the specially-constituted District Court over every order entered by the Commission. *Procter & Gamble* v. *United States,* 225 U. S. 282; *Lehigh Valley* v. *United States,* 243 U. S. 412; *United States* v. *Ills. Central,* 244 U. S. 82. The fact that the valuation is styled an order is immaterial. *Del. & Hud.* v. *United States,* 266 U. S. 438.

In destroying the valuation the District Court also destroyed the statute; for a valuation preliminarily adjudged to be void may not be offered as *prima facie* evidence. The District Court threw the entire task of valuation of railway property out of the Commission and into the courts and utterly defeated not only the purpose of Congress but also thirteen years of work by the Commission at the expenditure of many millions of dollars. The Valuation Act neither provides nor contemplates such procedure.

When the tentative valuation becomes final, it may be used as *prima facie* evidence in proceedings before the Commission and in judicial proceedings. When the valuation is offered and received in any proceeding before the Commission as *prima facie* evidence, the door of the Commission is still open to the carrier or any party in interest to assail the valuation, with additional evidence or otherwise,—which is the second hearing. If an order reducing rates is then entered, and the carrier or any other interested party files a bill in the appropriate District Court to enjoin, and evidence is received before the District Court, the case must be referred back to the Commission for its action before final action is taken by the court, which is the third hearing. If the Commission fails to modify its order the case then again comes

before the court for final determination, which is the fourth hearing. Thus four hearings in orderly sequence are allowed by the Valuation Act.

The carrier claims the right to another hearing by an original bill to strike down the final valuation the instant it is issued and before any attempt is made to use it. If the jurisdiction exercised by the District Court is sustained, the procedure provided for the two hearings which may follow after the valuation has been offered before the Commission or the court as *prima facie* evidence is destroyed.

The Commission followed the statute strictly. The phrase "rate-making purposes" was not an invention of the Commission for the purpose of this particular valuation. That phrase has been recognized and used by both Congress and this Court. *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388; *Patterson* v. *Mobile Gas Co.,* 271 U. S. 131; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400; *Ottinger* v. *Consol. Gas Co.,* 272 U. S. 576.

This case is controlled by *Smyth* v. *Ames,* 169 U. S. 466; *Minnesota Rate Cases,* 230 U. S. 552; *Wisconsin Rate Case,* 257 U. S. 563; *New Eng. Divisions Case,* 261 U. S. 184; and *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456.

Mr. Charles E. Hughes, with whom *Messrs. Henry A. Scandrett, A. S. Halsted,* and *J. M. Souby* were on the brief, for appellee.

The District Court had jurisdiction. Petitioner invokes both the special statutory jurisdiction under the Urgent Deficiencies Act of October 22, 1912, 38 Stat. 219, and the general equity jurisdiction. The Hepburn Act of June 29, 1906, 34 Stat. 584, by amendment of § 16 of the Interstate Commerce Act, vested in the Circuit Courts

jurisdiction "to hear and determine" suits to enjoin, set aside, annul, or suspend any order or requirement of the Commission. The jurisdiction of the Circuit Courts was transferred to the Commerce Court by the Act of June 18, 1910, 36 Stat. 539, and again transferred by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, to the District Courts, where it still remains. Prior to the enactment of this statutory remedy the Circuit Courts could entertain under their general equity jurisdiction suits to enjoin orders of the Commission if the necessary grounds for invoking equitable relief were shown. *Tex. & Pac.* v. *I. C. C.*, 162 U. S. 197. There was no occasion, therefore, for the enactment of the special statutory remedy unless it was designed to vest in the Circuit Courts a special jurisdiction to hear suits to enjoin orders of the Commission, independently of such a showing of grounds for invoking the aid of a court of equity as would be necessary in a suit under the general equity jurisdiction. Some sixty cases brought under this statutory remedy have come to this Court and in none of them has it been intimated that this remedy is unavailable in a case for which an adequate remedy at law exists.

The jurisdictional statute does not limit the character of orders that may be reviewed in this form. A final valuation order is an order of the Commission. Such an order is not subject to any of the limitations which this Court has announced upon the review of orders of the Commission. It is not necessary that the order require the petitioner to do or refrain from doing some specific thing. *Chicago Junction Case,* 264 U. S. 258. In *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, although relief against a tentative valuation order was denied, jurisdiction was entertained. The order in this case is the final and affirmative action of the Commission fixing the valuation of petitioner's property as of valuation date. The fact that the valuation so

determined is made by the Valuation Act merely *prima facie* evidence does not make the order proof against attack in a suit of this character. If the valuation is invalid, as asserted by petitioner, it is improper that such valuation should be used in any proceedings under the Interstate Commerce Act, even though its effect is only that of *prima facie* evidence. The theory of this suit is that the Commission has not performed its duty under the Valuation Act, that the result of its work is not the result contemplated thereby and that therefore the valuation fixed by its final order is not entitled to the presumption of accuracy extended by the Valuation Act. Petitioner has such an interest in the subject matter as to entitle it to insist upon strict performance by the Commission of its duties under the Act. *Kansas City Southern* v. *I. C. C.*, 252 U. S. 178.

Although believing the showing unnecessary, petitioner has shown that it has no adequate remedy at law. The petition alleges that the immediate and continuing effect of the order is and will be greatly to injure and impair petitioner's financial credit and its ability to borrow money. Petitioner had on valuation date $56,274,000 of mortgage bonds outstanding against the property which the Commission has valued at $45,200,000. Its property investment according to its books was $76,391,598, and, if this figure were reduced to the Commission's valuation figure, petitioner's liabilities, other than capital stock, would exceed its assets and it would have a profit and loss deficit of many millions of dollars. The ordinary conduct of its railroad business required continuous expenditures for additions and betterments. It is obvious that petitioner could not raise additional capital by public borrowing, or subscription to stock, in the face of this valuation. It is also obvious that a further injury would necessarily result from the use of this valuation, as a basis for rates under § 15a of the Interstate Commerce

Act, or as a factor in prescribing the divisions of joint rates under § 15, or as a limit upon capitalization in the case of a consolidation under § 5. No adequate remedy at law exists against this invalid valuation. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

The contention that this suit is premature is unfounded. While presumably the Commission will find it necessary at some future time to bring its valuation down to a later date, the fact remains that its order under review is a final determination of the value as of June 30, 1914. The Commission's valuations as of 1914 have already been used in the adjustment of rates, and as a basis for a drastic accounting requirement as to depreciation recently made. *Tel. & R. R. Depreciation Charges,* 118 I. C. C. 295.

The Valuation Act requires the Commission to find value. In finding what it designates "value for rate-making purposes" the Commission, as held by the District Court, has failed to comply with the statutory requirement. The Act directs that the Commission report "the value" and provides that the final valuation by the Commission shall be *prima facie* evidence of "the value" of the property in all proceedings under the Interstate Commerce Act or for its enforcement. The proceedings in which the valuations made under the Act are so declared to be *prima facie* evidence concern the consolidation of railroads under par. (6) of § 5, the issuance of securities under § 20a, and the division of joint rates under par. (6) of § 15, as well as the fixing of rates and recapture of excess earnings under § 15a. Neither the Act nor any other section of the Interstate Commerce Act recognizes or sanctions a special value for rate-making purposes. The phrase "value for rate-making purposes" occurs in no provision of the entire Interstate Commerce Act except in par. (4) of § 15a. But that section, added by the Transportation Act, 1920, did not, by these references or otherwise, purport to amend the Valuation Act.

As applied to a railroad property or any other property, value is what the property is worth—what it will bring as the result of fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Havre de Grace Bridge Co.* v. *Towers,* 132 Md. 16; *State ex rel. R. R. Co.* v. *Clausen,* 63 Wash. 535; *State* v. *Savage,* 65 Neb. 714.

The Commission refused to comply with the requirement of the Valuation Act that it report an analysis of the methods of valuation employed by it. It also refused to comply with the requirement of the Act that it ascertain and report separately "other values and elements of value."

The Commission, because it fixed an arbitrary rate base, instead of finding value, as required by the Valuation Act, ignored facts and factors which are of major importance in the determination of value, viz.: elements of value evidenced by earning power; trackage and terminal rights; going concern value; and appreciation. The valuation fixed as of a date nine years prior to the date of its announcement and predicated upon obsolete prices, is unwarranted and misleading. In making its estimate of cost of reproduction of petitioner's properties the Commission applied unit prices of labor and materials prevailing during five years and in some instances ten years prior to June 30, 1914. That the use of such unit prices is unwarranted is established by *Southwestern Tel. Co.* v. *Pub. Ser. Comm.,* 262 U. S. 276; *Bluefields Water Works* v. *Pub. Ser. Comm.,* 262 U. S. 679; and *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400.

The rules adopted by the Commission for the valuation and classification of lands were unsound and unwarranted by law. The treatment of original cost is contrary to the requirement of the Valuation Act. The restatement of petitioner's investment account is wrong

in principle and erroneous and misleading in point of fact. The estimates of cost of reproduction are incomplete and erroneous. The treatment of the question of depreciation is arbitrary and unwarranted.

The Commission, as found by the District Court, fixed the value of petitioner's property for rate making purposes far below the actual value thereof as established by the evidence.

Mr. Patrick 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 was brought in the federal court for southern California by the Los Angeles & Salt Lake Railroad Company to enjoin and annul an order of the Interstate Commerce Commission purporting to determine the "final value" of its property, under what is now § 19*a* of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, as amended by the Valuation Act, March 1, 1913, c. 92, 37 Stat. 701, by the Act of February 28, 1920, c. 91, § 433, 41 Stat. 456, 474, 493, and by the Act of June 7, 1922, c. 210, 42 Stat. 624. *San Pedro, Los Angeles and Salt Lake Railroad Co.,* 75 I. C. C. 463; 97 I. C. C. 737; 103 I. C. C. 398. The bill asserts that the order fixing the final value is invalid, because it is in excess of the powers conferred upon the Commission, is contrary to the provisions of the Valuation Act, and violates the Fifth Amendment. It asserts also that irreparable injury is threatened.

Reasons why the final valuation is invalid are set forth specifically in 31 paragraphs and 35 sub-paragraphs of the bill. It charges that the Commission adopted rules for the valuation which are unsound and unwarranted in law; that in the determination of values it ignored facts and factors of major importance; that it refused to report

an analysis of the methods employed by it, although required so to do by the Valuation Act; and that it refused to comply with the requirement that all values and elements of value be separately reported. It charges that the valuation was made as of June 30, 1914, whereas it should have been made as of June 7, 1923; that the value found is that for rate-making purposes, whereas the finding should have been a general one of value for all purposes; that properties enumerated were erroneously excluded from the valuation; that in making the finding of value the Commission erroneously failed to consider nine specified elements of value; that in making the finding of investment in road and equipment it ignored six items; that in making the finding of cost of reproduction new it ignored eleven items; that in making the finding of cost of reproduction new less depreciation it made thirteen errors; that in valuing the lands eleven errors were made; and that in making the finding as to working capital a large sum was arbitrarily deducted. It alleges that for these and other reasons the findings made are incomplete, erroneous in law and misleading in point of fact.

The jurisdiction of the District Court was invoked under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, and also under its general equity powers. The United States was named as defendant and the Commission became such by intervention. Both defendants answered. But by appropriate pleadings the United States objected that the adoption by the Commission of the final valuation does not constitute an order within the meaning of the Urgent Deficiencies Act; challenged also the jurisdiction of the court to enjoin or annul the order under its general equity powers; and moved that the bill be dismissed. The motion was overruled; the case was heard on the pleadings and evidence; and, after proceedings which it is not necessary to detail, a decree was entered which annulled the final valuation and enjoined its use

for any purpose. *Los Angeles & Salt Lake Railroad* v. *United States,* 4 F. (2d) 736; 8 F. (2d) 747. Whether all or any of the claims and charges made in the bill are well founded, we have no occasion to consider; for we are of opinion that the District Court should have sustained the motion to dismiss the bill.

The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438. For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, §§ 2–7, 34 Stat. 584, 586–595. The first suit to set aside an order was brought soon after. *Stickney* v. *Interstate Commerce Commission,* 164 Fed. 638; 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.

The so-called order here complained of is one which does not command the carrier to do, or to refrain from

doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

The Valuation Act requires that the investigation and study be made of the properties of each of the rail carriers. There are about 1800. 40 Annual Report Interstate Commerce Commission, 13. In directing the Commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made, and constituted the " final valuations " and " the classification thereof " *prima facie* evidence, in controversies under the Act to Regulate Commerce. Every party in interest is, therefore, entitled to

have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed. *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178. But Congress did not confer upon the courts power either to direct what this "tribunal appointed by law and informed by experience," *Illinois Central Ry. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454, shall find, or to annul the report, because of errors committed in making it. Moreover, errors may be made in the final valuation of the property of each of the nearly 1800 carriers. And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance.

The mere fact that Congress has, in terms, made "all final valuations . . and the classification thereof . . . *prima facie* evidence of the value of the property in all proceedings under the Act to Regulate Commerce . . in all judicial proceedings for the enforcement of the Act . . and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission" is, obviously, not a violation of the due process clause justifying proceedings to annul the order. That to make the Commission's conclusions *prima facie* evidence in judicial proceedings is not a denial of due process, was settled by *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 412, 430, 431. It was there said of a like provision relating to reparation orders: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence." See also *Mills*

v. *Lehigh Valley R. R. Co.,* 238 U. S. 473, 481–482; *St. Louis Southwestern Ry. Co.* v. *United States,* 264 U. S. 64, 77.

Nor does the fact that " all final valuations . . and the classifications thereof " are made *prima facie* evidence prevent the report from being solely an exercise of the function of investigation. Data collected by the Commission as a part of its function of investigation, constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered. See *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 93; *Chicago Junction Case,* 264 U. S. 258, 262; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 286–290; Act of June 18, 1910, c. 309, § 13, 36 Stat. 539, 555. Inquests and inquisitions, if they were expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence. 3 Wigmore on Evidence (2d ed.), §§ 1671–1674. Some inquests are at common law also *prima facie* evidence of the facts found. *Hughes* v. *Jones,* 116 N. Y. 67.

Congress has provided adequate remedies for the correction of errors in the final valuation and the classification thereof. The conclusions reached by the Commission must be submitted first in the form of a tentative report, § 19*a,* pars. (f) and (h). When so submitted, the carrier is authorized to file a protest and to be heard thereon, par. (i). If such protest is filed, the Commission is directed to make in the report such changes, if any, as it may deem proper. Even if no protest is filed, the Commission may of its own motion upon due notice to parties in interest correct the tentative report. Compare *New York, Ontario & Western Ry. Co.* v. *United States, post,* p. 652. When the final report is introduced in evidence the opportunity to contest the correctness of the findings

therein made is fully preserved to the carrier; and any error therein may be corrected at the trial. Specific findings may be excluded because of errors committed in making them. It is conceivable that errors of law may have been committed which are so fundamental and far-reaching, as to deprive the "final valuations . . and the classification thereof" of all probative force. Moreover, additional evidence may be introduced. Paragraph (j) provides that "if upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting the value," the proceedings shall be stayed so as to permit the Commission to consider the same and fix a final value different from that fixed in the first instance, and to "alter, modify, amend or rescind any order which it has made involving such final value."

The District Court rested jurisdiction to entertain a suit to set aside the valuation order largely upon the provisions of paragraph (j), believing that such a suit was within the scope of the words "upon the trial of any action involving a final value." That paragraph was intended to apply to actions brought to set aside rate-fixing orders in which the question of the value of the carrier's property would be material. In our opinion it is not applicable to so-called orders fixing only valuations. The objection to entertaining this suit to annul the final valuation is not merely that the question presented is moot, as in *United States* v. *Alaska Steamship Co.,* 253 U. S. 113, 116; or that the plaintiff's interest is remote and speculative as in *Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143, 148. There is the fundamental infirmity that the mere existence of error in the final valuation is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act.

Little need be added concerning the further contention that the suit should be entertained under the general equity power of the court. Two arguments are urged in support of the proposition. One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to § 15*a* of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, § 421, 41 Stat. 456; in prescribing divisions of joint rates under § 15; in determining the limit upon the amount of capitalization, in the event of a consolidation under § 5; in determining the propriety of an issue of securities, under § 20*a;* or as the basis of computation of the amount of excess earnings to be recaptured under § 15*a*. Neither argument is persuasive. The first reminds of the effort made in *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, to suppress the report of that board. The second reminds of the attempt to secure a declaratory judgment in *Liberty Warehouse Co.* v. *Grannis, ante,* p. 70; and, also, of cases in which it was sought to enjoin a municipality from passing an illegal ordinance. Compare *New Orleans Waterworks Co.* v. *New Orleans,* 164 U. S. 471, 481; *McChord* v. *Louisville & N. Ry. Co.,* 183 U. S. 483.

No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject

for injunction. Whether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy, we need not determine.

Reversed.

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

THE PUEBLO OF SANTA ROSA *v.* FALL, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 511. Argued January 11, 1927.—Decided February 21, 1927.

1. A court has power at any stage of a case to require an attorney to show his authority to appear. P. 319.
2. The clearest of proof is required to establish authority in the captain of an Indian Pueblo to deed without valuable consideration a one-half interest in a vast tract of land claimed by the Pueblo and to execute an irrevocable power of attorney to bring suit in its name to establish the title. P. 319.
3. Section 2103, Rev. Stats., declaring void, unless executed and supported as the section prescribes, any agreement with a tribe of Indians for payment or delivery of anything of value in consideration of services for such Indians relative to their lands, and § 2116, declaring that no conveyance of lands etc. from any Indian nation or tribe shall be of any validity unless made by treaty or convention entered into pursuant to the Constitution, apply to Pueblo as well as nomadic Indians. P. 320.
4. A decree dismissing a suit for want of authority in the counsel bringing it, should be without prejudice to the bringing of any other suit properly authorized. P. 321.

12 F. (2d) 332, reversed.

CERTIORARI (*post,* p. 678) to a decree of the Court of Appeals of the District of Columbia which affirmed a decree of the Supreme Court of the District dismissing on the merits a suit in the name of the Pueblo of Santa Rosa

to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing or disposing of certain lands in Arizona as public lands of the United States.

Messrs. W. C. Reid and *Hudson P. Hibbard,* with whom *Mr. Louis Kleindienst* was on the brief, for the petitioner.

Solicitor General Mitchell, with whom *Assistant Attorney General Parmenter, Mr. George A. H. Fraser,* Special Assistant to the Attorney General, and *Mr. D. V. Hunter,* Attorney in the Department of Justice, were on the brief, for the respondents.

Mr. Justice Sutherland delivered the opinion of the Court.

Our order granting the writ of certiorari in this case directed a hearing on the issue as to the existence of authority of counsel who filed the bill to represent complainant. That hearing now has been had.

The suit is brought to enjoin respondents from offering, listing or disposing of certain lands in Arizona as public lands of the United States. The case was here before on appeal, *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, and was remanded to the District supreme court with directions to overrule a motion to dismiss on the merits and allow defendants to answer the bill. After receipt of the mandate, an answer was filed denying the allegations of the bill and alleging, among other things, that the so-called pueblo had never authorized the suit or ratified or approved the acts of the attorneys in bringing or prosecuting it. And upon that ground, a motion to dismiss, supported by affidavits, was filed at the same time. After a hearing upon the motion, the trial court postponed a decision until final hearing; and the taking of testimony was proceeded with, much of it relating to the issue now before this court.

The record is a long one, but the pertinent facts may be shortly stated. About the year 1880, deeds were drawn and acknowledged by a number of Indians, conveying to one Hunter as trustee an interest in the lands, grants and privileges of certain named villages. Among these deeds was one which purported to be made by "Luis, Captain of the Village or Pueblo of Santa Rosa," for himself and inhabitants of that village and others, and to convey an undivided half interest in 720 square miles of land. At the same time, powers of attorney were executed by the various grantors. The only one with which we are here concerned is that given by Luis, the terms of which, we assume for present purposes, were sufficient to authorize Hunter to bring and maintain a suit like the present. It granted to Hunter powers of delegation, substitution and revocation, and recited that as it was "accompanied with an interest . . . it is hereby made irrevocable." While Hunter was authorized to render services in establishing the claim of the Indians to the lands, it does not appear that he agreed to do so unless by implication merely; nor does it appear that there was any other consideration for the conveyance.

In 1911, Hunter entered into contracts with one Martin, by which the latter was to undertake to establish the Indian title and make certain cash payments in consideration of the conveyance to him of an undivided three-fourths interest in the lands which would fall to Hunter upon a partition between himself and the Indians. The same year, and long after the death of Luis, Hunter executed a delegation of his powers to one Cates. Hunter died in 1912, and this suit was brought in 1914 by a firm of lawyers of which Cates was a member. Cates died in 1920, several years before the motion to dismiss was heard in the court of first instance.

The Luis deed was not recorded in the counties where the lands are situated until 34 years after its execution

and two years after the death of Hunter, the grantee. The delay is not explained. Careful and comprehensive inquiries, conducted among the Indians over a period of several years, failed to disclose anyone who knew of any authority from the Indians to bring or maintain the suit. Among them were contemporaries of Luis but none had ever heard of the deed or the power; and it is made clear that these instruments properly could not have been executed or any interest of the Indians conveyed without previous deliberation for that purpose on the part of the Indians in council, and that no such council was ever assembled. The evidence further shows that no suit properly could have been brought without the prior consent of the Indians in council and that no council for that purpose was ever assembled. The attitude of the government seems to have been that the lands claimed are public lands, subject only to the ordinary right of Indian occupancy.

Early in the year 1922, after consideration, 181 of the 195 adult male inhabitants of the villages said to form the Pueblo of Santa Rosa signed a petition declaring that none of them knew about the suit until after it was brought or gave anyone a right to bring it, and that none of them approves of it or wants it to go on, and requesting "that this suit which we do not want, and with which we have nothing to do, be dismissed."

The court of first instance, assuming without deciding that the plaintiff was a pueblo as set forth in the bill and owned the lands in question, held that it had never authorized the bringing or maintenance of the suit and that it did not have under any law or by any custom, usage or tradition the power to make the conveyance or power of attorney in question, and entered a decree dismissing the bill. The court of appeals disapproved the holding of the court of first instance upon the question of authority to bring the suit, on the ground that a chal-

lenge to the right of counsel to appear is a preliminary matter, to be disposed of before proceeding to the merits; but affirmed the order of dismissal upon the merits. 12 F. (2d) 332. In this we think that court erred.

The question as to the authority of counsel was raised by motion to dismiss filed with the answer. There was a hearing upon the motion, but the trial court of its own accord postponed a decision upon it until final hearing on the merits, an order clearly within its discretion. Whether, as a matter of practice, the challenge to the authority of counsel was seasonably interposed, it is not important to decide, for in any event, the trial court, or this court, has power, at any stage of the case, to require an attorney, one of its officers, to show his authority to appear. In *The King of Spain* v. *Oliver,* 2 Wash. C. C. 429, 430, Mr. Justice Washington, sitting in the circuit court, said: ". . . it would be strange, if a Court whose right and whose duty it is to superintend the conduct of its officers, should not have the power to inquire by what authority an attorney of that Court undertakes to sue or to defend, in the name of another—whether that other is a real or fictitious person—and whether its process is used for the purpose of vexation or fraud, instead of that for which alone it is intended. The only question can be, as to the time and manner of calling for the authority, and as to the remedy, which are in the discretion of the Court, and ought to be adapted to the case." See also, *W. A. Gage & Co.* v. *Bell,* 124 Fed. 371, 380; *McKiernan et al.* v. *Patrick et al.,* 4 How. (Miss.) 333, 335; *Clark* v. *Willett,* 35 Cal. 534, 539–541; *Miller* v. *Assurance Co.,* 233 Mo. 91, 99; *Munhall* v. *Mitchell,* 178 Mo. App. 494, 501; *S. F. Savings Union* v. *Long,* 123 Cal. 107, 113.

To justify the conclusion that there was no authority to bring or maintain the suit really needs nothing beyond the foregoing short recital of the facts. That Luis was without power to execute the papers in question, for lack

of authority from the Indian council, in our opinion is well established. Indeed, there is no evidence to the contrary worthy of serious consideration. The rights of Indians, unlettered and under national wardship, are here involved, and a deed purporting to convey their half interest in an enormous tract of country, without consideration aside from some indefinite and doubtful promise to establish their claim against the government, is upon its face so improvident as to call for affirmative proof of authority of the clearest kind. Instead of this we have no affirmative evidence of a substantial character and the suspicious circumstance of long unexplained delay in recording the deed and power and in bringing the suit.

But wholly aside from this, the conveyance and the power were both void by force of §§ 2103 and 2116 Revised Statutes. The first of these sections provides that any agreement with any tribe of Indians for the payment or delivery of anything of value in present or in prospective in consideration of services for such Indians relative to their lands is void, unless, among other requirements, the agreement is in writing, executed before a judge of a court of record, bears the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it, and contains the names of all parties in interest, their residence and occupation; and further that " if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically." Section 2116 declares that no " 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." These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. *United States* v. *Candelaria,* 271 U. S. 432, 441–442. None of their requirements can be dispensed with,

and it does not appear that in respect of most of them there was even an attempt to comply. See and compare *Green* v. *Menominee Tribe,* 233 U. S. 558, 568; *Lease of Indian Lands for Grazing Purposes,* 18 Op. Atty. Gen. 235, 237; *Indian Contract, Id.,* 497.

We agree with the conclusions of the court of first instance, but are of opinion that the dismissal should have been not upon the merits, but without prejudice to a suit if properly brought. The decrees of both courts, therefore, are erroneous, and the cause must be remanded to the court of first instance with directions to dismiss the bill, on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa. Other grounds appearing from the record, which would lead to the same result, we pass without consideration.

Decree reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 61. Argued January 6, 1927.—Decided February 21, 1927.

1. A land-grant-aided railroad under a duty to carry government troops at not to exceed fifty per cent. of the compensation charged private parties for like transportation must allow the government the benefit of this reduction from reduced party rates which are offered the public. P. 323.
2. Where the railroad has accepted the usual transportation request in issuing tickets for government transportation, it cannot avoid the land-grant reduction from a reduced rate offered the public upon the ground that by the tariff the rate was allowable only for cash paid in advance. P. 323.

59 Ct. Cls. 886, affirmed.

42847°—27——21

APPEAL from a judgment of the Court of Claims rejecting a claim of the Railroad on account of transportation of men of the army and navy.

Mr. Benjamin Carter for the appellant.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant owns and operates a system of railroads among which are two land-grant aided lines. During the period from 1911 to 1917 there were transported for the Government over these lines upon transportation requests large numbers of officers and enlisted men of the United States army and navy. Individual passenger rates to the public during that time were in force, and in addition certain party rates open to the public by which ten or more passengers were entitled to reduced rates. Some of the rate tariffs provided for cash payments when tickets were issued and that there should be no land-grant deductions made from such party rates. In other tariffs no such provisions were made. As initial carrier, appellant presented its bills on proper forms to the disbursing officers of the Government. In some of the bills individual rates with land-grant deductions were charged where ten or more persons had been transported in troop movement; and in others party rates without land-grant deductions were charged, depending upon which was the lower rate. The accounting officers of the Government in all these cases applied party rates with land-grant deductions. To these rulings appellant filed protests, and this suit to recover the amounts involved followed.

The court below denied appellant's right of recovery. 59 C. Cls. 886.

Appellant's contentions are (1) that the Government in transporting troops has no right to avail itself of party rates but that these are restricted to passengers traveling on private account and (2) that if the Government avail itself of the party rates it must pay cash in advance in accordance with the tariff provisions.

It is not disputed that in virtue of valid acts of Congress (for example, see c. 115, 36 Stat. 243, 256) appellant's land-grant aided lines were bound to carry officers and men of the army and navy at a rate, in the words of the law, "not to exceed fifty per centum of the compensation for such government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation" and that such amounts must "be accepted as in full for all demands for such service." That the party rates, being open to private parties, were open to the Government with a deduction of 50% under this express provision of the statute, does not admit of doubt.

Nor is there any merit in the contention that the Government may avail itself of the rate only by paying cash in advance. Appellant issued the tickets and sent in its bills therefor without asking for cash payments. It thereby waived the requirement, if any existed, for payment in cash. Moreover, as the court below pointed out, the Government from the very nature of things cannot be required to deal for transportation on a cash basis. It is not to be supposed that station agents generally are familiar with the land-grant legislation or the limits of the various land-grant lines so as to be able readily to make the necessary computations. But, in any event, the well settled practice of the Government is to issue requisitions for transportation, and to require the rendition of bills therefor to be examined and audited by its

accounting officers. This method was recognized and accepted by appellant in the present case. See *Louisville & Nashville R. R. Co.* v. *United States*, 58 C. Cls. 622, 631.

Judgment affirmed.

DAVIS SEWING MACHINE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Argued January 6, 1927.—Decided February 21, 1927.

A claim for profits anticipated from the performance of a contract with the Government cannot be based on delays caused by changes made by the Government, when under the contract itself the remedy for such delays was to be an extension of time to the contractor, and when the contract was terminated by a supplemental agreement expressly releasing all claims for such profits. P. 325.

60 Ct. Cls. 201, affirmed.

APPEAL from a judgment of the Court of Claims disallowing in part a claim under a contract to make Very pistols for the Government.

Mr. Raymond M. Hudson for the appellant.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This suit was brought to recover upon a contract between appellant and the United States to manufacture a large number of Very pistols. It was stipulated in the contract that the Government might terminate it in whole or in part at any time and in that event certain enumerated payments were to be made, not including, however, prospective profits upon uncompleted articles. The contract provided that upon written notice the Government

might make changes in the specifications, increased cost, if any, to be paid, and, for any delay in consequence thereof, a corresponding extension of time for the performance of the contract to be allowed. After the Armistice appellant was requested to suspend work with a view to the negotiation of a supplemental contract providing for the cancellation, settlement and adjustment of the existing contract. Subsequently, appellant filed a claim; and a partial payment supplemental contract was executed, by which the Government agreed to make appellant an advance payment and speedily determine and pay certain specified items. Appellant agreed that it would not perform further work or services, or incur further expense in connection with the performance of the uncompleted part of its original contract, and expressly waived " all claim to the prospective profits which he [it] might have made from the performance of that portion of said original contract which under the terms of this supplemental agreement will not be performed." The advance payment was made, and the court below found that, after its deduction and the allowance of another credit, there was due appellant a balance of $14,192.25; and it refused to allow appellant anything for profits which appellant would have realized if the contract had been performed. Judgment was rendered accordingly. 60 C. Cls. 201. The appeal to this court was taken under the law as it stood prior to the Act of February 13, 1925, c. 229, 43 Stat. 936.

Appellant contends that changes made by the Government in the specifications, etc., occasioned such delay as to preclude full operations under its contract prior to the termination thereof, and that it should have judgment for the profits which it would otherwise have made. The conclusive answer to this contention is two-fold: (1) The contract itself specified the remedies, to which appellant would be entitled in the event of changes in or a complete or partial termination of the contract, among which pros-

pective profits were not included; and (2) appellant by the terms of the supplemental contract expressly released all claims to such profits.

Judgment affirmed.

SACRAMENTO NAVIGATION COMPANY *v.* SALZ.

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

No. 51. Argued December 2, 3, 1926.—Decided February 21, 1927.

1. A contract for the transportation of cargo shipped on board a barge, with privilege to the carrier of reshipping, in whole or in part, on steamboats or barges and of towing with one steamer two or more barges at the same time, is a contract of affreightment, in which it is necessarily implied that the barge as a means of transportation will be used in conjunction with a steamer or tug, to be furnished by the carrier, the two constituting together the effective instrumentality. P. 328.
2. In such case, the barge and the tug together constitute the "vessel transporting merchandise or property" within § 3 of the Harter Act. P. 330.
3. The rule of strict construction is not violated by permitting the words of a statute to have their full meaning or the more extended of two meanings. P. 329.

3 F (2d) 759, reversed.

CERTIORARI (268 U. S. 683) to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court in favor of Salz, the present respondent, in a suit *in personam* brought by him to recover for the loss of a cargo of barley while it was being towed by the petitioner under a contract of affreightment.

Mr. Louis T. Hengstler, with whom *Messrs. H. H. Sanborn* and *Frederick W. Dorr* were on the brief, for the petitioner.

Mr. Carroll Single, with whom *Mr. S. Hasket Derby* was on the brief, for the respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This appeal involves the construction and application of § 3 of the Harter Act, c. 105, 27 Stat. 445, which, so far as pertinent here, provides: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . ."

Petitioner is a common carrier on the Sacramento River in California and owns and operates the barge "Tennessee," which is not equipped with motive power, and the steamer "San Joaquin No. 4." On September 23, 1921, petitioner received from respondent for transportation a quantity of barley in sacks. The bill of lading acknowledges shipment of the barley "on board of the Sacramento Transportation [Navigation] Co.'s. Barge 'Tennessee' . . . ; with the privilege of reshipping in whole or in part, on steamboats or barges; also with the privilege of towing with one steamer, at the same time, . . . two or more barges, either loaded or empty." While being towed by the steamer in the course of transportation, the barge came into collision with a British ship at anchor and was swamped. The barley was a total loss. The sole cause of the collision was the negligence of the steamer. That both barge and steamer were "in all respects seaworthy and properly manned, equipped, and supplied," is not in dispute. Upon these facts, respondent filed his libel *in personam* against petitioner.

In the view we take of the case the sole question to be determined is whether the barge alone or the combina-

tion of tug and barge was the "vessel transporting" the barley, within the meaning of the Harter Act. This question is a nice one, and the answer to it is by no means obvious. The court below thought the contract was between the respondent and the barge, and did not include the tug; that since the barge had no power of her own, there was an implied contract that a tug would be furnished to carry her to her destination; and that the Harter Act should receive a strict construction and, so construed, it applied only to the relation of a vessel to the cargo with which she was herself laden—that is to say, in this case, the barge alone. The decree of the district court for respondent, accordingly, was affirmed. 3 F. (2d) 759.

The libel recites that it is "in a cause of towage," and in argument this is strenuously insisted upon. Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods, and plainly that contract was a contract of affreightment. See *Bramble* v. *Culmer,* 78 Fed. 497, 501; *The Nettie Quill,* 124 Fed. 667, 670. Respondent's contention, however, seems to be that the shipping contract as evidenced by the bill of lading was with or for the barge alone; but that when petitioner took the barge in tow an implied contract of towage with respondent at once arose. This view of the matter, we think, is fallacious.

The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped *on board* the barge.

But it was to be transported; and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect;—that is, as we understand, a distinct contract implied in fact. But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made, 3 Williston on Contracts, § 1293; *Brodie* v. *Cardiff Corporation,* [1919] A. C. 337, 358; and there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract.

Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.

It is said that the Harter Act is to be strictly construed. *The Main* v. *Williams,* 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more

extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. *United States* v. *Hartwell,* 6 Wall. 385, 396; *United States* v. *Corbett,* 215 U. S. 233, 242. In the light of the decisions presently to be noted, the words, a "vessel transporting merchandise," etc., are entirely appropriate to describe the combination now in question, and we see no reason to think that Congress intended that they should not be so applied. This court and other federal courts repeatedly have held that such a combination constitutes, in law, one vessel. See *The Northern Belle,* 9 Wall. 526, 528–529; *The "Civilta" and the "Restless,"* 103 U. S. 699, 701; *The Nettie Quill, supra; The Columbia,* 73 Fed. 226; *The Seven Bells,* 241 Fed. 43, 45; *The Fred. W. Chase,* 31 Fed. 91, 95; *The Bordentown,* 40 Fed. 682, 687; *State* v. *Turner,* 34 Ore. 173, 175–176.

In *The Northern Belle, supra,* this court, speaking of a combination of barge and steamboat, said that "the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage." In *The "Civilta" and the "Restless," supra,* a tug and a ship which she was towing by means of a hawser were held to be in contemplation of law "one vessel, and that a vessel under steam."

In *The Columbia, supra,* it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. . . . When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one

vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that, without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes § 4283 *et seq.*, providing for a limitation of liability of "the owner of any vessel," etc.

The court below rejected this decision as not applicable to a case arising under the Harter Act; but it is hard to see why the case is not pertinent and, if sound, controlling. What we are called upon to ascertain is the meaning of the term "any vessel," and the point decided in that case is that it includes a combination identical in all respects with that here dealt with. True, the court there, in construing the phrase, "the owner of any vessel," was considering one statute while here we are considering another and different statute; but there is no such difference between the statutes in respect of the connection in which the phrase is used or in respect of the subject-matter to which it relates as to suggest that Congress intended that it should bear different meanings.

Respondent contends that his view to the contrary is sustained by *The Murrell,* 195 Fed. 483, affirming 200 Fed. 826, and *The Coastwise,* 233 Fed. 1, affirming 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decisions. Here, upon all the facts, as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo not to tow a vessel.

Liverpool, &c. Nav. Co. v. *Brooklyn Term'l,* 251 U. S. 48, also relied upon by respondent, is not to the contrary. There the libel was for a collision with petitioner's steamship, the moving cause of which was respondent's steam tug, proceeding up the East River, with a loaded car float lashed to one side and a disabled tug to the other, all belonging to respondent. The car float came into contact with the steamship; but the court said it was a passive instrument in the hands of the tug and did not affect the question of responsibility. The controversy arose upon a claim to limit liability, petitioner contending that the entire flotilla should have been surrendered. This court held that it was necessary to surrender only the active tug, saying "that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision. The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simple inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the contract of transportation was to be effected? a very different question. If the British ship which here was struck by the barge were suing to recover damages and a limitation of liability were sought by the owner of the tug and barge, the *Liverpool* case would be in point. But the present libel is for a loss of cargo and falls within the principle of *The Columbia, supra,* where, upon facts substantially identical with those here, a surrender was required of the combined means by which the company undertook the transportation of the cargo.

Decree reversed.

SMYER ET AL. *v.* UNITED STATES.

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

No. 131. Argued January 14, 1927.—Decided February 21, 1927.

Moneys collected by a post office official under the Act of August 24, 1912, upon C. O. D. parcels, and held by him for use by him in purchasing money orders to be sent to the senders of the parcels, are not "money order funds," within Rev. Stat. § 4045, nor "public money," within § 3846. Pp. 335, 336.

6 F. (2d) 12, reversed.

APPEAL from a judgment of the Circuit Court of Appeals which affirmed a judgment for the United States, in an action in the District Court against a postmaster and his surety, to recover money embezzled by an assistant superintendent of mails.

Mr. E. J. Smyer for the appellants.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This action was brought to recover upon the official bond of Smyer, who was postmaster at Birmingham, Alabama, the amount of moneys embezzled by one Smith, Assistant Superintendent of Mails at that office. The moneys came into Smith's hands as collections made by him upon numerous C. O. D. parcels or collected upon such parcels by letter carriers and turned over to him. The condition of the bond is that the postmaster "shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department."

All parcel post matter which came to the office was in charge of Smith. Parcel post matter and money order business were separately handled in different departments of the office. It was Smith's duty to receive and handle C. O. D. parcels and collect from the addressees the amounts called for upon tags attached to the parcels, and thereupon purchase from the money order department money orders payable to the senders of the parcels for the several amounts. These tags, signed by the addressees, were considered by the Post Office Department as applications for money orders payable to the senders of the parcels. The moneys so collected were converted by Smith and never came into the hands of anyone connected with the money order department. The court below affirmed a judgment in favor of the government. 6 F. (2d) 12.

The right of the government to recover depends upon the construction and application of §§ 4045 and 3846 Revised Statutes, copied in the margin.* We are of opinion that under neither section is there liability upon the bond.

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* Sec. 4045. All money received for the sale of money-orders, including all fees thereon, all money transferred from the postal revenues to the money-order funds, all money transferred or paid from the money-order funds to the service of the Post-Office Department, and all money-order funds transferred from one postmaster to another, shall be deemed and taken to be money-order funds and money in the Treasury of the United States. And it shall be the duty of the assistant treasurer of the United States to open, at the request of the Postmaster-General, an account of "money-order funds" deposited by postmasters to the credit of the Postmaster-General, and of drafts against the amount so deposited, drawn by him and countersigned by the Sixth Auditor.

Sec. 3846. Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster-General to be transferred or paid out.

The language of § 4045, so far as pertinent here, is that "all money received for the sale of money-orders, including all fees thereon, . . . shall be deemed and taken to be money-order funds and money in the Treasury of the United States." We are of opinion that, until the money intended for the purchase of money orders, reaches the hands of the postmaster, or some employee of the Post Office, authorized to issue money orders, it has not been received for the sale of money orders within the meaning of the language quoted. These sums of money were received, not for the *sale*—that is, as a price paid in for money orders—but for the *purchase* of money orders. That by the words, "for the sale of money-orders," was meant a completed purchase, is borne out by the phrase immediately following, "including all fees thereon." There could, of course, be no money received for fees on the sale of money orders here until actual payment to the money order department. The section further requires that it shall be the duty of the assistant treasurer, at the request of the Postmaster General, to open an account of "money-order funds" deposited by postmasters to the credit of the Postmaster General, etc. It cannot have been intended that money, collected for the specific purpose of buying a money order for the sender of a parcel, might be deposited to the credit of the Postmaster General as "money-order funds" before being put to that use. Section 4045 was enacted on June 8, 1872, while the act providing for the collection on delivery of articles sent by parcel post was not passed until August 24, 1912, c. 389, 37 Stat. 539, 558. Certainly, when § 4045 was originally enacted, Congress could have had in mind only a completed purchase, since a situation like the present was not then provided for. And while that consideration would be of no value where the language of the statute plainly applied to conditions subsequently arising, it may aid to some degree in the construction of a statute where, as here, the words are of doubtful import.

In *United States* v. *Mann,* 160 Fed. 552, a similar collection was made by a rural letter carrier, and having failed to purchase a money order for the sender he was indicted under § 4046 of the Revised Statutes for converting to his own use "money-order funds." The contention of the government as to the application of § 4045 was the same as here, but the court held that the money did not constitute money order funds and directed a verdict of not guilty. In the course of an opinion subsequently filed, it was said:

"It is nothing more or less than money which the regulation of the Postmaster General authorizes his qualified employé to accept from the citizen, with the duty of purchasing a money order therewith. It becomes no part of the 'money order funds' until that purchase has been made, and then it is within the category of the first class of the definition, viz., 'money received for the sale of money orders.'"

Nor is the case for the government helped by the more general language of § 3846. By that section, postmasters must keep safely "all the public money collected by them, . . . until it is ordered by the Postmaster-General to be transferred or paid out." The collections made by or turned over to Smith were in his hands for the purpose, and only for the purpose, of being remitted in the form of money orders to the persons for whom the collections were made and to whom the moneys equitably belonged. True, these moneys came to Smith's hands under color of his office, but subject to no form of disposition except for the use to which they were specifically devoted. Public money, within the meaning of § 3846, obviously is money belonging to the United States in such sense that it may be ordered by the Postmaster General to be transferred or paid out. It seems clear that the sums of money here in question were not subject to that control until

after they had reached the hands of the money order department.

There is a clear distinction between public money and these sums of money received by an employee of the office charged with the specific duty of transmitting them to their real owners in a definitely prescribed manner. That money though received under color of office may not be public money, is clearly recognized by § 225 of the Criminal Code, c. 321, 35 Stat. 1088, 1133, which defines the offense of embezzlement in part as the conversion by any person in the postal service of any money coming into his hands under color of his office, whether the same shall be the money of the United States or not.

Judgment reversed.

The CHIEF JUSTICE, MR. JUSTICE HOLMES and MR. JUSTICE STONE, dissent.

UNITED STATES v. BURTON COAL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 100. Argued January 10, 1927.—Decided February 21, 1927.

1. Where a buyer, in violation of an executory contract of sale, refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the time when and at the place where deliveries should have been made. P. 340.
2. The application of this rule is not affected by the fact that the seller relied on or intended procuring the commodity sold through contracts with third persons under which he would have been obliged to pay more than the market price existing when his purchaser refused to accept deliveries. P. 340.

60 Ct. Cls. 294, affirmed.

APPEAL by the United States from a judgment of the Court of Claims allowing damages for breach of a contract to accept and pay for coal.

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

Mr. Maclay Hoyne for the appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The judgment is for damages for breach of contract by the United States to accept and pay for coal purchased from appellee for use at army posts in the Chicago district. The only question presented for our consideration is whether the Court of Claims applied the right measure. It gave the difference between contract price and market value at the times and places specified for deliveries. Appellant maintains that, upon the facts of the case, that rule is not applicable, and that appellee is limited to recovery of the amount of profits it would have realized if appellant had accepted and paid for all the coal covered by the contract.

The facts on which appellant's contention is based follow. Appellant and appellee made a contract as of September 10, 1920, by which the former agreed to take and pay for, and the latter agreed to furnish and deliver, 150,000 tons of coal at $6.75 per ton. The contract contemplated the production of the coal at mines in southern Illinois: 40,000 tons at the White Ash Mine of the Johnson City Washed Coal Company, 50,000 tons at the Paradise Mine of the Forester Coal and Coke Company, and 60,000 tons at the Freeman Mine of the Freeman Coal Mining Company. But it was agreed that appellee might furnish coal from other mines if, for any reason for which it was not responsible, it should be unable at any time to furnish coal in sufficient quantities from the mines mentioned. Appellant agreed to furnish cars and give shipping directions. Appellee agreed to make deliveries on cars at each of the mines in specified quantities per week.

Appellee is a selling company and did not own or operate any of the mines named and did not have any interest in any of the companies owning or operating them. It had arrangements with the mining companies named, under which it, in its own name and under contracts between it and purchasers, sold coal produced from the mines. The president of appellee was also the president and principal owner of the company operating the White Ash Mine. It was customary for selling companies to assist in financing mining companies. Appellee advanced the companies operating the White Ash and Paradise mines funds to meet their payrolls. The Freeman mine was similarly financed by another selling company. Mines in southern Illinois have no facilities for storing coal. The general practice is to load the coal, as it comes from the mines, directly into cars. Appellee delivered the coal to appellant in that way. And, under the contract, 53,146 tons were accepted and paid for. Appellee was ready to deliver the balance, but appellant refused to take or pay for any more. The difference between the contract price and market value at the times and places specified for deliveries was $4.60 per ton; and this, applied to the 96, 854 tons that appellant refused to take, produces $445,528.40. Judgment was given for that amount. Under the agreements appellee had with the companies operating the mines, its profits on the tonnage refused would have been $46,065.97.

In support of its contention that recovery must be limited to that amount, the United States emphasizes that appellee had no mine or coal at the time of the breach; that the coal refused had not been mined; that it was not shown that appellee was bound to take or pay for any of that coal or that it suffered any loss because of the termination of the mining and deliveries under the agreements between it and the mining companies, and that appellee made no claim for damages suffered by such companies.

And appellant insists that the judgment is erroneous because it puts appellee in a better position than if the contract had been performed.

United States v. *Smith*, 94 U. S. 214, 218, 219, and *United States* v. *Wyckoff Co.*, 271 U. S. 263, are cited and relied on by appellant. They do not apply. Each arose out of a contract covering construction work for the United States. Performance by the contractor was delayed by the interference or default of the United States; and the action was for the resulting damages. The court held that the measure of damages for delay was the actual loss sustained by the contractor. Here the appellant by its refusal to accept the coal prevented appellee from completing its part of the contract. The coal had a market value and it was less than the contract price. The applicable measure of damages is fixed by the rule of law that, where a buyer in violation of an executory contract of sale refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the times when and the places where deliveries should have been made. 2 Williston on Sales, § 582. The facts brought forward by appellant do not take the case out of the general rule. Appellee was bound to deliver the quantity of coal covered by the contract. Failure of the sources referred to in the contract would not excuse it. In contemplation of law it could have obtained the coal at market prices prevailing at the times when deliveries were required under the contract. The contract was not for production or mining, but for sale and delivery, of coal. Appellant and appellee were the only parties to it. There was no contract relation between appellant and any of the mining companies. Their default would not make them liable to appellant or relieve appellee from the obligation to deliver the coal to appellant. Appellant's liability is not measured by appellee's losses or gains, if any, under its agreements with the mining companies. Appellee is not entitled to have the full con-

tract price of the coal not delivered, but is chargeable only with its market value. The difference between that value and the contract price is the amount of damage deemed by the law directly and naturally to result in the ordinary course of events from the appellant's breach of contract. The cost to appellee of securing the coal and the amount of its profits are immaterial. *Garfield &c. Co.* v. *N. Y., N. H. & H. Railroad,* 248 Mass. 502, 506; *Kadish* v. *Young,* 108 Ill. 170, 176, 186. Cf. *Jamal* v. *Dawood* [1916], 1 A. C. 175. The judgment leaves appellant in as good position as if it had accepted and paid for the coal in accordance with its contract.

Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PORTER ET AL.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 107. Submitted January 11, 1927.—Decided February 21, 1927.

1. Section 1(6) of the Act to Regulate Commerce, requiring carriers to establish and enforce just and reasonable regulations affecting "the issuance, form and substance" of bills of lading, applies to provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country. P. 343.
2. This is a general regulation by Congress broad enough to include stipulations in bills of lading exempting carriers from liability for loss of such shipments by fire, not due to the carriers' negligence. P. 345.
3. A state law forbidding such stipulations is therefore as applied to such shipments invalid in view of the occupation of the field by Congress. P. 346.

168 Ark. 22, reversed.

ERROR to a judgment of the Supreme Court of Arkansas which affirmed a judgment against the railroad for loss of goods by fire, in favor of Porter and other shippers.

Messrs. Thos. T. Railey, Edward J. White, E. B. Kinsworthy, and *Robert E. Wiley,* for the plaintiff in error, submitted.

Mr. J. C. Marshall for the defendant in error, submitted.

Mr. Justice Butler delivered the opinion of the Court.

October 21, 1920, at Earle, Arkansas, defendants in error delivered to plaintiff in error seventy-five bales of cotton for transportation to Liverpool, England. The carrier issued to the shippers an export bill of lading in two parts: the first covered the inland haul from Earle to Brunswick, Georgia, designated as port A, and the second covered the ocean carriage from Brunswick to Liverpool, designated as port B. The inland route specified was over the lines of railroad of plaintiff in error, the Mobile and Ohio, and the Atlanta, Birmingham and Atlantic. The inland rate for the railroads named was 98.5 cents per hundred pounds. The ocean transportation was to be by the Leyland Line for the rate of $1.95. The bill of lading contained, as applicable in respect of the service and delivery at Brunswick, a provision that, "No carrier or party in possession of . . . the property, herein described, shall be liable for any loss thereof . . . by fire . . ." After the bill of lading was issued, while the cotton was on the cars of the carrier and before they were moved from Earle, it was destroyed by a fire originating at the compress and which was not set by plaintiff in error. Sections 843 and 844, Crawford and Moses' Digest of the Statutes of Arkansas, declare that it is unlawful for any railroad to enter into an agreement with any shipper for the purpose of limiting or abrogating its statutory and common law duties or liability as a common carrier; that all agreements made for that purpose and any rule or regulation limiting the common law rights of shippers are void. Defendants in error brought this

action in the Circuit Court of Pulaski County, Arkansas, to recover the value of the cotton. Plaintiff in error contended—as it here insists—that these provisions of the Arkansas statute do not apply to the shipment in question; and that, if held to be applicable, they contravene the laws of the United States regulating interstate and foreign commerce. The Circuit Court applied the statute, and gave judgment for the shippers. The carrier took the case to the Supreme Court of the State, and there it was held that the Acts of Congress regulating bills of lading apply only to interstate commerce and to shipments from a point in the United States to an adjacent foreign country, and do not evince an intention to regulate bills of lading for shipments from a point in the United States to non-adjacent foreign countries. 168 Ark. 22. The case is here on writ of error allowed by the chief justice of that court. § 237, Judicial Code.

There is no claim that the loss was caused by any fault or negligence of the carrier; and, if the Arkansas statute does not apply to the shipment, the clause in the bill of lading exempting the carrier from liability is valid. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427. The power of Congress under the commerce clause to regulate bills of lading in respect of such shipments is not questioned; and, if it has entered the field of such regulation, the state statute is thereby superseded. The Interstate Commerce Act extends to the plaintiff in error and to the other railroads named in the bill of lading over which the cotton was to have been transported from Earle, Arkansas, to the port of Brunswick, Georgia, and it also extends to the interstate transportation over the inland route constituting a part of the movement in foreign commerce. § 1 (1), (2) and (3). 41 Stat. 474. Among other things, the Act requires all carriers subject to it to establish and enforce just and reasonable regulations affecting the issuance, form and

substance of bills of lading. § 1 (6). 41 Stat. 475. It directs the Interstate Commerce Commission to keep informed as to the manner and method in which the business of carrier is conducted, and "to execute and enforce the provisions of" the Act. § 12. 25 Stat. 858. It provides that whenever, after hearing, the commission shall be of opinion that any "regulation or practice whatsoever" of the carriers is unjust or unreasonable it may determine and prescribe what is just, fair and reasonable, and may make an order requiring the carriers to observe the regulation or practice prescribed. § 15. 41 Stat. 484. The Act requires a carrier receiving property for transportation from a point in one State to a point in another State or from a point in the United States to a point in an adjacent foreign country to issue bills of lading therefor; and, to some extent, it regulates their provisions affecting the liability of carriers. § 20 (11)—Carmack and Cummins Amendments. 38 Stat. 1197. Section 25, added by the Amendment of February 28, 1920, 41 Stat. 497, was enacted to promote the business of common carriers by water in foreign commerce whose vessels are registered under the laws of the United States; it applies to shipments from points in the United States to non-adjacent foreign countries and requires the commission to do certain things in furtherance and regulation thereof. Subdivision 4 of that section requires a railroad carrier receiving a shipment to be delivered to such a vessel for further transportation to issue a through bill of lading which shall state separately the amount to be paid for railroad transportation, for water transportation and in addition, if any, for port charges. It requires the railroad as a part of its undertaking to deliver the shipment to the vessel and provides that it will not be liable after such delivery. The commission is expressly empowered, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, to pre-

scribe the form of such bills of lading. The section does not apply to shipments in such commerce where the ocean carriage is by a foreign vessel. The record does not disclose whether the vessel on which the cotton was to have been carried was registered under the laws of the United States; and, in favor of the shippers, we assume it was a foreign vessel.

The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country. All of the provisions referred to were in force when the cotton was delivered to plaintiff in error. No Act of Congress or order of the commission prescribed a form of bill of lading for this shipment. Cf. *In the Matter of Bills of Lading,* 64 I. C. C. 347, *et seq.; Alaska S. S. Co.* v. *United States,* 259 Fed. 713; same case, 253 U. S. 113. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment, or § 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section 1 (6) extends to all carriers and to all transportation subject to the Act; it prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable. And the commission is empowered and directed to enforce the rule.

The general regulation of the " issuance, form, and substance " of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided

to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. *Napier* v. *Atlantic Coast Line Ry. Co.,* 272 U. S. 605; *Oregon-Washington Co.* v. *Washington,* 270 U. S. 87, 102; *Penna. R. R. Co.* v. *Pub. Service Comm.,* 250 U. S. 566; *Charleston & Car. R. R. Co.* v. *Varnville Co.,* 237 U. S. 597, 604; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 505; *Nor. Pac. Ry.* v. *Washington,* 222 U. S. 370, 378; *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617, 618; *Houston* v. *Moore,* 5 Wheat. 1, 21, 22.

Judgment reversed.

BOWERS, INDIVIDUALLY AND AS COLLECTOR, *v.* NEW YORK & ALBANY LIGHTERAGE COMPANY.

SAME *v.* SEAMAN.

SAME *v.* FULLER.

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

Nos. 366, 367, 368. Argued January 5, 1927.—Decided February 21, 1927.

The provision of § 250–d of the Revenue Act of 1921 that no "suit or proceeding" for the collection of the income, excess profits and other taxes mentioned, due under that or prior Acts, shall be begun after five years from date when return was filed, applies not only to suits in court but also to "proceedings" to collect such taxes by distraint. P. 348.

10 F. (2d) 1017, affirmed.

CERTIORARI (271 U. S. 658, 659) to judgments of the Circuit Court of Appeals which affirmed judgments against the collector in the District Court in three suits to recover back income and excess profits taxes which he had collected from the respondents here by distraint.

Mr. Charles T. Hendler, Special Attorney, Bureau of Internal Revenue, with whom *Solicitor General Mitchell* and *Mr. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, were on the brief, for the petitioner.

Winifred Sullivan for the respondent, in No. 366.

Messrs. Bern Budd, Henry P. Keith, and *Benjamin Mahler* for the respondent, in No. 367.

Messrs. George W. Matthews and *Thomas S. Fuller* for the respondent, in No. 368.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In No. 366, respondent, March 26, 1918, filed its return of income and excess-profits taxes for 1917 and paid the amount shown due. Shortly before the expiration of five years after the return the commissioner assessed and the collector demanded payment of additional income and excess-profits taxes. Respondent refused to pay. More than five years after the return the collector distrained and sold personal property of the respondent to pay the amount claimed.

In No. 367, respondent, February 28, 1917, filed his return of income taxes for 1916 and paid the amount shown due. Later an additional tax was assessed; and, more than five years after the return, the collector sought to enforce payment by distraint. Respondent brought suit to restrain the collection on the ground that it was barred by the limit fixed by § 250 (d), Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), and that respondent had no adequate remedy at law. The district court denied

relief and its decree was affirmed by the Circuit Court of Appeals. 297 Fed. 371. The latter expressed the view that distraint was barred, and held that respondent had an adequate remedy at law. Later the collector enforced payment by distraint.

In No. 368, respondent, February 27, 1917, filed his income tax return for 1916 and paid the amount shown due. The commissioner, February 27, 1922, assessed an additional income tax. In 1924 the collector enforced payment by distraint.

Each respondent sued in the southern district of New York to recover the amount so collected. Judgments for respondents were affirmed in the Circuit Court of Appeals. 10 F. (2d) 1017. Writs of certiorari were granted. 271 U. S. 658, 659.

The question for decision is this: Where, under the tax laws enacted prior to the Revenue Act of 1921, income and excess-profits taxes were assessed within five years after filing return, does § 250 (d) of that Act bar collection by distraint proceedings begun after the expiration of the five-year period?

The part of the subdivision that has a bearing is printed in the margin.[1] The clause in controversy is: "No suit

[1] The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts . . . shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts . . . shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act.

or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed." Petitioner insists that the word "proceeding" refers only to a proceeding in court and means the same as "suit"; and that the Act prescribes no limitation against the collection of such taxes by distraint.

There are two methods to compel payment. One is suit, a judicial proceeding; the other is distraint, an executive proceeding. The word "proceeding" is aptly and commonly used to comprehend steps taken in pursuit of either. There is nothing in the language or context that indicates an intention to restrict its meaning, or to use "suit" and "proceeding" synonymously.

The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit. Under petitioner's construction taxpayers having no property within reach of the collector would be protected against stale demands, while others would be liable to have their property distrained and sold to pay like claims. The result tends strongly to discredit petitioner's contention.

He maintains that any ambiguity in the clause under consideration must be resolved in his favor. Undoubtedly the United States will not be held barred by a general statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute. *Dupont De Nemours & Co.* v. *Davis,* 264 U. S. 456, 462. That rule rests upon

the general principle of policy applicable to all governments that the public interest should not be prejudiced by the default or negligence of public officers. *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310, 314. The limitation applies to petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. *Eidman* v. *Martinez,* 184 U. S. 578, 583; *Shwab* v. *Doyle,* 258 U. S. 529, 536. There has been suggested no principle of public policy or other consideration that furnishes any reasonable support for the setting of a limitation against only one of the two authorized methods of enforcing collection.

The provision is to be applied in harmony with the intention reasonably to be inferred from its terms and the circumstances of its enactment. Cf. *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 299. Prior to the Revenue Act of 1918 there was no limitation against suit to collect income taxes. Section 250(d) of that Act (40 Stat. 1083) required assessment within five years after return, and prohibited the commencement of suit or proceeding to collect such taxes after that period. This bar was held to apply only in respect of taxes for 1918 and later years. Then § 250(d) of the Act of 1921 made the limitation apply against collection of taxes under all the earlier Acts; and, in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors, prescribed the five-year period for determination and assessment of taxes under earlier Acts but allowed only four year as to those for 1921 and succeeding years. The same purpose is shown by the requirement that the commissioner, within one year after request by their personal representatives, shall make assessments on income received by deceased persons. These stricter limitations applicable to taxes for the later

period make against the petitioner's contention that the Act sets no bar against collection by distraint. A reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and pressed within five years.

Petitioner's construction of the limitation is inconsistent with the provision immediately preceding it. "The amount of any such taxes due under any return . . . shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and *collection* of the tax." If collection by distraint were not barred by § 250(d) it would not be necessary to have this general consent of taxpayers that collection, as well as determination and assessment, might be made after the lapse of the prescribed period.

Later legislation assumes that the limitation under consideration applies to distraints as well as to suits. See § 278(d) and (e), Revenue Act of 1924, c. 234, 43 Stat. 253, 300. Section 278(d) provides that, where assessment is made within the prescribed time, the tax may be collected by distraint or by a proceeding in court within six years after the assessment. And § 278(e) provides: "This section shall not authorize the assessment of a tax or the collection thereof by *distraint* or by a proceeding in court if at the time of the enactment of this Act such assessment, *distraint,* or proceeding was barred by the period of limitation then in existence." This plainly implies that distraint might be barred. And the limitation prescribed by § 250(d) is the only one that could have that effect. See also § 278(d) and (e), Revenue Act of 1926, c. 27, 44 Stat. 9, 59.

The word "proceedings" is rightly used as descriptive of steps taken for the distraint and sale of property to enforce payment of taxes. See *Parker* v. *Rule's Lessee,*

9 Cranch 64, 70; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Sheridan* v. *Allen*, 153 Fed. 568. Cf. *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U. S. 611, 632, 633; *Hale* v. *Henkel*, 201 U. S. 43, 66. In a later part, subdivision (g), of § 250, "proceedings" is used broadly in reference to steps for the collection of taxes. Obviously its meaning is not there limited to collection by suit. And in other parts of the Internal Revenue Laws, enacted before this controversy arose, that word is used as descriptive of steps taken to distrain and sell personal property and to seize and sell real estate for the collection of taxes. See R. S., §§ 3194, 3199, 3200, 3203; side-notes to §§ 3190 and 3197.[2] Section 250(d) of the Act of 1921 and these sections of the Revised Statutes relate to the same subject and are to be construed together.

It is clear that the meaning of "proceeding" as used in the clause of limitation in § 250(d), Revenue Act of 1921, cannot be restricted to steps taken in a suit; it includes as well steps taken for the collection of taxes by distraint.

Judgments affirmed.

QUON QUON POY *v.* JOHNSON, COMMISSIONER.

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

No. 68. Argued December 9, 10, 1926.—Decided February 21, 1927.

1. A hearing before a Board of Special Inquiry, in an immigration proceeding, was not rendered unfair by mere delay in its com-

[2] By § 2, c. 140, Act of June 27, 1866, 14 Stat. 74, the commissioners appointed to revise the laws of the United States were directed to arrange "side-notes so drawn as to point to the contents of the text." The side-notes at §§ 3190 and 3197, above referred to, appear in the first edition of the Revised Statutes and were carried into the second edition.

mencement; nor by the absence of a friend or relative of the applicant for entry, when the applicant waived his right in that regard; nor by the introduction before the Board of testimony previously taken by an inspector, where the applicant made no objection thereto and did not seek to recall the witness. P. 355.

2. An applicant for admission who has never resided in the United States, is not entitled under the Constitution to a judicial hearing of his claim that he is a citizen of the United States by birth. P. 357.
3. A petition in *habeas corpus* based solely on the right of the petitioner cannot be maintained on the right of another. P. 358.
4. When a party respondent has since died, the judgment (one of affirmance) will be *nunc pro tunc,* as of the date of submission. P. 359.

Affirmed.

APPEAL from a final order of the District Court discharging a writ of *habeas corpus,* and remanding Poy, the petitioner, to the custody of the Commissioner of Immigration.

Mr. Warren Ozro Kyle for the appellant.

Solicitor General Mitchell, with whom *Messrs. Theodore G. Risley,* Solicitor, Department of Labor, and *A. E. Reitzel,* Assistant Solicitor, Department of Labor, were on the brief, for the appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Quon Quon Poy, a Chinese boy fifteen years of age, arrived at the port of Boston in June, 1924, and applied for admission to the United States, claiming to be a foreign-born son of Quon Mee Sing, a native-born citizen—whose citizenship was conceded—and, hence, under R. S. § 1993[1] (U. S. C., Tit. 8 § 6), to be himself a citizen of the

[1] By this section—with an exception not here material—all children born out of the limits and jurisdiction of the United States, whose fathers are at the time of their birth citizens thereof, are declared to be citizens of the United States.

United States. After a preliminary investigation by an inspector, his claim was heard, under the provisions of the Immigration Act of 1917,[2] by a Board of Special Inquiry, which decided, on the evidence, that he was not shown to be the son of Quon Mee Sing, and should be excluded as a Chinese alien not a member of any of the exempt classes entitled to enter the United States. On an appeal to the Secretary of Labor—this finding having been approved by the Board of Review—the Secretary sustained the decision of the Board of Special Inquiry; and a deportation warrant was issued to the Commissioner of Immigration.

The applicant then presented to the District Court a petition for a writ of *habeas corpus,* alleging that he was the son of Quon Mee Sing and a citizen of the United States; that he had been denied a fair hearing and opportunity to establish his citizenship by the Department of Labor; that the procedure in the Department by which he had been declared an alien denied him the due process of law to which he was entitled under the Constitution; and that under his claim to citizenship he was entitled to an adjudication by the court as to such procedure and as to his relationship to Quon Mee Sing. The writ was granted. Upon a hearing on the petition and return, in which the record of the Departmental proceedings was introduced, the court, finding that the Departmental decision was conclusive as to the petitioner's citizenship,

[2] This Act provides that any alien, including "any person not a native-born or naturalized citizen of the United States," who may not appear to the examining immigration inspector to be clearly and undoubtedly entitled to land, shall be detained for examination in relation thereto by a board of special inquiry, which shall have authority to determine whether he shall be allowed to land or shall be deported; and that in the event of his rejection by the board of special inquiry he may appeal to the Secretary of Labor, whose decision, where the deportation is ordered, shall be final. Act of February 5, 1917, c. 29, 39 Stat. 874, §§ 1, 16, 17, 19.

declined to hear witnesses offered by him for the purpose of independently establishing his citizenship; and entered judgment discharging the writ and remanding the petitioner to the custody of the Commissioner of Immigration. This direct appeal was then allowed under § 238 of the Judicial Code, prior to the Jurisdictional Act of 1925.

1. The contention that the petitioner was denied a fair hearing as to his citizenship by the Department of Labor, cannot be sustained. The record shows that in September the inspector to whom the case was referred in its preliminary stage, separately examined, under oath and at length, the petitioner, and his alleged father and an alleged brother who offered themselves as witnesses. Their examination, which was by question and answer, was taken down and is in the record. It was conducted in an entirely fair and impartial manner. Each of them stated at the conclusion of his examination that he had nothing further to say; and no other witnesses offered themselves or were produced. The petitioner was intelligent, had attended school, and stated that he thoroughly understood the interpreter. At the close of this preliminary investigation the case was immediately referred to the Board of Special Inquiry, consisting of the same inspector, and two others. At the commencement of the hearing before the Board the petitioner was informed of his right to have a relative or friend present, and stated that he did not desire to avail himself of this right and was willing to proceed with the hearing. He was also informed that the previous testimony given by himself and his alleged father and brother would be made a part of the proceedings before the Board; to which he made no objection. The petitioner was then further examined by the Board. After a postponement for the purpose of obtaining a report as to the physical condition of the petitioner, the Board resumed its hearing, the petitioner being again present; and after consideration of the entire testimony, being of opinion that his relation-

ship to Quon Mee Sing had not been reasonably established, voted to accord him five days in which to submit additional evidence. Notice of this was sent to the attorney representing the petitioner—who had not been present at any of the proceedings—and he replied that the petitioner had no further testimony to offer. The Board then recalled the petitioner for further examination—after which he stated that he had nothing further to say—and again decided that his claimed relationship to Quon Mee Sing had not been reasonably established and that he should be excluded; and informed him of his right to appeal to the Secretary of Labor.

This appeal having been taken, the Board of Review, after hearing the attorney for the petitioner, made a report in which it reviewed the entire testimony, found that the record was " exceptionally unfavorable " to the petitioner, and—after referring to his lack of knowledge of matters which clearly should have been within his memory, his unsatisfactory explanations, the discrepancies between his statements and those of his alleged father and brother, and to a previous statement by his alleged father to the effect that he had no such son—concluded that the petitioner had fallen " far short " of establishing that he was in truth and fact the son of Quon Mee Sing; and accordingly recommended that the exclusion decision be affirmed.

The entire record discloses a painstaking and impartial effort to ascertain the merits of the petitioner's claim. There is no contention here that the decision of the Board of Special Inquiry had no adequate support in the evidence. The arguments made as to the unfairness of the hearing—in so far as they are based upon anything properly appearing in the record before us—relate to the delay in commencing the hearing, the absence of a friend or relative of the petitioner at the hearing, and the introduction before the Board of the testimony previously taken by the

single inspector. These are not well taken. Clearly the mere delay in the commencement of the investigation—although involving the detention of the petitioner—had no bearing upon the fairness of the hearing itself. The argument as to the necessity for the presence of a kinsman or friend of the petitioner at the hearing, is based upon the provision in § 17 of the Immigration Act that while the hearing "shall be separate and apart from the public," the applicant for admission "may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor." Here, however, the Board, at the outset of the hearing, informed the petitioner of his right to have a relative or friend present; and he expressly waived this right and stated that he was willing to proceed with the hearing. And see *United States* v. *Sing Tuck,* 194 U. S. 161, 169. The contention that the hearing was invalid because the greater part of the testimony was taken before a single inspector and introduced before the Board, is based upon a provision in the same section of the Act that on an appeal from the Board of Special Inquiry the decision shall be rendered "solely upon the evidence adduced before the Board." There is, however, no suggestion whatever in the Act that the evidence adduced before the Board of Special Inquiry must be taken in its presence. We see no reason to doubt that evidence properly taken before an inspector, § 16,—which has substantially the same effect as a deposition taken in an ordinary case—may be introduced before the Board and considered by it. See *Kwock Jan Fat* v. *White,* 253 U. S. 454, 458. And here the petitioner offered no objection to the introduction of such testimony, and no application was made to recall the witnesses for re-examination by the Board.

2. It is also contended that as the petitioner claimed the right of admission to the United States as a citizen thereof under R. S. § 1993, the Immigration Act, in vest-

ing in the Board of Special Inquiry the authority to determine the question of his citizenship and making its decision when approved by the Secretary of Labor final, is unconstitutional, in that it deprives him of the right to a judicial hearing to which he is entitled as due process under the Constitution; and that it was therefore the duty of the District Court to proceed, independently of the Departmental decision, to an adjudication as to his citizenship. It is clear, however, in the light of the previous decisions of this Court, that when the petitioner, who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing; and that unless it appeared that the Departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of *habeas corpus* without proceeding further. *United States* v. *Sing Tuck,* 194 U. S. 161, 168; *United States* v. *Ju Toy,* 198 U. S. 253, 263; *Chin Yow* v. *United States,* 208 U. S. 8, 11; *Tang Tun* v. *Edsell,* 223 U. S. 673, 675; and *Ng Fung Ho* v. *White,* 259 U. S. 276, 282.

3. It is also urged in argument, that, apart from the petitioner's own claim, Quon Mee Sing was independently entitled to maintain the petition for *habeas corpus* in enforcement of his right to the custody of a minor child, and to obtain to that end an adjudication of his kinship to the petitioner. It suffices to say that no such question is here presented. The petition was filed solely in the right of the petitioner. No right was asserted in behalf of Quon Mee Sing. No such question appears to have been presented in the hearing in the District Court; and none was raised by the assignments of error.

The judgment of the District Court must accordingly be affirmed. But the Court being advised that the appellee, the Commissioner of Immigration, has died since December 10, 1926, the day on which this case was argued and submitted, the judgment here will be entered *nunc pro tunc* as of that day. *Mitchell* v. *Overman,* 103 U. S. 62, 65; *Richardson* v. *Green,* 130 U. S. 104, 116; *Bell* v. *Bell,* 181 U. S. 175, 179; *Cuebas* v. *Cuebas,* 223 U. S. 376, 390.

Judgment affirmed, nunc pro tunc.

EASTMAN KODAK COMPANY OF NEW YORK *v.* SOUTHERN PHOTO MATERIALS COMPANY.

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

No. 6. Argued November 19, 1925.—Decided February 21, 1927.

1. Under § 12 of the Clayton Act, a suit against a corporation for injuries sustained from violations of the Anti-Trust Act may be brought in a federal court in any district in which the corporation transacts business, although neither residing nor "found" there; and the process may be served in another district in which the corporation either resides or is "found." P. 370.
2. A corporation is engaged in transacting business in a district, in the sense of this venue provision, if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character. P. 373.
3. A corporation is none the less engaged in transacting business in a district, within the meaning of this section, because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. P. 373.
4. Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued to another district in which the defendant resides or is found. P. 374.
5. A corporation which, in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers within a certain district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales, was transact-

ing business in that district, within the meaning of this venue provision of the Clayton Act. P. 374.

6. That the intent of a defendant manufacturer in refusing to continue selling its goods to a plaintiff retailer at dealers' discounts was to perpetuate its monopoly in such goods, may be inferred from circumstances. P. 375.
7. Such refusal was not justified by the fact that the plaintiff retailer has previously undertaken to handle goods of another manufacturer under a preferential contract, when it was not shown that the defendant knew of such contract at the time of the refusal. P. 375.
8. In an action for injury to an established retail business due to a defendant manufacturer's monopoly of a line of the goods dealt in and to its refusal, in the interest of its monopoly, to continue supplying such goods to the plaintiff at retailers' discounts, the gross profits derived by the plaintiff from selling such goods during a period preceding the refusal, less the expense, additional to the general expenses of the business, which would have been incurred in handling them during the period in suit, may be used as a standard in measuring the damages, if the plaintiff had not been *in pari delicto* with the defendant in the monopoly, and the profits were not increased thereby, and if the other facts are such that the inference of the lost anticipated profits from the past profits is reasonable. P. 376.
9. Damages are not uncertain because they cannot be calculated exactly. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. P. 378.
10. A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness as would otherwise be possible. P. 379.

295 Fed. 98, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court in a suit brought to recover damages for injuries sustained through violation of the Sherman Anti-Trust Act. See also 234 Fed. 955.

Mr. John W. Davis, with whom *Messrs. Frank L. Crawford* and *Clarence P. Moser* were on the brief, for plaintiff in error.

The attempted service of process upon the defendant, whether in the State of Georgia or in the State of New York, was void and the court below had no jurisdiction in the premises. *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79; *Internat. Harvester Co.* v. *Kentucky,* 234 U. S. 579; *Minn. Comm. Assn.* v. *Benn,* 261 U. S. 140; *Davis* v. *Farmers Equity Co.,* 262 U. S. 312; *V. S. & P. Ry.* v. *De Bow,* 148 Ga. 738; *Southeastern Dist. Co.* v. *Marmon Co.,* 159 Ga. 150; *Chase Bag Co.* v. *Munson S. S. Line,* 295 Fed. 990; *Holzer* v. *Dodge Bros.,* 233 App. Div. 216. Distinguishing *N. W. Consol. Milling Co.* v. *Massachusetts,* 246 U. S. 147.

That Congress, by inserting in § 12 of the Clayton Act, after the words "may be found," the additional words "or transacts business," did not intend to broaden the section but merely to make explicit what this Court had already decided, is shown by the legislative proceedings. *Duplex Co.* v. *Deering,* 254 U. S. 443. Language of this Court in the *People's Tobacco* case, defines the words "resides or is found" as the equivalent of "carrying on business." In *St. Louis S. W. Ry. Co.* v. *Alexander,* 227 U. S. 218, it had been said that, "A long line of decisions in this Court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof." *Frey & Son* v. *Cudahy Packing Co.,* 228 Fed. 209, and the decision in the instant case (234 Fed. 955), were both rendered long before the decision of this Court in the *People's Tobacco* case. Distinguishing *Gen. Investment Co.* v. *Ry. Co.,* 260 U. S. 261.

The plaintiff, while a customer of the defendant, was a participant in the latter's unlawful acts and was, therefore, *in pari delicto,* and the profits earned by plaintiff during the period of such illegality cannot be used as a

standard by which to measure the damages which it alleges it sustained in the period for which it was allowed to recover. There is, therefore, no competent proof of damages in the record. The court would not have then given relief to either party to the illegal contract for injuries caused by the other party and growing out of the contract relation. *McMullen* v. *Hoffman,* 174 U. S. 639; *Coppell* v. *Hall,* 7 Wall. 542; *Cont. Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244; *Hall* v. *Corcoran,* 107 Mass. 251. Mere participation and acquiescence by the plaintiff in the unlawful system of defendant made the former a party to the wrongdoing and itself a violator of the Sherman Act. *Sage* v. *Hampe,* 235 U. S. 99; *Victor Co.* v. *Kemeny,* 271 Fed. 810; *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694; *Tilden* v. *Quaker Oats Co.,* 1 Fed. (2d) 160; *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1. The assumed fact that plaintiff accepted the terms of sale and joined with defendant in maintaining the latter's illegal system because, as stated by the trial judge in his charge; "he needed the goods and that was the only way he could get them," did not excuse the plaintiff nor relieve it of the penalties of one who is *in pari delicto.* Its necessity did not constitute legal duress. *Eastman Kodak Co.* v. *Blackmore, supra; Dennehy* v. *McNulta,* 86 Fed. 825; *Detroit Edison Co.* v. *Wyatt Coal Co.,* 293 Fed. 489; *Radich* v. *Hutchins,* 95 U. S. 210; *Chesebrough* v. *United States,* 192 U. S. 253. Distinguishing *Ramsey* v. *Assoc. Bill Posters,* 260 U. S. 501.

The only measure of damages proposed by plaintiff and allowed by the court was the assumed net profits which plaintiff claims it would have made after it ceased to be an Eastman customer, had it been allowed to purchase Eastman goods at dealers' discounts, such net profits being arrived at by taking the actual gross profits which plaintiff claims to have made during the period before it

so ceased, and deducting therefrom a speculative cost of conducting the increased business, which it is claimed would have resulted from the handling of Eastman goods. In short, the whole recovery hinged upon the use of the alleged gross profits of the earlier period, as a standard of comparison by which to determine the amount of net profits claimed to have been lost in the later period. It is well settled that one may not use the earnings or profits which he made in the course of a violation of law, or in a business which was illegal, as a measure of the damages which he suffered after the date when he claimed that his business was interrupted. *Riggs* v. *Palmer,* 115 N. Y. 506; *Murray* v. *Interurban Ry. Co.,* 118 App. Div. 35; *Victor Co.* v. *Kemeny, supra; Eastman Co.* v. *Blackmore, supra; Raynor* v. *Blatz Brewing Co.,* 100 Wis. 414; *Continental Paper Co.* v. *Voight,* 212 U. S. 227. Distinguishing *Ramsey* v. *Assoc. Bill Posters,* 260 U. S. 501.

There was no proof of damages such as, under the authorities, is necessary to enable plaintiff, in cases under the Anti-Trust Acts, to recover any damages whatever. *Keogh* v. *C. & N. W. R. R. Co.,* 260 U. S. 156; *Central Coal Co.* v. *Hartman,* 111 Fed. 96; *Locker* v. *Amer. Tobacco Co.,* 218 Fed. 447; *Amer. Slate Co.* v. *O'Halloran,* 229 Fed. 77; *Cramer* v. *Grand Rapids Showcase Co.,* 223 N. Y. 63; *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.,* 160 Fed. 948; *Montgomery* v. *C. B. & Q. R. R. Co.,* 228 Fed. 616. Plaintiff offered no proof of the amount of its capital either before or after the alleged interruption, either as to the whole amount invested in its entire business or as to the amount invested in that part of the business which concerns Eastman goods.

The sale of Eastman goods formed only a small part of the total sales of plaintiff. If the entire business be considered as a unit and the total expenses and cost of goods be deducted from the entire receipts, then the plaintiff lost money in 1908 and 1909; whereas, in 1910

and 1911 after the alleged interruption, it cleared a substantial net profit. There is no provision in any of the decisions cited above for allowing the plaintiff, in such cases, to estimate that his total sales would have been increased, if permitted during the period when he was unable to procure the goods in question. The precise point was decided in *Horton* v. *Hall & Clark Mfg. Co.,* 94 App. Div. 404. *Frey* v. *Welch Co.,* 240 Fed. 114, was reversed in 261 Fed. 68. Distinguishing *Lincoln* v. *Orthwein,* 120 Fed. 880. The assumption that, had plaintiff handled Eastman goods after April, 1910, it would have sold at least as great a quantity of them as before that date, is entirely speculative.

The plaintiff offered no proof as to the reason why defendant declined to continue plaintiff as a customer on the terms formerly in force between them The presumption is that the refusal was made either for good or for purely indifferent reasons, and that it was therefore entirely legal. *United States* v. *Colgate & Co.,* 250 U. S. 300. This presumption not having been overcome, the plaintiff in error was entitled to a dismissal or a direction on this ground alone. The record, it is true, fails to show expressly whether defendant knew the provisions of the Ansco contract at or about the time it was entered into. The plaintiff on its part assumed that defendant had such knowledge. In any event, since these provisions, if known, would have furnished a lawful reason for terminating the relations between the parties, even if defendant was not aware of them at the time, it should be permitted to take advantage of them when they became known to it. This is the well established rule in the law of master and servant and of agency. *In re Nagle,* 278 Fed. 105; *Farmer* v. *First Trust Co.,* 246 Fed. 671; *Carpenter Steel Co.* v. *Norcross,* 204 Fed. 537; *Sanborn* v. *United States,* 135 U. S. 271; *McGar* v. *Adams,* 65 Ala. 106.

Substantially the same rule applies wherever a fiduciary relation exists. An apparently contrary rule in the law of contracts has been modified so that it no longer conflicts with the foregoing authorities. *Strasbourger* v. *Leerburger,* 233 App. Div. 55; *Granger Co.* v. *Universal Mach. Corp.,* 193 App. Div. 234.

Mr. Daniel MacDougald, with whom *Mr. J. A. Fowler* was on the brief, for the defendant in error.

On the question of jurisdiction: *Peoples Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 70; *Frey & Son* v. *Cudahy Co.,* 228 Fed. 209; *Eastman Kodak Co.* v. *Southern Photo Co.,* 234 Fed. 955; *International Harvester Co.* v. *Kentucky,* 234 U. S. 579; *Davis* v. *Farmers' Co-operative Co.,* 262 U. S. 312; *General Investment Co.* v. *Lakeshore,* 260 U. S. 261.

On the right of the plaintiff to sue: *Ramsey* v. *Associated Bill Posters,* 260 U. S. 501, *Connally* v. *Union Pipe Co.,* 184 U. S. 540; *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U. S. 165. Distinguishing *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1, *Victor Talking Mach. Co.* v. *Kemeny,* 271 Fed. 810, *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694, and *Tilden* v. *Quaker Oats Co.,* 1 Fed. (2d) 160.

On the question of damages: *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96; *Lanier Gas Engine Co.* v. *Du Bois,* 130 Fed. 834; *Hollweg* v. *Schaeffer Brokerage Co.,* 197 Fed. 689; *Yates* v. *Wyhel Coke Co.,* 221 Fed. 603; *Homestead Co.* v. *Des Moines Electric Co.,* 248 Fed. 439; *Frey & Son* v. *Welch Grape Juice Co.,* 240 Fed. 114; *Lincoln* v. *Orthwein,* 120 Fed. 880.

The suit was brought to recover loss of income to an established business. The business continued in operation throughout the entire period covered by the suit. The loss of income is the loss of profits on sales which the plaintiff could have made during the period covered

by the suit except for the defendant's illegal act. In proving the damages, but two factors must be shown. First, that a loss of income resulted from the defendant's illegal refusal to sell to the plaintiff, and, second, the extent of the loss. The previous sales and the previous income would be sufficient evidence to authorize a verdict for the plaintiff and form the basis for the jury to conclude that the same income would have been realized during the period of the suit. The sales were detailed for a period of four years prior to the defendant's refusal to sell to the plaintiff. The gross profits on such sales were likewise shown. Plaintiff, of course, was not entitled to recover the gross profits. This would violate the principle of indemnity. The plaintiff could only recover the gross profit or income less such items of expense as were saved to it by reason of not actually making these sales. The evidence shows that the plaintiff continued its business during the entire period covered by the suit, consequently it still had the items of general expense, incident to carrying on its business, such as administrative, organization and selling expenses. In fact, the evidence showed that the plaintiff continued to travel the territory and that its salesmen solicited orders continuously throughout this territory and from the plaintiff's regular trade. The evidence shows that the plaintiff in continuing the operation of its business still had every expense incident thereto and incident to a sale of the goods which it could no longer obtain, except the actual expenses incident to handling these goods through its established business. This evidence more than supports the deduction that the plaintiff would have sold the same amount of goods during the period covered by the suit that it did prior thereto, when during the period of the suit plaintiff had increased its number of customers 60%. The evidence shows that the plaintiff's sales per photographer dropped from $79.00

prior to the period covered by the suit to $36.09 per photographer during that period.

There was direct testimony that the plaintiff could not supply its customers more than 25% in kind and value of the articles consumed by them in the operation of their studios. This was more than substantial data from which the extent of the damage could reasonably be inferred or determined by the jury.

The plaintiff, with an established organization, was a "going concern" with a demand for certain articles which it could not supply despite the fact that the plaintiff had every "going concern" expense incident to supplying such articles.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the Southern Photo Materials Co., a Georgia corporation, in 1915, in the Federal District Court for Northern Georgia, against the Eastman Kodak Co., a New York corporation, to recover damages for injuries sustained by the plaintiff through the defendant's violation of the Sherman Anti-Trust Act.[1] Proceeding under § 12 of the Clayton Act,[2] process was issued and served upon the defendant, pursuant to an order of the court, at Rochester, New York, where it had its principal place of business. The defendant, appearing specially, traversed the return, entered a plea to the jurisdiction, and moved to quash the service. The jurisdictional issues thus raised were tried by the judge, who overruled

[1] Act of July 2, 1890, c. 647, 26 Stat. 209. This Act makes it illegal, *inter alia*, to monopolize, or combine to monopolize, any part of the trade or commerce among the several States, § 2; and authorizes any person injured in his business or property by reason of anything declared to be unlawful by the Act, to sue therefor and recover three fold the damages sustained and a reasonable attorney's fee, § 7.

[2] Act of October 15, 1914, c. 323, 38 Stat. 730.

these defenses. 234 Fed. 955. The defendant, by leave of court, then answered on the merits. The trial to the court and jury resulted in a verdict for the plaintiff assessing its actual damages at $7,914.66. Judgment was entered against the defendant for triple this amount and an attorney's fee. This was affirmed by the Circuit Court of Appeals. 295 Fed. 98. And the case was then brought here by writ of error, prior to the Jurisdictional Act of 1925.

The plaintiff operates a photographic stock house in Atlanta and deals in photographic materials and supplies, which it sells to photographers in Georgia and other Southern States. The defendant is a manufacturer of photographic materials and supplies, which it sells to dealers throughout the United States.

The case made by the allegations of the complaint was, in substance, this: The defendant, in violation of the Anti-Trust Act, had engaged in a combination to monopolize the interstate trade in the United States in photographic materials and supplies, and had monopolized the greater part of such interstate trade. This had been brought about by purchasing and acquiring the control of competing companies engaged in manufacturing such materials, and the businesses and stock houses of dealers; by restraining the vendors from re-entering these businesses; by imposing on the dealers to whom it sold goods restrictive terms of sale fixing the prices at which its goods could be resold and preventing them from handling competitive goods; and by other means of suppressing competition.

Prior to 1910 the plaintiff had dealt with the defendant and purchased its goods on the same terms as other dealers, with whom it was enabled to compete; but in that year the defendant, having acquired the control of the stock houses in Atlanta which were in competition with the plaintiff and unsuccessfully attempted to purchase the plaintiff's business, had, in furtherance of its purpose to

monopolize, thereafter refused to sell the plaintiff its goods at the dealers' discounts, and would no longer furnish them except at the retail prices at which they were sold by other dealers and the agencies which the defendant owned and controlled, with whom the plaintiff could no longer compete. And, the plaintiff being thus deprived, by reason of the monopoly, of the ability to obtain the defendant's goods and supply them to its trade, its business had been greatly injured and it had sustained large damages in the loss of the profits which it would have realized in the four years covered by the suit had it been able to continue the purchase and sale of such goods.

The answer denied that the defendant had combined to monopolize or monopolized interstate trade, or refused to sell its goods to the plaintiff at the dealers' discounts in furtherance of a purpose to monopolize; and averred that the defendant had not only committed no actionable wrong, but that in any event the plaintiff had sustained no damages capable of ascertainment upon any legal basis.

While many errors were assigned, some of which were also specified, in general terms, in the defendant's brief in this Court, we confine our consideration of the case in this opinion to the controlling questions which are stated in that brief to present the chief issues here in controversy, and to which alone the argument in the brief is directed. See *I. T. S. Co.* v. *Essex Rubber Co.*, 272 U. S. 429. These do not involve the existence of the defendant's monopoly—which is not questioned here[3]—but relate solely to the questions whether there

[3] The plaintiff's allegations in this respect were supported on the trial by a final decree that had been entered in 1916 in another District Court in a suit in equity brought by the United States against the defendant and others, which the plaintiff introduced, under § 5 of the Clayton Act, as *prima facie* evidence of the defendant's violation of the Anti-Trust Act.

was local jurisdiction or venue in the District Court; whether the refusal of the defendant to continue to sell the plaintiff its goods at the dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong which could form the basis of any recovery; and whether there was any competent and legal proof on which a measurement of the plaintiff's damages could be based.

1. Whether or not the jurisdiction of the District Court was rightly sustained—which resolves itself into a question whether the venue of the suit was properly laid in that court—depends upon the construction and effect of § 12 of the Clayton Act and its application to the facts shown by the evidence set forth in the separate bill of exceptions relating to the hearing on the jurisdictional issues. *Dunlop* v. *Munroe,* 7 Cranch 242, 270; *Jones* v. *Buckell,* 104 U. S. 554, 556.

It appears from this evidence that the defendant—which resides and has its principal place of business in New York—had not registered in Georgia as a non-resident corporation for the purpose of doing business in that State, and had no office, place of business or resident agent therein. It had, however, for many years prior to the institution of the suit, in a continuous course of business, carried on interstate trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its travelling salesmen who visited Georgia several times in each year and solicited orders from these dealers which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed travelling "demonstrators," who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other

users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the defendant.

It is clear that upon these facts this suit could not have been maintained in the Georgia district under the original provision in § 7 of the Anti-Trust Act that anyone injured in his person or property "by any other person or corporation" by reason of anything declared to be unlawful by the Act, might sue therefor "in the district in which the defendant resides or is found."[4] In *Peoples Tobacco Co.* v. *Am. Tobacco Co.*, 246 U. S. 79, 84, 86—decided in 1918—it was held that this provision, as applied to a corporation sued in a district in which it did not reside, required that it "be present in the district by its officers and agents carrying on the business of the corporation," this being the only way in which it could be said to be "found" within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, and was by its duly authorized officers or agents present therein; and that advertising its goods in a State and sending its soliciting agents therein, did not amount to "that doing of business" which subjected it to the local jurisdiction for the purpose of serving process upon it.

Manifestly the defendant was not present in the Georgia district through officers or agents engaged in carrying on business of such character that it was "found" in that district and was amenable to the local jurisdiction for the service of process.

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[4] A like provision was contained in the Tariff Act of 1894, 28 Stat. 509, c. 349, which made illegal, combinations and trusts in restraint of import trade. §§ 73, 74.

However, by the Clayton Act—which supplemented the former laws against unlawful restraints and monopolies of interstate trade—the local jurisdiction of the district courts was materially enlarged in reference to suits against corporations. By § 4 of that Act it was provided that any person "injured in his business or property by reason of anything forbidden in the anti-trust laws" might sue therefor in the district "in which the defendant resides or is found or has an agent." Whether, as applied to suits against corporations, as distinguished from those against individuals, the insertion of the words "or has an agent" in this section can be held, in the light of the decision in the *Peoples Tobacco Co.* case, to have enlarged to any extent the jurisdictional provision in § 7 of the Anti-Trust Act, we need not here determine. Be that as it may, it is clear that such an enlargement was made by § 12 of the Clayton Act—dealing specifically with the venue and service of process in suits against corporations—under which the plaintiff proceeded in the present case. This provided that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business;* and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." That this section altered the venue provisions in respect to suit under the anti-trust laws was pointed out in *General Inv. Co.* v. *Lake Shore Ry.,* 260 U. S. 261, 279. And we think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is "found," but also in any district in which it "transacts business"—

although neither residing nor "found" therein—in which case the process may be issued to and served in a district in which the corporation either resides or is "found"; and, further, that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character. This construction is in accordance, not only with that given this section by the two lower courts in the present case, but also with the decisions in *Frey & Son* v. *Cudahy Packing Co.* (D. C.), 228 Fed. 209, 213 and *Haskell* v. *Aluminum Co. of America* (D. C.), 14 F. (2d) 864, 869. And see *Green* v. *Chicago, B. & Q. Ry.*, 205 U. S. 530, 533, in which it was recognized that a corporation engaged in the solicitation of orders in a district was in fact "doing business" therein, although not in such sense that process could be there served upon it.

We are further of opinion that a corporation is none the less engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade—because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. And see *International Harvester* v. *Kentucky*, 234 U. S. 579, 587; *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 316.

Thus construed, this section supplements the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it

resides or may be "found"—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be "found."

To construe the words "or transacts business" as adding nothing of substance to the meaning of the words "or is found," as used in the Anti-Trust Act, and as still requiring that the suit be brought in a district in which the corporation resides or is "found," would to that extent defeat the plain purpose of this section and leave no occasion for the provision that the process might be served in a district in which the corporation resides or is found. And we find nothing in the legislative proceedings leading to its enactment which requires or justifies such a construction.

That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued to another district in which the defendant resides or is found, is not open to question. *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, 604; *Robertson* v. *Labor Board*, 268 U. S. 619, 622.

And, since it appears from the facts already stated that the defendant, in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales, we conclude that it was transacting business in that district, within the meaning of § 12 of the Clayton Act, in such sense as properly established the venue of the suit; that it was duly brought before the court by the service of process in the New York district, in which it resided and was "found"; and that its jurisdictional defenses were rightly overruled.

2. On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that such taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff. And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. "Clearly," as was said by the Court of Appeals, "it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly." This question was submitted under proper instructions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Anvil Mining Co.* v. *Humble,* 153 U. S. 540, 554. And see *Johnson* v. *United States,* 157 U. S. 320, 326; *Goldman* v. *United States,* 245 U. S. 474, 477.

3. On the question of the amount of damages, there was substantial evidence to the effect that prior to 1910 the plaintiff had an established business in selling supplies used by professional photographers, of which it carried a complete line, purchased in large part from the defendant; that the defendant sold to dealers such supplies only; that shortly before the defendant's refusal to continue the sale of its goods the plaintiff also took on a complete line of goods used by amateurs, which did not conflict with its sales to professional photographers; that after the defendant's refusal, the plaintiff was unable, by reason of the defendant's monopoly, to obtain and supply the greater part of the goods necessary to professional photographers, and lost its established trade in such goods; that its trade with professional photographers greatly decreased; and that its business was so organized that it would have been able to continue to handle the defendant's goods during the period in suit with no increase in its general expenses and no additional cost except that incident to the handling of such goods themselves—its business being operated during such period at only two-thirds of its capacity. The plaintiff's claim was that under these circumstances it was entitled to recover, as the loss of profits which it would have realized had it been able to continue the purchase of defendant's goods, the amount of its gross profits on the defendant's goods during the four years preceding the period in suit, which was shown, less the additional expense which it would have incurred in handling the defendant's goods during the four years' period in suit, which was estimated.

The defendant—while conceding that the loss of anticipated profits from the destruction or interruption of an established business may be recovered where the amount of the loss is made reasonably certain by competent proof, *Central Coal & Coke Co.* v. *Hartman* (C. C. A.), 111 Fed. 96, 98—contends that there was a lack of com-

petent proof of such damages in that the profits earned by the plaintiff during the preceding four years in which it had been a customer of the defendant, were improperly used as a standard by which to measure the damages sustained by the plaintiff during the period covered by the suit, since during such preceding years it had participated in the defendant's unlawful acts in furtherance of the monopoly and was *in pari delicto.*

There was, as stated by the Court of Appeals, evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the monopoly *in pari delicto* with the defendant, and that the plaintiff had complied with the defendant's restricted terms of sale merely for the reason that otherwise it could not purchase or secure the goods necessary in the conduct of its business. There was also affirmative evidence, not contradicted, tending to show that under the defendant's restricted terms of sale the dealers' profits did not exceed those on the sale of goods of other manufacturers not parties to the monopoly.

The jury was instructed, in substance, that if, during the preceding period in which the plaintiff had been a customer of the defendant, it had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods; and, further, that even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant to the extent that they had been increased by the monopoly and exceeded those in a normal business, but that they must be reduced to the basis of normal profits.

We find, under the circumstances of this case, nothing in these instructions of which the defendant may justly

complain. See *Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 512. The statement in *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A.), 271 Fed. 810, 819, on which the defendant relies was based on the assumptions that the plaintiff had not only been a party to the unlawful combination, but that his earlier profits had exceeded those which "he could earn lawfully in a competitive market." And in *Eastman Kodak Co.* v. *Blackmore* (C. C. A.), 277 Fed. 694, 699, the substance of the holding was that the profits made by the plaintiff during an earlier period ending in 1902, in which he had actively participated in the unlawful combination, could not be set up as the standard of the profits which he would have realized in a much later period commencing in 1908.

The defendant further contends that, apart from this question the plaintiff's damages were purely speculative, not proved by any facts from which they were logically and legally inferable, and not of an amount susceptible of expression in figures, *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 165. In support of this contention it is urged in argument, *inter alia*, that there was no showing as to the separate cost of handling the defendant's goods during the preceding four years; that if the plaintiff's entire business be considered as a unit and the total expenses and costs of goods be deducted from the entire receipts, it is shown to have had a net loss in the two years preceding 1910, but to have made a substantial net profit in that and the succeeding year; that the estimate as to the additional expense which the plaintiff would have incurred in handling the defendant's goods during the period in suit, was purely conjectural and speculative; and that it was a mere assumption, discredited by the testimony, that the plaintiff could have sold as large a quantity of the defendant's goods during the period in suit, after taking over a line of other goods, as it had before.

As to this question the Court of Appeals—after stating that in its opinion the plaintiff's evidence would have sup-

ported a much larger verdict than that returned by the jury—said: "The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hetel* v. *Baltimore & Ohio R. R.*, 169 U. S. 26, 39. And see *Lincoln* v. *Orthwein* (C. C. A.), 120 Fed. 880, 886.

We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive.

The judgment is accordingly

Affirmed.

MYERS *v.* INTERNATIONAL TRUST COMPANY.

CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

No. 122. Argued January 12, 13, 1927.—Decided February 21, 1927.

1. In Massachusetts, a partner who indorses a firm note as an individual, incurs—in addition to the liability for the partnership debt arising from his membership in the firm—a distinct and separate liability arising by reason of his personal indorsement. P. 384.
2. A composition between a bankrupt partnership and the partnership creditors only, in respect only of the partnership debts, will not discharge the partners as individuals from their separate obligations as endorsers of partnership notes. P. 383.
3. The fact that the holder of the notes was scheduled as a partnership creditor and received, as such, his proportion of the consideration deposited for the composition, did not enlarge the effect of the composition so as to discharge the partners from their personal liabilities as endorsers. P. 385.

252 Mass. 94, affirmed.

CERTIORARI (268 U. S. 686) to a decree of the Superior Court for Suffolk County, entered pursuant to a rescript from the Supreme Judicial Court.

Mr. Edward F. McClennen for the petitioners.

Mr. John R. Lazenby for the respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the International Trust Co. in a Superior Court of Massachusetts against Samuel A. Myers and Harry Myers, partners composing the firm of S. A. & H. Myers, to hold them individually liable upon certain notes that had been executed by the partnership, in the firm name, for a partnership obligation, and endorsed by them personally. The defense was that the individual liabilities of the defendants had been dis-

charged by a composition in a prior proceeding in bankruptcy. The Superior Court sustained this defense, and dismissed the plaintiff's bill. On appeal, the Supreme Judicial Court—without entering judgment—directed the Superior Court, by a rescript, to reverse its decree and enter a decree for the plaintiff. 252 Mass. 94. The Superior Court, pursuant to the rescript, entered a decree against the defendants in the respective amounts of their individual obligations as indorsers upon the notes.[1] This being, under the practice that was followed,[2] the final decree in the case and not appealable, *Boston, Petitioner,* 223 Mass. 36, is to be regarded as the final decision of the highest court of the State in which a decision could be had; and the writ of certiorari was therefore properly directed to the Superior Court. See *Davis* v. *Cohen Co.,* 268 U. S. 638, 639.

The Bankruptcy Act[3] provides, in so far as pertinent here, that a partnership may be adjudged a bankrupt, § 5*a;* that a "bankrupt"—including, as defined by § 1*a,* a person against whom an involuntary petition has been filed—"may offer, either before or after adjudication, terms of composition to his creditors," after filing "a schedule of his property and the list of his creditors," § 12*a,* as amended; that upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, § 12*e;* and that the confirmation "shall discharge the bankrupt from his debts," § 14*c.*

The proceedings in the prior bankruptcy case, shortly stated,[4] show that creditors of the firm of S. A. & H. Myers filed an involuntary petition in bankruptcy, praying that

[1] These amounts differed, as one note was indorsed by only one of the defendants.

[2] Gen. Laws, 1921, c. 211.

[3] 30 Stat. 544, c. 541.

[4] These are set out at length in the opinion of the Supreme Judicial Court, *supra.*

it be adjudged a bankrupt. There was no prayer that the partners be adjudged bankrupts individually. A partnership schedule, signed and sworn to by the partners, was filed, showing the partnership property and listing the partnership creditors. In this the plaintiff's notes were listed as unsecured debts of the partnership, with no statement that they were indorsed; and each of the partners stated that he had no individual debts and no individual assets that were not exempt. Thereafter, before any adjudication, the partners offered terms of composition, at forty per cent., to the unsecured creditors. The consideration therefor was deposited in the court; the composition was confirmed; and the consideration distributed among the partnership creditors. The plaintiff, as a creditor of the partnership listed in the schedule, received its proportion of the consideration, which it credited on the notes before bringing the present suit.

No offer of composition was made to the creditors of the individual partners, who were not listed; no consideration was deposited for them; and none was received by the plaintiff on account of the individual obligations of the partners as indorsers on the notes.

We are not called upon to determine whether the discharge of the notes as debts of the partnership which resulted from the confirmation of the composition, carried with it the discharge of the defendants, as partners, from the liabilities on the notes as partnership debts which arose from their membership in the firm.[5] The Supreme Judicial Court predicated the liabilities of the defendants solely on their personal indorsements, and the

[5] See *Re Coe* (C. C. A.), 183 Fed. 745, 747; *Abbott* v. *Anderson*, 265 Ill. 285, 291; and *Curlee Clothing Co.* v. *Hamm*, 160 Ark. 483, 486. And compare, as to the effect of a discharge granted a partnership under § 14: *Francis* v. *McNeal*, 228 U. S. 695, 701; *Re Bertenshaw* (C. C. A.), 157 Fed. 363, 369; *Horner* v. *Hamner* (C. C. A.), 249 Fed. 134, 140; *Armstrong* v. *Norris* (C. C. A.), 247 Fed. 253, 255; and *Re Neyland & M'Keithen* (D. C.), 184 Fed. 144, 151.

decree was based on their respective liabilities as such indorsers. And the sole question here presented is whether the composition discharged them, as individuals, from the obligations arising by reason of their indorsements.

This question must be answered in the light of the principle stated by the Supreme Judicial Court, that a "composition partakes of the nature of a contract." It is settled by the decisions of this Court in *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 447, 453, 454, and *Nassau Works* v. *Brightwood Co.,* 265 U. S. 269, 271, 273, 274, that a composition is "a settlement of the bankrupt with his creditors"—in a measure superseding and outside of the bankruptcy proceedings—which originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors; that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they "bargained for," and no more. And see: *Re Coe* (C. C. A.) 183 Fed. 745, 747; *Re Adler* (D. C.) 103 Fed. 444, 446; *Re Lane,* (D. C.) 125 Fed. 772, 773.

Here the partnership, being proceeded against as a distinct legal entity, *Meek* v. *Centre County Banking Co.,* 268 U. S. 426, 431, could offer terms of composition to its creditors under § 12*a,* after filing a schedule of its property and a list of its creditors. It filed such a schedule and list. And—although the District Court in Massachusetts had always refused to adjudge the bankruptcy of a partnership unless the partners were also adjudged bankrupts, *Re Forbes* (D. C.), 128 Fed. 137, 140,[6] and doubtless

[6] We need not determine here whether the adjudication of the bankruptcy of a partnership involves an adjudication of the bankruptcy of the individual partners. See *Francis* v. *McNeal, supra,* 701; *Liberty Nat'l Bank* v. *Bear,* 265 U. S. 365, 368; *Meek* v. *Centre County Banking Co., supra,* 432.

would have permitted the terms of composition to be offered to the creditors of the partners as well as to the creditors of the partnership—we think it clear that, read in the light of the schedule, the offer of the terms of composition was made only to the partnership creditors listed in the schedule, for whom the required consideration was deposited, and not to the creditors of the individual partners, who were not listed and for whom no consideration was deposited; in short, that the "bargain" was made only with the partnership creditors and in respect to the partnership debts. The necessary result is that the confirmation of the composition merely discharged the partnership debts, and did not discharge the separate debts of the partners to their individual creditors, who were offered and received no consideration for such release.

That, as was said by the Supreme Judicial Court, the indorsements of the notes by the defendants "created individual obligations, separate and distinct from the firm obligations," is clear; it being well settled in Massachusetts that a partner who indorses a firm note as an individual, incurs—in addition to the liability for the partnership debt arising from his membership in the firm—a distinct and separate liability arising by reason of his personal indorsement. *Roger Williams Nat. Bank* v. *Hall,* 160 Mass. 171; *Faneuil Hall Nat. Bank* v. *Meloon,* 183 Mass. 66, 67; *Fourth Nat. Bank* v. *Mead,* 216 Mass. 521, 523. As was said in the *Meloon* case, the defendants "were none the less indorsers and none the less liable as such because they were also liable as members of the firm which made the note." And see *Robinson* v. *Seaboard Nat. Bank* (C. C. A.), 247 Fed. 1007, 1008; *Matter of Peck,* 206 N. Y. 55, 60; and *Wilder* v. *Keeler,* 3 Paige (N. Y.) 167, 176.

It also results, from the very nature of a composition, that where the terms offered and accepted go merely to the discharge of the maker of a note, its confirmation does not release an indorser from his separate liability for which no

"bargain" was made. See *Easton Furn. Mfg. Co.* v. *Caminez* (N. Y.), 146 App. Div. 436, 438; *Silverman* v. *Rubenstein,* 162 N. Y. S. 733, 735; *Bromberg* v. *Self,* 16 Ala. App. 627, 628; and *Guild* v. *Butler,* 122 Mass. 498, 500.

Nor do we think that the effect of the composition of the partnership debts was enlarged so as to include the discharge of the defendants from their personal liabilities as indorsers, by the fact that the plaintiff was scheduled as a partnership creditor and received, as such, its proportion of the consideration deposited. The Supreme Judicial Court rightly said that the plaintiff was a party to the composition "only to the extent in which its claim against the partnership was concerned; it was not recognized as an individual creditor; no offer was made to it as the holder of a claim against the individuals. In this respect it was a stranger to the offer; it stood as any other individual creditor whose demand was not listed, to whom no offer of compromise was made and who entered into no bargain with the defendants."

We conclude that the composition did not discharge the defendants from their individual and personal obligations as indorsers upon the notes. And the decree, which merely enforced their liabilities as such indorsers, must therefore be

Affirmed.

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FRED T. LEY & COMPANY INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 125. Argued January 14, 1927.—Decided February 21, 1927.

In a suit to recover the cost of public liability insurance paid under a building contract allowing reimbursement for such insurance "as the contracting officer might approve or require," a finding by the Court of Claims that there was no evidence that the expenditure was required or approved will not be reviewed by this Court. P. 387.

60 Ct. Cls. 654, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for money expended for liability insurance in connection with building operations under a government contract.

Mr. George A. King, with whom *Messrs. William B. King* and *George R. Shields* were on the brief, for appellant.

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

MR. JUSTICE STONE delivered the opinion of the Court.

Appellant entered into a contract with the government for the construction of certain army cantonment buildings at Camp Devens, Massachusetts, upon a cost-plus basis. The contract provided for the reimbursement of the contractor for all expenditures made in performance of the contract, including the cost of "such bonds, fire, liability and other insurance as the Contracting Officer [might] approve or require; . . ." Appellant brought suit in the Court of Claims to recover the cost of public liability insurance effected by it in connection with the perform-

ance of its contract. That court found that the evidence failed to show that the liability insurance in question was ever required or approved by the contracting officer of the government or any person representing him or performing his duties, and gave judgment for the government. 60 Ct. Cls. 654.

On appeal to this Court, Jud. Code, §§ 242 and 243, before the amendment of 1925, appellant seeks to avoid the effect of this finding by pointing out that all the contracts for the construction of army cantonments during the late war were identical in form and that recovery has been allowed for the cost of public liability insurance in connection with the construction of Camp Zachary Taylor, Kentucky, in *Mason & Hanger Co.* v. *United States,* 56 Ct. Cls. 238; affirmed, 260 U. S. 323; and of Camp Grant, Illinois, in *Bates & Rogers Const. Co.* v. *United States,* 58 Ct. Cls. 392. It is urged that the records in those cases show a blanket approval by the government of the expenditures made for liability insurance in the construction of all the army cantonments. But the Court of Claims specifically found that there was no evidence that the present expenditure was required or approved. By that finding we are concluded. *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533; *Rogers* v. *United States,* 270 U. S. 154, 162. Moreover, in *Mason & Hanger* v. *United States, supra,* the court's finding was that the contracting officer had merely approved the particular insurance involved in that suit. In *Bates & Rogers Const. Co.* v. *United States, supra,* the court based its decision upon a stipulation that the case should be controlled by the decision of this Court in the *Mason* case. No substantial question is presented by the appeal.

Judgment affirmed.

SMITH ET AL. *v.* WILSON ET AL.

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

No. 648. Argued January 5, 6, 1927.—Decided February 21, 1927.

1. Section 266 of the Judicial Code, as amended by the Act of February 13, 1925, does not require a court of three judges on the final hearing unless an application for preliminary injunction was pressed to a hearing. In that case, an appeal either from the determination on the preliminary application or from the final decree may be taken directly to this Court. P. 391.
2. If the plaintiff does not press an application for an interlocutory injunction, the final hearing may be before a single judge, whose decision may be reviewed by the Circuit Court of Appeals and this Court under other applicable provisions of the Code. *Id.*
3. Whether it is erroneous for three judges to sit at final hearing in a case in which there was no application for an interlocutory injunction, is not here decided. *Id.*

Appeal from 13 F. (2d) 1007, dismissed.

APPEAL from a final decree of the District Court (of three judges) in a suit to enjoin officials of Texas from levying assessments on plaintiffs' land, and issuing bonds, under a plan of navigation improvement authorized by a state law which the bill challenged as violative of the Fourteenth Amendment.

Mr. A. D. Lipscomb, with whom *Messrs. Frederick S. Tyler* and *R. E. Seagler* were on the brief, for appellants.

Mr. A. R. Rucks, with whom *Messrs. Lewis R. Bryan, C. D. Jessup,* and *Louis J. Wilson* were on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellants, some of whom are citizens of Texas, filed their bill in the district court for southern Texas against

appellees, the county commissioners of Brazoria County, certain tax officials of that county, and the commissioners of the Brazos River Harbor Navigation District and others, all citizens of Texas. The relief prayed was a preliminary and final injunction restraining appellees from levying assessments on appellants' land and from issuing or selling bonds pursuant to a plan authorized by the Act of February 19, 1925, c. 5, General Laws of Texas, 7, creating a taxing district to raise funds to defray the cost of a proposed improvement of navigation at the mouth of the Brazos River.

The jurisdiction of the district court was based solely upon allegations in the bill that the Texas statutes and the proceedings had under them for the formation of the Brazos River Harbor Navigation District violated the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

No application was made for a preliminary injunction. Testimony was taken before a special master and final hearing had before three judges on the assumption that a trial by three judges was required by § 266 of the Judicial Code, as amended by the Act of February 13, 1925. From the judgment of the district court, dismissing the bill on the merits, 13 Fed. (2d) 1007, the case has been brought here by direct appeal under §§ 238 and 266 of the Judicial Code as amended, which permit an appeal from a final decree in an injunction suit of this kind in which the final hearing must be had before three judges, as provided in that section. The jurisdiction of this Court turns on whether or not § 266, as amended, required the hearing below to be before three judges.

Section 266 before the amendment of February 13, 1925, required, as it still does, all applications for an interlocutory injunction restraining state officers from enforcing state statutes or orders of administrative boards or com-

missions, upon the ground of unconstitutionality, to be heard by a court of three judges. But as the section then stood, the final hearing might be had before a single district judge who might arrive at a different conclusion from that reached on the preliminary hearing by the three judges, one of whom was a justice of the Supreme Court or a circuit judge. Compare *Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50. To remove this anomaly and save the right of direct appeal to this Court from the operation of the repealing provisions of the Act of February 13, 1925, § 266 was amended by the addition of the following provisions:

"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."

See *Ex parte Buder*, 271 U. S. 461, 465.

It is to be noted that this amendment provides that the "requirement" of a court of three judges "shall also apply" to the final hearing "in such suit." The question now presented is whether the phrase "such suit" was intended to refer only to a suit in which a preliminary injunction had been in fact sought or to a suit in which an application for such an interlocutory injunction might have been but in fact was not made. Before the amendment the section applied only when interlocutory relief was actually sought, regardless of the scope of the bill, and direct appeal to this Court was permitted only from the determination of the court of three judges on such an application. The general purpose of the Act of February 13, 1925 was to relieve this Court by restricting the right to a review by it. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317. The specific purpose of the amendment to

§ 266, as already noted, was to end the anomalous situation in which a single district judge, on the final hearing, might reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction. Both purposes are accomplished if the amendment is taken as its language suggests, not to extend the application of the section with respect either to the requirement of three judges or the right of direct appeal to any case in which an interlocutory injunction is not sought.

We conclude that the section as amended does not require a court of three judges on the final hearing unless an application for preliminary injunction is pressed to a hearing. In that case, an appeal either from the determination on the preliminary application or from the final decree may be taken directly to this Court. The plaintiff is thus given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must be before a like court with appeal directly to this Court, or he may not press an application for an interlocutory injunction, in which case the final hearing may be before a single judge, whose decision may be reviewed by the circuit court of appeals and this Court under other applicable provisions of the Judicial Code. Here there was no application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide. There is therefore no jurisdiction in this Court to hear the appeal, which must accordingly be

Dismissed.

UNITED STATES *v.* TRENTON POTTERIES COMPANY ET AL.

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

No. 27. Argued November 30, December 1, 1926.—Decided February 21, 1927.

1. A charge to a jury which was correctly given and adequately covered the case is not made erroneous by a refusal to charge in another correct form or to quote from opinions of this Court, or by the fact that it was inspired by a mistaken view of the law disclosed in a ruling previous to the trial. P. 396.
2. An agreement of those controlling over 80% of the business of manufacturing and distributing sanitary pottery in the United States, to fix and maintain uniform prices, violates the Sherman Act, whether the prices in themselves were reasonable or unreasonable. *Chicago Bd. of Trade* v. *United States,* 246 U. S. 231, distinguished. P. 396.
3. In a case of conviction and sentences upon two counts, where the sentences are in part concurrent, but do not, combined, exceed that which could have been imposed on either count alone; where the first count is sufficient and the case under it was properly submitted to the jury, and the record does not suggest that the verdict on that count was induced by evidence introduced upon the other,—objections relating to the second count may be disregarded. P. 401.
4. Under the Sherman Act, the offensive agreement or conspiracy is criminal whether or not followed by efforts to carry it into effect; but where the indictment does not charge its formation in the district, the District Court is without jurisdiction unless some act in pursuance of it took place there. P. 402.
5. Failure of the court to instruct that overt acts in the district were necessary to the jurisdiction or venue, though charging that they were not necessary to constitute the offence, was not a ground for reversal, where the defendants made no request to charge and where the jurisdictional facts were not in dispute but were clearly established by the evidence. P. 402.
6. Where much evidence was taken and a wide range of inquiry covered, a new trial is not lightly to be ordered on technical errors in the admission of evidence which do not affect matters of substance. P. 404.

7. In a prosecution of corporations and individuals under the Sherman Act, where the manager of a corporation in the same line of business but which was not one of the defendants, testified on their behalf, and on cross examination, being asked whether his company had not pleaded guilty to a violation of that Act, replied, "I don't know anything about that at all," the answer did not so prejudice the defendants as to justify a reversal, even if the question was improper. P. 404.
8. Upon redirect examination, an inquiry, relevant and otherwise competent may not be excluded merely because of its tendency to discredit the witness by showing his relations with unreliable persons. P. 405.
9. In a prosecution under the Sherman Act, refusal to admit conclusions of defendants' witnesses as to the existence of competition was not erroneous, when full opportunity was given to prove by details and records of actual transactions the conditions of the industry within the period in question. P. 406.

300 Fed. 550, reversed.

CERTIORARI (266 U. S. 597) to a judgment of the Circuit Court of Appeals which reversed a conviction under the Sherman Act. The defendants were twenty individuals and twenty-three corporations engaged in the manufacturing of vitreous pottery fixtures used in bathrooms and lavatories.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Messrs. Rush H. Williamson,* and *William D. Whitney,* Special Assistants to the Attorney General, were on the briefs, for the United States.

Mr. Charles E. Hughes, with whom *Messrs. George Wharton Pepper, Edward L. Katzenbach, George H. Calvert, John W. Bishop, Jr.,* and *H. Snowden Marshall* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondents, twenty individuals and twenty-three corporations, were convicted in the district court for south-

ern New York of violating the Sherman Anti-Trust Law, Act of July 2, 1890, c. 647, 26 Stat. 209. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery, in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as "legitimate jobbers." On appeal, the court of appeals for the second circuit reversed the judgment of conviction on both counts on the ground that there were errors in the conduct of the trial. 300 Fed. 550. This Court granted certiorari. 266 U. S. 597. Jud. Code, § 240.

Respondents, engaged in the manufacture or distribution of 82 per cent. of the vitreous pottery fixtures produced in the United States for use in bathrooms and lavatories, were members of a trade organization known as the Sanitary Potters' Association. Twelve of the corporate respondents had their factories and chief places of business in New Jersey; one was located in California and the others were situated in Illinois, Michigan, West Virginia, Indiana, Ohio and Pennsylvania. Many of them sold and delivered their product within the southern district of New York and some maintained sales offices and agents there.

There is no contention here that the verdict was not supported by sufficient evidence that respondents, controlling some 82 per cent. of the business of manufacturing and distributing in the United States vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers.

The issues raised here by the government's specification of errors relate only to the decision of the court of appeals upon its review of certain rulings of the district court made in the course of the trial. It is urged that the court below erred in holding in effect (1) that the trial

court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade; (2) that the trial court erred in failing to charge the jury correctly on the question of venue; and (3) that it erred also in the admission and exclusion of certain evidence.

REASONABLENESS OF RESTRAINT.

The trial court charged, in submitting the case to the jury, that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints. These instructions repeated in various forms applied to both counts of the indictment. The trial court refused various requests to charge that both the agreement to fix prices and the agreement to limit sales to a particular group, if found, did not in themselves constitute violations of law unless it was also found that they unreasonably restrained interstate commerce. In particular the court refused the request to charge the following:

"The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful."

Other requests of similar purport were refused including a quotation from the opinion of this Court in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

The court below held specifically that the trial court erred in refusing to charge as requested and held in effect that the charge as given on this branch of the case was

erroneous. This determination was based upon the assumption that the charge and refusals could be attributed only to a mistaken view of the trial judge, expressed in denying a motion at the close of the case to quash and dismiss the indictment, that the "rule of reason" announced in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and in *American Tobacco Co.* v. *United States,* 221 U. S. 106, which were suits for injunctions, had no application in a criminal prosecution. Compare *Nash* v. *United States,* 229 U. S. 373.

This disposition of the matter ignored the fact that the trial judge plainly and variously charged the jury that the combinations alleged in the indictment, if found, were violations of the statute as a matter of law, saying:

". . . the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; . . ."

If the charge itself was correctly given and adequately covered the various aspects of the case, the refusal to charge in another correct form or to quote to the jury extracts from opinions of this Court was not error, nor should the court below have been concerned with the wrong reasons that may have inspired the charge, if correctly given. The question therefore to be considered here is whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged.

That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable.

Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. See *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; *Standard Oil Co.* v. *United States, supra; American Column Co.* v. *United States,* 257 U. S. 377, 400; *United States* v. *Linseed Oil Co.,* 262 U. S. 371, 388; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 614.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government

in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Nash* v. *United States, supra.* Thus viewed, the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It "is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained." *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49.

That such was the view of this Court in deciding the *Standard Oil* and *Tobacco* cases, and that such is the effect of its decisions both before and after those cases, does not seem fairly open to question. Beginning with *United States* v. *Trans-Missouri Freight Association, supra; United States* v. *Joint Traffic Association*, 171 U. S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon. In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237, a case involving a scheme for fixing prices, this Court quoted with approval the following passage from the lower court's opinion, (85 Fed. 271, 293):

". . . the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." See also, p. 291.

In *Swift & Co.* v. *United States,* 196 U. S. 375, this Court approved and affirmed a decree which restrained the defendants "by combination, conspiracy or contract [from] raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents." In *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 408, decided at the same term of court as the *Standard Oil* and *Tobacco* cases, contracts fixing reasonable resale prices were declared unenforcible upon the authority of cases involving price-fixing arrangements between competitors.

That the opinions in the *Standard Oil* and *Tobacco* cases were not intended to affect this view of the illegality of price-fixing agreements affirmatively appears from the opinion in the *Standard Oil* case where, in considering the *Freight Association* case, the court said (p. 65):

"That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was

not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."

And in *Thompson* v. *Cayser,* 243 U. S. 66, 84, it was specifically pointed out that the *Standard Oil* and *Tobacco* cases did not overrule the earlier cases. The decisions in *Maple Flooring Association* v. *United States,* 268 U. S. 563, and in *Cement Manufacturers' Protective Association* v. *United States,* 268 U. S. 588, were made on the assumption that any agreement for price-fixing, if found, would have been illegal as a matter of law. In *Federal Trade Commission* v. *Pacific States Paper Trade Association, ante,* p. 52, we upheld orders of the Commission forbidding price-fixing and prohibiting the use of agreed price lists by wholesale dealers in interstate commerce, without regard to the reasonableness of the prices.

Cases in both the federal and state courts [1] have generally proceeded on a like assumption, and in the second circuit the view maintained below that the reasonableness or unreasonableness of the prices fixed must be submitted

[1] The illegality of such agreements has commonly been assumed without consideration of the reasonableness of the price levels established. *Loder* v. *Jayne,* 142 Fed. 1010; *Craft* v. *McConoughy,* 79 Ill. 346; *Vulcan Power Co.* v. *Hercules Powder Co.,* 96 Cal. 510; *Johnson* v. *People,* 72 Colo. 218; *People* v. *Amanna,* 203 App. Div. 548; see *Trenton Potteries Co.* v. *Oliphant,* 58 N. J. Eq. 507, 521; *Beechley* v. *Mulville,* 102 Iowa 602, 608; *People* v. *Milk Exchange,* 145 N. Y. 267 (purchase prices). In many of these cases price-fixing was accompanied by other factors contributing to the illegality.

Upon the precise question, there has been diversity of view. *People* v. *Sheldon,* 139 N. Y. 251; *State* v. *Eastern Coal Co.,* 29 R. I. 254, 256, 265; Pope, *Legal Aspect of Monopoly,* 20 Harvard Law Rev. 167, 178; Watkins, *Change in Trust Policy,* 35 Harvard Law Rev. 815, 821–3; (reasonableness of prices immaterial) *contra: Cade & Sons* v. *Daly,* [1910] 1 Ir. Ch. 306; *Central Shade Roller Co.* v. *Cushman,* 143 Mass. 353; *Skrainka* v. *Scharringhausen,* 8 Mo. App. 522; *Dueber Watch Case Mfg. Co.* v. *Howard Watch Co.,* 55 Fed. 851.

to the jury has apparently been abandoned. See *Poultry Dealers' Association* v. *United States,* 4 Fed. (2d) 840. While not necessarily controlling, the decisions of this Court denying the validity of resale price agreements, regardless of the reasonableness of the price, are persuasive. See *Dr. Miles Medical Co.* v. *Park & Sons Co., supra; Boston Store of Chicago* v. *American Graphophone Co.,* 246 U. S. 8; *United States* v. *Schrader's Sons,* 252 U. S. 85; *Federal Trade Commission* v. *Beechnut Packing Co.,* 257 U. S. 441.

Respondents rely upon *Chicago Board of Trade* v. *United States, supra,* in which an agreement by members of the Chicago Board of Trade controlling prices during certain hours of the day in a special class of grain contracts and affecting only a small proportion of the commerce in question was upheld. The purpose and effect of the agreement there was to maintain for a part of each business day the price which had been that day determined by open competition on the floor of the Exchange. That decision, dealing as it did with a regulation of a board of trade, does not sanction a price agreement among competitors in an open market such as is presented here.

The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict. The requested charge which we have quoted, and others of similar tenor, while true as abstract propositions, were inapplicable to the case in hand and rightly refused.

The first count being sufficient and the case having been properly submitted to the jury, we may disregard certain

like objections relating to the second count. The jury returned a verdict of guilty generally on both counts. Sentence was imposed in part on the first count and in part on both counts, to run concurrently. The combined sentence on both counts does not exceed that which could have been imposed on one alone. There is nothing in the record to suggest that the verdict of guilty on the first count was in any way induced by the introduction of evidence upon the second. In these circumstances the judgment must be sustained if either one of the two counts is sufficient to support it. *Claassen* v. *United States,* 142 U. S. 140; *Locke* v. *United States,* 7 Cranch 339, 344; *Clifton* v. *United States,* 4 How. 242, 250.

QUESTION OF VENUE.

The trial court instructed the jury in substance that if it found that the respondents did conspire to restrain trade as charged in the indictment, then it was immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect. The court below recognized that this charge was a correct statement of the general proposition of law that the offensive agreement or conspiracy alone, whether or not followed by efforts to carry it into effect, is a violation of the Sherman Law. *Nash* v. *United States, supra.* And it was clearly the intent and purpose of the trial judge to deal with that aspect of the case in giving it. But the appellate court held the charge erroneous and ground for reversal because the trial judge did not go further and charge the necessity of finding overt acts within the southern district of New York to satisfy jurisdictional requirements. Since the indictment did not charge the formation of the conspiracy or agreement within that district, the court was without jurisdiction unless some act pursuant to the agree-

ment or conspiracy took place there. *Hyde* v. *United States,* 225 U. S. 347; *Easterday* v. *McCarthy,* 256 Fed. 651.

This part of the charge, so far as respondents deemed it objectionable in that the absence of efforts to carry out the agreement might be taken into account in determining whether it was in fact made, was promptly remedied by an instruction that the jury might consider all the facts in determining whether a combination or conspiracy had been entered into. But respondents made no request to charge with respect to venue or the jurisdictional necessity of overt acts within the district. Neither did they except to the charge as given nor move to dismiss the indictment on that ground. A motion in arrest of judgment was directed to the jurisdictional sufficiency of the indictment but the adequacy of the evidence establishing jurisdiction was not questioned.

The reason for this complete failure of respondents to point out the objection to the charge now urged, or otherwise to suggest to the trial court the desirability of a charge upon the facts necessary to satisfy jurisdictional requirements is made plain by an inspection of the record.

In point of substance, the jurisdictional facts were not in issue. Although the respondents were widely scattered, an important market for their manufactured product was within the southern district of New York, which was therefore a theatre for the operation of their conspiracy, adjacent to the home of the largest group of the respondents located in a single state. The indictment sufficiently alleged that the conspiracy was carried on in the southern district of New York by combined action under it. The record is replete with the evidence of witnesses for both prosecution and defense, including some of the accused, who testified without contradiction to the course of business within the district, the circulation of price bulletins, and the making of sales there by some of the members of

the association organized by respondents. The secretary testified that, acting for the association, he effected sales within the district. All of these were overt acts sufficient for jurisdictional requirements. In such a state of the record, the appellate court might well have refused to exercise its discretionary power to disturb the conviction because of the trial court's failure to give a charge not requested. If this failure to guard against the misinterpretation of a correct charge is to be deemed error it was of such slight consequence in the actual circumstances of the case and could have been so easily corrected by the trial judge had his attention been directed to it, that the respondents should not have been permitted to reap the benefit of their own omission.

QUESTIONS OF EVIDENCE.

The alleged errors in receiving and excluding evidence were rightly described by the court below as minor points. The trial lasted four and one-half weeks. A great mass of evidence was taken and a wide range of inquiry covered. In such a case a new trial is not lightly to be ordered on grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance. We take note only of some of the objections raised which sufficiently indicate the character of others, all of which we have considered.

Respondents called as a witness the manager of a potteries corporation which was not a defendant. On cross-examination, he was asked whether he knew that his concern had pleaded guilty to a violation of the Sherman Act, to which he answered, " I don't know anything about that at all." While it may be within the discretion of the trial judge to limit cross-examination of this type, we would not be prepared to say that such a question, when allowed, would be improper, if its admissibility were urged on the

ground that it was directed to the bias of the witness, *Wabash Screen Door Co.* v. *Black,* 126 Fed. 721, 726; 2 Wigmore, Evidence (2d ed.) § 949, or that it was preliminary to showing his implication in the supposed offense, and thus affecting his credibility. But in any case, we do not think the answer given prejudiced the respondents in any such substantial way as to justify a reversal. *Davis* v. *Coblens,* 174 U. S. 719, 727; *Blitz* v. *United States,* 153 U. S. 308, 312.

It was a part of the government's case to show that it was the purpose of respondents, in aid of their price-fixing agreement, not to sell second grade or Class " B " pottery in the domestic market. The government offered evidence, including the testimony of the secretary of the respondents' association, to show that a distinct association of jobbers of pottery was coöperating in this effort and that its secretary had tendered his active assistance to confine the sale of this class of pottery to the export trade. On cross-examination of the secretary of the respondents' association, the fact was brought out that at one time twenty out of twenty-four members were selling Class " B " pottery in the domestic market. On re-direct examination, the government asked questions of the witness tending to show that at about that time the secretary of the Jobbers' Association had been called for examination before a committee of the New York Legislature, conducting a general investigation into restraints of trade and extortions in connection with the building industry in New York City and vicinity, an investigation of which the lower court took judicial notice. It was held below and it is urged here that because of the known character of the investigation, the evidence should have been excluded because it improperly " smirched " the witness by showing that he had relations with an " unreliable " person. But the brief statement which we have given of

the record makes it plain that the testimony sought was material in explaining the failure of the members of the respondents' association at that time to confine their sales of Class "B" pottery to the export market as promised. The inquiry was not directed to the impeachment of the government's own witness. Its purpose was to dispel the adverse impression possibly created by the cross-examination. An inquiry otherwise relevant and competent may not be excluded merely because it tends to discredit the witness by showing his relations with unreliable persons.

Respondents called numerous witnesses who were either manufacturers or wholesale dealers in sanitary pottery, to show that competition existed among manufacturers, particularly the respondents, in the sale of such pottery. On direct examination these witnesses were asked in varying form, whether they had observed or noted competition among the members of the association. The questions were objected to and excluded on the ground that they were too general and vague in character and called for the opinion or conclusion of the witness.

Whenever the witness was asked as to the details of transactions showing competition in sales, his testimony was admitted and the introduction of records of prices in actual transactions was facilitated by stipulation. Whether or not such competition existed at any given time is a conclusion which could be reached only after the consideration of relevant data known to the witness. Here the effort was made to show the personal conclusion of the witness without the data and without, indeed, showing that the conclusion was based upon knowledge of relevant facts. Hence, the offered evidence, in some instances, took the form of vague impressions, or recollections of the witness as to competition, without specifying the kind or extent of competition.

A certain latitude may rightly be given the court in permitting a witness on direct examination to testify as to his conclusions, based on common knowledge or experience. Compare *Erie R. R.* v. *Linnekogel,* 248 Fed. 389; 2 Wigmore, § 1929. Even if these questions could properly have been allowed here, we cannot say that the discretion of the court was improperly exercised in excluding the conclusions of the witnesses as to competitive conditions when full opportunity was given to prove by relevant data the conditions of the industry within the period in question.

Other objections urged by respondents to the sufficiency of the indictment and charge have received our consideration but do not require comment.

It follows that the judgment of the circuit court of appeals must be reversed and the judgment of the district court reinstated.

Reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

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

SWISS OIL CORPORATION *v.* SHANKS, AUDITOR.

ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

No. 148. Argued January 21, 1927.—Decided February 21, 1927.

1. Upon review of a decision of a state court construing the state law as denying the relief sought by the appealing party even if the particular state statute attacked by him were assumed to be invalid, the constitutionality of that statute is not involved in this Court. P. 411.

2. A state tax, called a "license" or "franchise" tax, measured by 1% of the market value of the annual production and imposed, in addition to general *ad valorem* property taxes, on producers of petroleum only, is not in violation of the Equal Protection Clause of the Fourteenth Amendment, even if itself a property tax, since a separate classification of petroleum producers for tax purposes is not palpably arbitrary or unreasonable. P. 412.
3. The Fourteenth Amendment does not require uniformity in taxation or forbid double taxation. P. 413.

208 Ky. 64, affirmed.

ERROR to a judgment of the Court of Appeals of Kentucky which reversed a judgment in mandamus commanding Shanks, as Auditor of Public Accounts, to issue a warrant for a refund of taxes to the plaintiff Oil Company.

Mr. A. Owsley Stanley, with whom *Messrs. Edward L. McDonald, Edward C. O'Rear, William T. Fowler,* and *William L. Wallace* were on the briefs, for plaintiff in error.

Mr. Charles F. Creal, Assistant Attorney General of Kentucky, with whom *Mr. Frank E. Daugherty,* Attorney General of Kentucky, was on the brief, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

The Swiss Oil Corporation, plaintiff in error, instituted a mandamus proceeding in the Circuit Court of Franklin County, Kentucky, to compel the state auditor, the defendant in error, to issue a warrant for the refund of taxes alleged to have been illegally assessed against it, on the ground among others, that the taxing statute was repugnant to the Constitution of the United States. This is the appropriate procedure, under the state law, for compelling a return to the taxpayer of taxes improperly collected. § 162, Carroll Ky. Stat. 1922; *Craig, Auditor* v. *Renaker,* 201 Ky. 576.

The trial court gave judgment for plaintiff which was reversed on appeal to the Court of Appeals of Kentucky. 208 Ky. 64. The case comes here on writ of error. Jud. Code, § 237.

Plaintiff is engaged in producing crude oil in Kentucky and delivering it to pipe lines for transportation to points outside of the state. The tax in question was levied for the period from March, 1922 to February, 1924, pursuant to the Act of March 29, 1918, c. 122, Acts 1918, p. 540, which requires those "producing crude petroleum oil" in the state to pay "in lieu of all other taxes on the wells producing said crude petroleum" an annual tax "of one per centum of the market value of all crude petroleum so produced." Section 3 of the Act provides "the tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production." By other sections those engaged in the business of transporting oil are required to report to the tax officials, the amount of oil transported by them and to pay the tax, and they are authorized to collect the amount of the tax from the producer, either in money or crude petroleum. This Act, as stated in its title, is an amendment and re-enactment of the Act of May 2, 1917, c. 7, Acts 1917, p. 40, which similarly required oil producers to pay in lieu of other taxes a "license" or "franchise" tax for the "right or privilege of engaging in such business," within the state. The producers themselves, under the 1917 Act, were required to pay the tax and to report the amount of the oil produced to the State Tax Commission on the first day of July of that year and at the end of each succeeding three months. The taxpayer was entitled, under the 1917 Act, to notice of the valuation placed by the Commission upon the oil produced and had ten days from the time of receiving notice to go before the Commission and contest the valuation. He was privileged to

introduce evidence and the Commission was authorized, after a hearing, to change the value set for taxation purposes upon the oil produced.

This Act, as amended, was construed by the Kentucky Court of Appeals, in an earlier decision, *Raydure* v. *Board of Supervisors,* 183 Ky. 84. It there held that the legislature had no power under §§ 171 and 172 of the state constitution to substitute the production tax authorized by the Act of 1917 as amended by the Act of 1918 for the *ad valorem* method of taxing oil producing property required by the constitution, nor to exempt such property from *ad valorem* taxation. Following this decision, the wells and oil producing property of plaintiff and others have been subjected to state, county and local *ad valorem* taxes in addition to the production tax imposed upon plaintiff.

Plaintiff in the state court drew in question the validity of the Act of 1918 as thus construed under the Kentucky constitution. It contended that if construed as imposing a license tax, the statute was unconstitutional in attempting to substitute an occupation for the *ad valorem* tax required by § 172 of the state constitution. The main contention however was that the tax in substance was a property and not a license tax and hence invalid under § 171 of the state constitution requiring uniform taxation, since oil properties were subject to two property taxes whereas other classes of property were subject to but one. These contentions translated into terms of the Federal Constitution were urged below and renewed here.

It is argued (a) that the Act of 1918 as construed and administered by the state authorities imposes double taxation upon the plaintiff not put on other classes of property, thus denying the equal protection of the laws guaranteed by the Fourteenth Amendment; (b) that it authorizes a tax upon interstate shipments, thus interfering with interstate commerce in violation of Art. I,

§ 8 of the Federal Constitution; (c) that the tax is assessed and collected without notice and without opportunity to the taxpayer to be heard, in violation of the due process clause of the Fourteenth Amendment.

The court below upheld the tax as a license or production tax valid under the laws and constitution of Kentucky, notwithstanding the imposition of a separate *ad valorem* tax upon the oil producing lands or leases. It disposed of the objections to the tax under the Federal Constitution, saying:

"Each of these criticisms is leveled at, and can affect only, the amendment of 1918, and there is, and could be, no criticism of the title of the original act passed in 1917, or any claim that it imposed any burden upon interstate commerce, or that it did not afford the taxpayer ample opportunity to be heard before the tax attached.

"The original act imposes, just as does the amendment, a graduated occupational tax, measured by the amount of business done by each and every oil producer in the state. The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are sound, the amendment would be destroyed, but this would leave the original act in force, and unamended. Precisely the same tax would have been collected from oil producers in either event."

The court also pointed out that as this is a proceeding by a taxpayer for a refund of taxes under a statute which permits the refund only if the taxes paid were not due, there could in any event be no recovery by the plaintiff since the tax, if not due under the Act of 1918, was due and payable under the Act of 1917.

As the case is brought here from a state court, the construction put by the court below upon the statutes

and constitution of its own state is not open to review here. *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 119; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 569. Since the Kentucky Court of Appeals has held that the plaintiff is not entitled under the state law to the relief prayed even if the Act of 1918 be deemed invalid, no question as to the validity of that act under the Federal Constitution is presented for decision on this record.

But plaintiff argues that this determination of the state court presupposes the validity under the Federal Constitution of the Act of 1917, which has the same vice as the later act. It is contended, as it was of the Act of 1918, that the one per cent. production tax imposed is in effect a property tax. Since the constitution of Kentucky as construed in *Raydure* v. *Board of Supervisors, supra,* does not admit of the substitution of a production tax for an *ad valorem* tax and requires the latter to be levied in addition to the production tax, there is therefore double taxation not imposed on other classes of property and hence a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

We are unable to distinguish the Act of 1917 in its constitutional aspects from the statute of Kentucky imposing a license tax at the rate of one and one-fourth cents per gallon upon those engaged in the business or occupation of rectifying or blending spirits, considered by this Court in *Brown-Forman Co.* v. *Kentucky, supra.* There the tax imposed was assailed on the ground that it was a property tax not assessed upon similar classes of property whether produced within or without the state, and that its imposition resulted in a denial of the equal protection of the laws. But this Court, accepting the state court's interpretation of the tax as a license tax, upheld the statute as based upon a classification which was neither arbitrary nor unreasonable, saying that the reasonableness of the classification was the ultimate ques-

tion to be determined whether the tax be regarded as a license or a property tax (p. 571). See also *Southwestern Oil Co.* v. *Texas, supra,* where an occupation tax upon wholesale dealers in coal and other mineral oils was upheld despite the fact that wholesale dealers in other commodities were not similarly taxed.

Without a labored analysis of the nature of the taxing measure, we see no reason for not accepting the interpretation of the state court that this statute authorizes a license tax to which there can be no serious constitutional objection. *Texas Co.* v. *Brown,* 258 U. S. 466, 481; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 649; cf. *Watson* v. *State Comptroller,* 254 U. S. 122. But even if regarded as a property tax, it is imposed alike upon all crude oil produced within the state and there is nothing in the record to suggest that the classification is so palpably arbitrary or unreasonable as to render it invalid. Unlike the state constitution, *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288; *Greene* v. *Louisville & Interurban R. R.,* 244 U. S. 499, the Fourteenth Amendment does not require uniformity of taxation, *Davidson* v. *New Orleans,* 96 U. S. 97, 105, nor forbid double taxation. *St. Louis, S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 367, 368; *Shaffer* v. *Carter,* 252 U. S. 37, 58; *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533; cf. *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Cream of Wheat Co.* v. *Grand Forks Co.,* 253 U. S. 325; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109. It is sufficient, as stated, that there be some adequate or reasonable basis for the classification. *Kidd* v. *Alabama,* 188 U. S. 730, 733; *Watson* v. *State Comptroller, supra,* 124, 125; *Maxwell* v. *Bugbee,* 250 U. S. 525, 540; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139; *Coulter* v. *Louisville & Nashville R. R.,* 196 U. S. 599, 608, 609. The particular classification adopted "is not open to objection unless it precludes the assumption that [it] was

made in the exercise of legislative judgment and discretion." *Stebbins* v. *Riley*, 268 U. S. 137, 143.

Judgment affirmed.

HAYMAN *v.* CITY OF GALVESTON ET AL.

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

No. 155. Submitted January 21, 1927.—Decided February 21, 1927.

1. *Quaere* whether, in the circumstances mentioned in the opinion, a regulation by a municipal hospital board excluding osteopathic physicians from practicing in the hospital, was action by the State, in the sense of the Fourteenth Amendment? P. 416.
2. A person not claiming to be a citizen of the State, or of the United States, but having the right, under the state law, to practice his profession of osteopathic physician, is not deprived of rights under the Federal Constitution,—the Privileges and Immunities Clause, and the Due Process and Equal Protection clauses of the Fourteenth Amendment—by a regulation excluding osteopaths from practicing in a hospital maintained by the State and its municipality partly for the instruction of medical students attending the state university. P. 416.
3. In Art. XVI, § 31, of the Constitution of Texas, the limitation that "no preference shall ever be given by law to any schools of medicine" is directed only to qualifications for admission to practice. P. 417.

Affirmed.

APPEAL from a decree dismissing for want of equity a bill to enjoin the respondents from excluding appellant, or other osteopathic physicians, from practicing their profession in the hospital maintained by the City of Galveston and from denying admission to patients who wish to be treated by appellant or other osteopathic physicians.

Mr. D. A. Simmons for appellant, submitted.

No appearance for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellant, a resident of Texas, an osteopathic physician, duly licensed to practice medicine in the state, brought suit in the district court for southern Texas against the City of Galveston, the Board of Commissioners of the city, and the members of the Governing Board of the John Sealy Hospital, maintained by the city, to enjoin the enforcement of any rule or regulation excluding appellant or other osteopathic physicians from practicing their profession in the hospital, and denying admission to patients who wish to be treated by appellant or other osteopathic physicians.

The bill alleged that the State of Texas, acting through the Board of Regents of the State University, had leased land to appellee, the City of Galveston, on which it was maintaining a municipal hospital in accordance with the provisions of the lease. The lease, which is annexed to the bill of complaint and made part of it, stipulates that the State reserves the right of use of the operating amphitheatre, the wards and grounds of the hospital, by the faculty of the Medical Department of the State University, for purposes of clinical instruction of medical students attending the University in Galveston; and reserves also the right for such purposes to control the treatment of all charity patients. The city undertakes to permit the use of the facilities of the hospital for such instruction. The lease further provides that the hospital shall be managed and controlled by a hospital board, which is given the exclusive right to prescribe rules and regulations for the management and conduct of the hospital and to control its internal government. It is alleged that appellees, the Board of Managers, have made regulations excluding appellant and other licensed osteopathic physicians from practicing in the hospital and excluding patients who desire to be treated by appellant or other osteopaths. The bill does not set up diversity of citizenship of the parties

and the only ground of jurisdiction alleged is that the suit is one arising under the Constitution of the United States.

On motion directed to the pleadings, the bill was dismissed for want of equity. The case comes here on direct appeal. Jud. Code, § 238, before amended.

The case as presented carries to the point of extreme attenuation the principle that action by state officials depriving a person of property is to be deemed the action of the state for the purpose of determining whether the deprivation is within the prohibition of the Fourteenth Amendment. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278; *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 35, 36. Appellant does not point to any law of the state denying his asserted constitutional right to practice medicine in the John Sealy Hospital. The bill did not set up that appellees purported to act under any statute of the state denying such right. Appellant in fact argues that the state constitution and laws confer upon him the asserted right which is infringed by the action of the hospital board.

But if it be assumed that the question presented is the same as though the state legislature had enacted the regulation adopted by the hospital board, *Waterworks Co.* v. *Owensboro,* 200 U. S. 38, appellant fails to suggest, and we fail to perceive, any substantial basis for asserting that rights guaranteed to him by the Fourteenth Amendment have been infringed. The bill does not allege that appellant is a citizen of the state or of the United States, and there does not appear to be any substantial basis for urging that the action of the board abridges any privileges or immunities of a citizen of the United States. The protection of the due process clause extends to persons who are non-citizens. But the only protection claimed here is that of appellant's privilege to practice his calling. However extensive that protection may be in other situations, it can not we think, be said that all licensed physicians

have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private practice of medicine. Compare *Heim* v. *McCall,* 239 U. S. 175.

But it is argued that if some physicians are admitted to practice in the hospital all must be or there is a denial of the equal protection of the laws. Even assuming that the arbitrary exclusion of some physicians would have that legal consequence in the circumstances of this case, the selection complained of was based upon a classification not arbitrary or unreasonable on its face. Under the Texas constitution and statutes, anyone who shall " offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof " is a physician and may be admitted to practice within the state. Art. XVI, § 31, Texas Constitution, Complete Tex. Stat. 1920, Art. 5739, 5741, 5745. We cannot say that a regulation excluding from the conduct of a hospital the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws. Compare *Collins* v. *Texas,* 223 U. S. 288; *Watson* v. *Maryland,* 218 U. S. 173; *Crane* v. *Johnson,* 242 U. S. 339; *Jacobson* v. *Massachusetts,* 197 U. S. 11.

The validity of the action of the board under the Texas constitution is also before us. Art. XVI, § 31, of the Texas Constitution provides:

"The legislature may pass laws prescribing the qualification of practitioners of medicine in this state, and to punish persons for malpractice, but no preference shall ever be given by law to any schools of medicine."

The limitation of the provision is obviously directed to the qualifications of those to be admitted to the practice of their profession in the state and has nothing to do with the qualifications of those who are to be allowed to practice in a state hospital or to participate in an educational enterprise conducted by the state. Cf. *Germany* v. *The State,* 62 Tex. Cr. Rep. 276; *Ex parte Gerino,* 143 Cal. 412; *Harris* v. *Thomas* (Tex. Civ. App.), 217 S. W. 1068.

The action of the board does not violate rights or immunities guaranteed by either the state or the Federal Constitution.

Judgment affirmed.

TYSON AND BROTHER — UNITED THEATRE TICKET OFFICES, INCORPORATED, *v.* BANTON, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 261. Argued October 6, 7, 1926.—Decided February 28, 1927.

1. Sections 167 and 172, c. 590, N. Y. Ls. 1922, the former declaring that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, is a matter affected with a public interest, and the latter forbidding the resale of any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, contravene the Fourteenth Amendment. Pp. 429, 445.
2. The validity of the declaration (§ 167) that the price of admission is a matter "affected with a public interest," is in this case necessarily involved in determining the question directly

presented, viz., the validity of the price restriction on resales of tickets. P. 429.

3. The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the Due Process of Law clauses of the Fifth and Fourteenth Amendments. P. 429.
4. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all. P. 430.
5. The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. P. 430.
6. The power to fix prices does not exist in respect of merely private property or business, but exists only where the business or the property involved has become "affected with a public interest." P. 430.
7. A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood. P. 430.
8. Characterizations of businesses as "*quasi* public, not strictly private," and the like, while well enough as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description "affected with a public interest," as that phrase is used in the decisions of this Court as the basis for legislative regulation of prices. P. 430.
9. A declaration of the legislature that a business is affected with a public interest is not conclusive upon the judiciary in determining the validity of a regulation fixing prices in the business. P. 431.
10. The language of an opinion (*Munn* v. *Illinois*, 94 U. S. 113, 126) must be limited to the case under consideration. P. 433.
11. A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public. P. 434.

12. Each of the decisions of this Court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use. P. 438.
13. A theatre, though a license may be required, is a private enterprise; the license is not a franchise putting the proprietor under a duty to furnish entertainment to the public and admit all who apply. P. 439.
14. The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges, is rejected. P. 441.
15. A statutory provision fixing the prices at which theatre tickets may be resold can not be sustained as a measure for preventing fraud, extortion, and collusive arrangements between theatre managers and ticket brokers. P. 442.
16. Constitutional principles, applied as they are written, must be assumed to operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice. P. 445.

Reversed.

APPEAL from a decree of the District Court denying a temporary injunction in a suit brought by the appellant, a licensed ticket-broker corporation in New York, to restrain the District Attorney of New York County and the State Comptroller from forfeiting the license, forfeiting the bond accompanying the same, and prosecuting criminal proceedings, under the state law, because of the appellant's failure to conform to a provision thereof limiting the prices at which it may resell tickets, which it challenges as invalid under the Fourteenth Amendment.

Mr. Louis Marshall, with whom *Mr. James Marshall* was on the brief, for appellant.

The business of a ticket broker is lawful and cannot be prohibited. Theatre tickets are property in the constitutional sense. *People ex rel. Tyroler* v. *Warden of*

City Prison, 157 N. Y. 116; *People ex rel. Fleischmann* v. *Caldwell,* 64 App. Div. 46; aff'd 168 N. Y. 671; *People* v. *Marks,* 64 Misc. Rep. 679; *Collister* v. *Hayman,* 183 N. Y. 250; *Matter of Newman,* 109 Misc. Rep. 622; *People* v. *Weller,* 237 N. Y. 320.

It is unreasonable to suggest that the price of theatre tickets is "affected with a public interest" when this is not true of the prices of necessaries of life and wages. The limitations on the power of the Legislature to fix the price of commodities or of services, or to limit the right to contract with regard to them, were stated in *People* v. *Budd,* 117 N. Y. 15, aff'd *sub nom. Budd* v. *New York,* 143 U. S. 517; *People* v. *Weller,* 237 N. Y. 322; *Adkins* v. *Childrens Hospital,* 261 U. S. 525; *Adair* v. *United States,* 208 U. S. 174; *Coppage* v. *Kansas,* 236 U. S. 14. Distinguishing, *Wilson* v. *New,* 243 U. S. 322; *Block* v. *Hirsh,* 256 U. S. 135; *Brown Holding Co.* v. *Feldman,* 256 U. S. 170; and *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242. Other applicable decisions are, *Adams* v. *Tanner,* 244 U. S. 590; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Carrollton* v. *Bazette,* 159 Ill. 283; *People ex rel. Moskowitz* v. *Jenkins,* 202 N. Y. 53; *People ex rel. Tyroler* v. *Warden,* 157 N. Y. 116; *Collister* v. *Hayman,* 183 N. Y. 250; *Producers Transp. Co.* v. *R. R. Comm'rs,* 251 U. S. 230; *Pub. Util. Comm.* v. *Duke,* 266 U. S. 570; *Frost* v. *R. R. Comm.,* 271 U. S. 583.

Power to fix the price of theatre tickets was denied in *People* v. *Newman,* 109 Misc. Rep. 622; *Ex parte Quarg,* 149 Cal. 79; *People* v. *Steele,* 231 Ill. 340; *Chicago* v. *Powers,* 231 Ill. 531; *People* v. *Weiner,* 271 Ill. 74; *Chicago* v. *Netcher,* 183 Ill. 104; *People ex rel. Cort* v. *Thompson,* 283 Ill. 87. *Opinion of the Justices,* 247 Mass. 589, was merely an advisory opinion.

Neither the business of conducting a theatre nor that of a ticket broker is affected with a public interest. *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522; 267 U. S.

552; *Dorchy* v. *Kansas,* 264 U. S. 286; *National Bank* v. *Mechanics Nat. Bank,* 94 U. S. 438; *Rensselaer Glass Factory* v. *Reid,* 5 Cowen 608; *Gray* v. *Bennet,* 3 Metc. 522; *Dunham* v. *Gould,* 16 Johns. 367; *Houghton* v. *Page,* 2 N. H. 42; *Mason* v. *Callender,* 2 Minn. 350; *Kermot* v. *Ayer,* 11 Mich. 181; *Adriance* v. *Brooks,* 13 Tex. 279. Such cases as *Munn* v. *Illinois,* 94 U. S. 113; and *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, proceed upon the principle that an emergency existed. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 293, and *Adkins* v. *Childrens Hospital, supra. Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, distinguished. See also *Yellow Taxicab Co.* v. *Gaynor,* 82 Misc. Rep. 94; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Burns Baking Co.* v. *Bryan,* 264 U. S. 505; *People ex rel. Armstrong* v. *Warden,* 183 N. Y. 226. That even a theatre, and *a fortiori,* those who are engaged in the business of selling tickets entirely outside of the theatre, do not come within the purview of the doctrine on which the State relies, is apparent from the decisions in *Collister* v. *Hayman,* 183 N. Y. 250; *People ex rel. Burnham* v. *Flynn,* 189 N. Y. 160; *Aaron* v. *Ward,* 203 N. Y. 355, and *Wolcott* v. *Shubert,* 217 N. Y. 212. *People* v. *King,* 110 N. Y. 418 distinguished. *People ex rel. Cort* v. *Thompson,* 283 Ill. 87.

Mr. Felix C. Benvenga, with whom *Messrs. Robert D. Petty* and *Edwin B. McGuire* were on the brief, for appellee Banton.

The Court of Appeals of the State of New York has upheld the statute in its entirety, *People* v. *Weller,* 237 N. Y. 316; aff'g 207 App. Div. 337, and this Court has upheld it in part, *Weller* v. *New York,* 268 U. S. 319. The statute was passed in 1922. During 1923, at least three states passed statutes relating to the sale of tickets to places of amusement. Illinois, L. 1923, p. 323; New Jersey, L. 1923, p. 143, ch. 71; Connecticut, L. 1923, ch.

48. During 1924, while a similar bill was pending in the Massachusetts Senate, the Justices of the Supreme Judicial Court, in a carefully considered advisory opinion, in which *People* v. *Weller, supra,* was cited with approval, advised the Senate that the bill before it was constitutional. *Opinion of the Justices,* 247 Mass. 589. Thereafter, an act was passed, containing the substantial features of the proposed bill. See Ls. Massachusetts, 1924, c. 497, p. 551. The conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare as to require legislative regulation, cannot have been accidental and without cause. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389. Their determination, after investigation, must have great weight. *McLean* v. *Arkansas,* 211 U. S. 539; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Radice* v. *New York,* 264 U. S. 292; *Jones* v. *Portland,* 245 U. S. 217; *Block* v. *Hirsh,* 256 U. S. 135; *Armour* v. *North Dakota,* 240 U. S. 510; *People ex rel. Durham* v. *La Fetra,* 230 N. Y. 429; *Schieffelin* v. *Hylan,* 236 N. Y. 254. In determining whether local conditions justify state legislation, this Court should not only give great weight to the estimate of the state Legislature as to the existence of evils, but should give a cumulative effect to the recognition of the courts of the same state that those evils exist. *Green* v. *Frazier,* 253 U. S. 233; *Jones* v. *Portland,* 245 U. S. 217; *People* v. *Newman,* 109 Misc. Rep. 622; *People* v. *Weller, supra.* To concede that the only cure for the evil is some remedy initiated by the managers of the theatres is to admit that the State is powerless to promote the general welfare of the people and to accomplish the purposes for which governments are founded. *People ex rel. Durham* v. *La Fetra, supra; People* v. *Weller, supra.*

The extent to which regulation may reasonably go depends upon the nature of the business—whether it is

"affected with a public interest"; the fact that it closely touches a great many people, and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like. The business of conducting a theatre, though in one sense private, is not "strictly" private; it is a business that is "affected with a public interest," *People* v. *King,* 110 N. Y. 418; *Aaron* v. *Ward,* 203 N. Y. 351; *People* v. *Weller,* 237 N. Y. 322; *People ex rel. Cort Theatre Co.* v. *Thompson,* 283 Ill. 87; *Opinion of the Justices,* 247 Mass. 589. It is because the business is affected with a public interest that governmental regulation is justified. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore, the theatre becomes more essential to the welfare of the public; it becomes more "affected with a public interest." *People* v. *Weller, supra;* 37 Harvard L. R. 1127. Historically considered, theatres may be regarded as so affected. The Attic Theatre, Haigh, [3d ed.] p. 4, 330; Theatre of the Greeks, Donaldson, 309; 15 Amer. Cyc. 685; 26 Ency. Brit. [11th ed.] 736; Law of the Theatre, Wandell, p. 3. And in the United States, theatres have been subject to governmental regulation from earliest times, *Opinion of the Justices, supra; People ex rel. Cort* v. *Thompson, supra; Cecil* v. *Green,* 161 Ill. 265. The modern trend is shown by 19 R. C. L. 722. See also *Egan* v. *San Francisco,* 165 Cal. 576; *Los Angeles* v. *Dodge,* 51 Cal. App. 492; *Schieffelin* v. *Hylan,* 236 N. Y. 254; *People ex rel. Cort* v. *Thompson, supra.*

If the business of conducting a theatre is a business affected with a public interest, that of reselling theatre tickets is also affected. *Opinion of the Justices, supra; People* v. *Weller, supra.* Assuming that the business may not, in its origin, have been affected with a public interest, yet because of the abuses which have grown up in con-

nection with it, it has become so affected. *German Alliance Ins. Co.* v. *Lewis, supra.* Although the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified, yet the indication by the legislature of its own purposes may certainly, in some degree, guide the courts in their consideration of the validity of the legislative assertion of power. *People* v. *Weller, supra; Block* v. *Hirsh, supra; Opinion of the Justices, supra.* The general principle is that a state legislature may, under its police power, regulate prices and charges; that the extent to which regulation may reasonably go depends upon the nature of the business—whether it is "affected with a public interest"; the fact that it touches a great many people, and that it may afford opportunities for imposition and oppression, as cases of monopoly and the like. *Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *Brass* v. *Stoeser,* 153 U. S. 391; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Block* v. *Hirsh, supra; Brown* v. *Feldman,* 256 U. S. 170; *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522. Since *Munn* v. *Illinois* (1876), this method of regulation has been familiar in all American courts, and many kinds of business carried on without special franchises or privileges have been treated as public in character, and declared subject to legislative control. *Ratcliff* v. *Stockyards Co.,* 74 Kan. 1; *Opinion of the Justices, supra,* and many cases cited therein. The illustrations given in the cases cited show that the doctrine of the *Munn* case has not only been adhered to, but has been expanded and advanced to meet conditions as they arose. Burdick, Law of the Constitution, § 272; *Producers Transp. Co.* v. *R. R. Comm.,* 251 U. S. 228; *People ex rel. Durham* v. *La Fetra, supra; Frost* v. *R. R. Comm.,* 271 U. S. 589; *People* v. *King,* 110 N. Y. 418; *Aaron* v. *Ward,* 203 N. Y. 351; *Civil Rights Cases,* 109 U. S. 3, dissent.

When evils are admitted, great discretion should be allowed the legislature in devising remedies. If it has been demonstrated by experience that a remedy is not sufficient to check the evil, then certainly the legislature can, under the police power, adopt a new and more drastic remedy. Power to adopt new remedies when old remedies fail is illustrated by the legislation as to lotteries, carrying concealed weapons and regulating the sale of intoxicating liquors. *Ford* v. *State* 85 Md., 465; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Collister* v. *Hayman, supra.* The Legislature was under a duty to pass the present statute and fix a rate. Its inaction would have been a confession that it was powerless to secure to its citizens the blessings of freedom and to promote the general welfare. *People ex rel. Durham* v. *La Fetra* 230 N. Y. 429; *People* v. *Schweinler Press,* 214 N. Y. 395; *State* v. *Harper,* 148 Wis. 57; *Lawton* v. *Steele,* 152 U. S. 133.

Mr. Robert P. Beyer, Deputy Attorney General of New York, with whom *Mr. Albert Ottinger,* Attorney General, was on the brief, for appellee Murphy.

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant is engaged in the business of reselling tickets of admission to theatres and other places of entertainment in the City of New York. It employs a large number of salesmen, messenger boys and others. Its expenses are very large, and its sales average approximately 300,000 tickets per annum. These tickets are obtained either from the box office of the theatre or from other brokers and distributors. It is duly licensed under § 168, c. 590, New York Laws, 1922, and has given a bond under § 169 of that chapter in the penal sum of $1,000 with sureties, conditioned, among other things, that it will not be guilty of any fraud or extortion. See *Weller* v. *New York,* 268 U. S. 319, 322.

Section 167 of chapter 590 declares that the price of or charge for admission to theatres, etc., is a matter affected with a public interest and subject to state supervision in order to safeguard the public against fraud, extortion, exorbitant rates and similar abuses. Section 172 forbids the resale of any ticket or other evidence of the right of entry to any theatre, etc., "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry," such printing being required by that section. Both sections are reproduced in the margin.*

This suit was brought to enjoin respondents from proceeding either at law or in equity to enforce the last named section, and from revoking plaintiff's license, enforcing by suit or otherwise the penalty of the bond or prosecuting criminally appellant or any of its officers or agents for reselling or attempting to resell any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of fifty cents in advance of the printed

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* § 167. *Matters of Public Interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§ 172. *Restriction as to Price.* No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm, or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

price. The bill alleges threats on the part of appellees to enforce the statute against appellant, to forfeit its license, enforce the penalty of its bond and institute criminal prosecutions against appellant, its officers and agents. It is further alleged that the terms of the statute are so drastic and the penalties for its violation so great [imprisonment for one year or a fine of $250 or both] that appellant may not resell any ticket or evidence of the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the law; and that appellant will be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law, in contravention of the Fourteenth Amendment to the federal Constitution. Following the rule frequently announced by this court, that "equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property," we sustain the jurisdiction of the district court. *Packard* v. *Banton,* 264 U. S. 140, 143, and cases there cited.

The case was heard below by a statutory court of three judges and a decree rendered denying appellant's prayer for a temporary injunction and holding the statute assailed to be valid and constitutional. The provision of the statute in question also has been upheld in a judgment of the New York state court of appeals, *People* v. *Weller,* 237 N. Y. 316, brought here on writ of error. That case, however, directly involved only § 168, requiring a license, and although it was insisted that § 172 restricting prices should also be considered, upon the ground that the two provisions were inseparable, this court held otherwise, sustained the validity of the license section and declined to

pass upon the other one. *Weller* v. *New York,* 268 U. S. 319, 325.

Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (§ 167) is that the price of or charge for admission to a theatre, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is a matter affected with a public interest. To affirm the validity of § 172 is to affirm this declaration completely, since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated. And since the ticket broker is a mere appendage of the theatre, etc., and the *price of* or *charge for admission* is the essential element in the statutory declaration, it results that the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of the charge, which its patrons may be required to pay.

In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax,* 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See *City of Carrollton* v. *Bazzette,* 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.

The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U. S. 238, 246, but exists only where the business or the property involved has become "affected with a public interest." This phrase, first used by Lord Hale 200 years ago, *Munn* v. *Illinois,* 94 U. S. 113, 126, it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined;—it can only be approximated.

A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.

The characterizations in some decisions of businesses as "*quasi* public," *People* v. *King,* 110 N. Y. 418, 428, "not 'strictly' private," *Aaron* v. *Ward,* 203 N. Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular

businesses, cannot be accepted as equivalents for the description "affected with a public interest," as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.

And, finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 536.

In the *Wolff* case, this court held invalid the wage fixing provision of the compulsory arbitration statute of Kansas as applied to a meat packing establishment. The power of a legislature, under any circumstances, to fix prices or wages in the business of preparing and selling food was seriously doubted, but the court concluded that, even if the legislature could do so in a public emergency, no such emergency appeared, and, in any event, the power would not extend to giving compulsory continuity to the business by compulsory arbitration. In the course of the opinion (p. 535), it was said that business characterized as clothed with a public interest might be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest

times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State* v. *Edwards,* 86 Me. 102; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly." Citing the *Munn* case and others.

If the statute now under review can be sustained as valid, it must be in virtue of the doctrine laid down in the third paragraph; and it will aid in the effort to reach a correct conclusion in that respect if we shall first consider the principal decisions of this court where that doctrine has been applied. The leading, as well as the earliest, definite decision dealing with a business falling within that class is *Munn* v. *Illinois, supra,* which sustained the validity of an Illinois statute fixing the maximum charge to be made for the use of elevators and warehouses for the elevation and storage of grain.

As ground for that decision the opinion recites, among other things, that grain came from the west and northwest by water and rail to Chicago where the greater part of it was shipped by vessel to the seaboard and some of it by railway to eastern ports; that Chicago had been made the greatest grain market in the world; and that the business had created a demand for means by which the immense quantity of grain could be handled or stored and these had been found in grain elevators. In this way the largest

traffic between the country north and west of Chicago and that lying on the Atlantic coast north of Washington, was in grain passing through the elevators at Chicago. The trade in grain between seven or eight of the great states of the west and four or five of those lying on the sea-shore, formed the largest part of the interstate commerce in these states. The elevators in Chicago were immense structures, holding from 300,000 to 1,000,000 bushels at one time. Under these circumstances, it was said that the elevators stood in the very "gateway of commerce" and took toll from all who passed; that their business certainly tended to a common charge and had become a thing of public interest and use; that every bushel of grain for its passage paid a toll, which was a common charge; and, finally, that if any business could be clothed "with a public interest, and cease to be *juris privati* only," this had been made so by the facts.

There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. It was said, for example (p. 126): "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Literally, that would include all the large industries and some small ones; but in accordance with the well settled rule the words must be limited to the case under consideration. *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Plumley* v. *Massachusetts,* 155 U. S. 461, 474. Indeed, the language quoted is qualified immediately by a statement of the general rule, that— "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The significant requirement is that the property shall be devoted to a use in which the public has an interest,

which simply means, as in terms it is expressed at page 130, that it shall be devoted to "a public use." Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public. See *Louisville &c. R. R. Co.* v. *West Coast Co.,* 198 U. S. 483, 500. The subsequent elevator and warehouse cases, *Budd* v. *New York,* 143 U. S. 517, and *Brass* v. *Stoeser,* 153 U. S. 391, while presenting conditions of less gravity, rest upon the authority of the *Munn* case. The differences among the three cases are in matters of degree.

In *Cotting* v. *Kansas City Stock Yards Co., &c.,* 183 U. S. 79, 85, Mr. Justice Brewer, speaking on that point for himself and two other members of the court, said that, tested by the *Munn* case, the stock yards of the company, situated in one of the gateways of commerce and so located that they furnished important facilities to all seeking transportation of cattle, were subject to governmental price regulation. But the majority of the court, without referring to this view, assented to a reversal upon a ground specifically stated (pp. 114–115); and the authority of the case must be limited by the terms of that statement.

German Alliance Ins. Co. v. *Kansas,* 233 U. S. 389, carries the doctrine further and marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation. There the court said that a business might be affected with a public interest so as to permit price regulation although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service; and it was held that fire insurance was such a business. Mr. Justice McKenna, speaking for the court, pointed out that in an insurance business each risk was not individual;

that "there can be standards and classification of risks, determined by the law of averages," and, while there might be variations, that rates are fixed and accommodated to such standards. Discussing the question whether the business was affected with a public interest so as to justify regulation of rates, it was then said (p. 406):

"And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation."

The business of common carriers, transmission of intelligence, furnishing water and light, gas and electricity, were cited as examples, and the *Munn, Budd* and *Brass* cases reviewed. The fact that the contract of fire insurance was personal in character, it was said, did not preclude regulation, and in that connection it was pointed out that insurance companies were so regulated by state legislation as to show that the law-making bodies of the country, without exception, regarded the business of insurance as so far affecting the public welfare as to invoke and require governmental regulation. And it was then said (p. 412–413):

"Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as

possible on the public at large, the body of the insured, not the companies, paying the tax."

And again (p. 413):

"Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals."

And again (p. 414):

"We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility."

Answering the objection that the reasoning of the opinion would subject every act of human endeavor and the price of every article of human use to regulation, it was said (p. 415):

"And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.'"

This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business. And this view is borne out by a general consideration of the case. The decision proceeds

upon the ground that the insurance business is to be distinguished from ordinary private business; that an insurance company, in effect, is an instrumentality which gathers funds upon the basis of equality of risk from a great number of persons—sufficiently large in number to cause the element of chance to step out and the law of averages to step in as the controlling factor,—and holds the numerous amounts so collected as a general fund to be paid out to those who shall suffer losses. Insurance companies do not sell commodities;—they do not sell anything. They are engaged in making contracts with and collecting premiums from a large number of persons, the effect of their activities being to constitute a guaranty against individual loss and to put a large number of individual contributions into a common fund for the purpose of fulfilling the guaranty. In this fund all are interested, not in some vague or sentimental way, but in a very real, practical and definite sense. It was from the foregoing and other considerations peculiar to the insurance business that the court drew its conclusion that the business was clothed with a public interest.

Wilson v. *New,* 243 U. S. 332 (involving the Adamson law), *Block* v. *Hirsh,* 256 U. S. 135, and *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170 (the rental cases), are relied upon to sustain the statute now under review. But in these cases the statutes involved were of a temporary character, to tide over grave emergencies, *Adkins* v. *Children's Hospital,* 261 U. S. 525, 551–552, the emergency in the *New* case being of nation-wide extent; and it is clear that, in the opinion of this court, at least the business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists. *Block* v. *Hirsh, supra,* p. 157; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 548. And even with the emergency, the stat-

utes "went to the verge of the law." *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 416.

Nor is the sale of ordinary commodities of trade affected with a public interest so as to justify legislative price fixing. This court said in *Wolff Co.* v. *Industrial Court, supra,* p. 537:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

See also, *United States* v. *Bernstein,* 267 Fed. 295, 296.

From the foregoing review it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.

Lord Hale's statement that when private property is "affected with a public interest, it ceases to be *juris privati* only," is accepted by this court as the guiding principle in cases of this character. That this phrase was not intended by its author to include private undertakings, like those enumerated in the statute now under consid-

eration, is apparent when we consider the connection in which it was used. It occurs in Lord Hale's manuscript, *De Portibus Maris,* 1 Harg. Law Tracts, 78, in which the three-fold rights of the proprietor, the public and the king in ports are considered. It first is pointed out that no man can erect a public port without the king's license, though if he set up a port for his private advantage he may take what rates he and his customers can agree upon. But, it is said, if the king or the subject have a public wharf, to which all persons must come, because it is the wharf only licensed by the king, or there is no other wharf in that port, arbitrary and excessive charges cannot be made. For it is then affected with a public interest and ceases to be *juris privati* only; "as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest."

It is clear that, as there announced, the rule is confined to conveniences made public because the privilege of maintaining them has been *granted* by government or because there has arisen what may be termed a *constructive grant* of the use to the public. That this is what Lord Hale had in mind is borne out, and the question now under consideration is illuminated, by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting public right of use is very apparent.

A theatre or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stock yards, standing in

like relation to the commerce in live stock; or an insurance company, engaged, as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, "terminating in their effect with the instances." And, certainly, a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency.

The interest of the public in theatres and other places of entertainment may be more nearly, and with better reason, assimilated to the like interest in provision stores and markets and in the rental of houses and apartments for residence purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency; and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments.

A theatre ticket may be in the form of a revocable license or of a contract. If the former, it may be revoked at the will of the proprietor; if the latter, it may be made non-transferable or otherwise conditioned. A theatre, of course, may be regulated so as to preserve the public peace, insure good order, protect public morals, and the like. A license may be required, but such a license is

not a franchise which puts the proprietor under the duty of furnishing entertainment to the public or, if furnished, of admitting everyone who applies. See *Collister* v. *Hayman,* 183 N. Y. 250, 253. How far the power of the legislature may be exerted to prevent discriminating selection by the proprietor of his patrons upon the basis of race, color, creed, etc., *People* v. *King,* 110 N. Y. 418, need not be determined; for in any event such power and the other powers of regulation just enumerated fall far short of the one here invoked to fix prices.

The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges, does not seem to us impressive. It may be true, as asserted, that, among the Greeks, amusement and instruction of the people through the drama was one of the duties of government. But certainly no such duty devolves upon any American government. The most that can be said is that the theatre and other places of entertainment, generally have been regarded as of high value to the people, to be encouraged, but, at the same time, regulated, within limits already stated. While theatres have existed for centuries and have been regulated in a variety of ways, and while price fixing by legislation is an old story, it does not appear that any attempt hitherto has been made to fix their charges by law. This is a fact of some significance in connection with the historical argument, and, when set in contrast with the practice in respect of inn-keepers and others, whose charges have been subjected to legislative regulation from a very early period, it persuasively suggests that by general legislative acquiescence theatres, historically, have been regarded as falling outside the classes of things which should be thus controlled. It will not do to say that this failure of legislative bodies to act in the matter has been due to the absence of complaints on the part of the public,

for it hardly is probable that a privilege as ancient and as amply exercised as that of complaining about prices in general, has not been freely indulged in the matter of charges for entertainment. Indeed, it is judicially recorded that, as long ago as 1809, there was a riot in the Royal Theatre, London, for the purpose of compelling a reduction in prices of admission. In deciding a case growing out of the disturbance, *Clifford* v. *Brandon,* 2 Campb. 358, 368, the court summarily disposed of the claim that people had a right to express their disapprobation of high prices in such a tumultuous manner, by saying that " the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage," and that any person who did not approve could stay away.

If it be within the legitimate authority of government to fix maximum charges for admission to theatres, lectures (where perhaps the lecturer alone is concerned), baseball, football and other games of all degrees of interest, circuses, shows (big and little), and every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy-gurdy, *Commonwealth* v. *Bow,* 177 Mass. 347, it is hard to see where the limit of power in respect of price fixing is to be drawn.

It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental

interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—*Commonwealth* v. *O'Brien & others,* 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.

What this court said in *Adams* v. *Tanner,* 244 U. S. 590, 594, in the course of its opinion holding invalid a statute of Washington penalizing the collection of fees for securing employment, is apposite:

"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 cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

The evil of collusive alliances between the proprietors of theatres and ticket brokers or scalpers seems to have been effectively dealt with in Illinois by an ordinance

which required (1) that the price of every theatre ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theatre shall receive or enter into any arrangement or agreement to receive more. This ordinance was sustained as valid by the state supreme court in *The People* v. *Thompson,* 283 Ill. 87, 97; and that decision is cited here in support of the present statute. But the important distinction between that case and this is that the ordinance did not forbid the resale of the ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit, provided that price was printed on the face of the ticket.

That court had held in the earlier case of *The People* v. *Steele,* 231 Ill. 340, 344, that the business of conducting a theatre was a private one; that the legislature had the power to regulate it as a place of public amusement and might require a license; that the legislature had the same power to regulate such a business as it had to regulate any other private business, and no more. And an act which prohibited the resale of tickets for more than the price printed thereon was held to be invalid as an arbitrary and unreasonable interference with the rights of the ticket broker. It was distinctly held that the intending purchaser of the ticket had no right to buy at any price except that fixed by the holder; that the manager might fix the price arbitrarily, and raise or lower it at his will; that having advertised a performance, he was not bound to give it, and having advertised a price, he was not bound to sell at that price; and that the business of dealing in theatre tickets and the right to contract with regard to them were entitled to protection. To the same effect, see *Ex parte Quarg,* 149 Cal. 79.

This doctrine was reaffirmed in the *Thompson* case, but held to have no application to the ordinance there considered and not to be inconsistent with the holding (p. 97)

that the manager of a place of public entertainment might "be compelled to treat patrons impartially by putting an end to an existing system by which theatre owners and ticket scalpers are confederated together to compel a portion of the public to pay a different price from others."

It should not be difficult similarly to define and penalize in specific terms other practices of a fraudulent character, the existence or apprehension of which is suggested in brief and argument. But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice.

We are of opinion that the statute assailed contravenes the Fourteenth Amendment and that the decree must be

Reversed.

MR. JUSTICE HOLMES, dissenting.

We fear to grant power and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (*Graham* v. *United States,* 231 U. S. 474, 480), and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation

when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. Coming down to the case before us I think, as I intimated in *Adkins* v. *Children's Hospital,* 261 U. S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. *Mugler* v. *Kansas,* 123 U. S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE STONE, dissenting.

I can agree with the majority that "constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice." But I find nothing written in the Constitution, and nothing in the case or common law development of the Fourteenth Amendment, which would lead me to conclude that the type of regulation attempted by the State of New York is prohibited.

The scope of our inquiry has been repeatedly defined by the decisions of this Court. As was said in *Munn* v. *Illinois*, 94 U. S. 113, 132, by Chief Justice Waite, "For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legisla-

ture is the exclusive judge." The attitude in which we should approach new problems in the field of price regulation was indicated in *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 409: "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of the regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or constitutional guarantees impaired." Again, in sustaining the constitutionality of a zoning ordinance under the Fourteenth Amendment, this Court has recently said, "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

The question with which we are here concerned is much narrower than the one which has been principally discussed by the Court. It is not whether there is constitutional power to fix the price which theatre owners and producers may charge for admission. Although the statute in question declares that the price of tickets of admission to places of amusement is affected with a public interest, it does not purport to fix prices of admission. The producer or theatre proprietor is free to charge any price he chooses. The statute requires only that the sale price, whatever it is, be printed on the face of the ticket, and prohibits the licensed ticket broker, an intermediary

in the marketing process, from reselling the ticket at an advance of more than fifty cents above the printed price.[1] Nor is it contended that this limit on the profit is unreasonable. It appears affirmatively that the business is now being carried on profitably by ticket brokers under this very restriction. But if it were not, there could be judicial relief without affecting the constitutionality of the measure. In these respects, the case resembles *Munn* v. *Illinois, supra,* where the attempt was not to fix the price of grain but to fix the price of the service rendered by the proprietors of grain elevators in connection with the transportation and distribution of grain, the cost of which entered into the price ultimately paid by the consumer. The statute there, as the statute here, was designed in part to protect a large class of consumers from

[1] Turning to the broader question, the public importance of theatres has been manifested in regulatory legislation in this country from the earliest times. Beale, Innkeepers, § 325n; *Cecil* v. *Green,* 161 Ill. 265, 268. In New York, physical construction of theatres with respect to fire escapes, exits and seating is regulated, Village Law, § 90, par. 25; licenses to produce shows are required, Town Law, § 217; Sunday entertainments of certain kinds, Penal Code, § 2145, cf. *People* v. *Hoym,* 20 How. Prac. 76; *Neuendorff* v. *Duryea,* 6 Daly 276; discrimination because of race or color, Penal Code, § 514, *People* v. *King,* 110 N. Y. 418, or against persons wearing United States uniforms, Penal Code, § 517; appearance of children under fourteen upon the stage, *People* v. *Ewer,* 141 N. Y. 129; admission of children under sixteen, Penal Code, § 484; presentation of certain types of exhibitions, Penal Code, §§ 831, 833; or immoral shows and exhibitions, Penal Code, § 1140a; or plays in which a living character represents the Deity, Penal Code, § 2074; are all prohibited. Section 3657, Page, Ohio Gen. Code, empowering municipalities to require licensing of theatrical exhibitions and theatre ticket selling and § 12600–2 *et seq.* regulating physical construction, etc., are typical of present day statutes. This Court has upheld legislation regulating admissions to public entertainments, *Western Turf Association* v. *Greenberg,* 204 U. S. 359; and providing for censorship of motion pictures, *Mutual Film Corp.* v. *Ohio Industrial Commission,* 236 U. S. 230.

exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer.

There are about sixty first class theatres in the borough of Manhattan. Brokers annually sell about two million tickets, principally for admission to these theatres. Appellant sells three hundred thousand tickets annually. The practice of the brokers, as revealed by the record, is to subscribe, in advance of the production of the play and frequently before the cast is chosen, for tickets covering a period of eight weeks. The subscriptions must be paid two weeks in advance and about twenty-five per cent. of the tickets unsold may be returned. A virtual monopoly of the best seats, usually the first fifteen rows, is thus acquired and the brokers are enabled to demand extortionate prices of theatre goers. Producers and theatre proprietors are eager to make these advance sales which are an effective insurance against loss arising from unsuccessful productions. The brokers are in a position to prevent the direct purchase of tickets to the desirable seats and to exact from the patrons of the successful productions a price sufficient to pay the loss of those which are unsuccessful, plus an excessive profit to the broker.

It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that as a general proposition, under the decisions of this Court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power, before concluding that it may not be exercised here.

The phrase "business affected with a public interest" seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences, and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is "free" competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the

bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in *Munn* v. *Illinois, supra;* or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in *German Alliance Ins. Co.* v. *Kansas, supra,* or from a housing shortage growing out of a public emergency as in *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, the result is the same. Self interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.

That should be the result here. We need not attempt to lay down any universal rule to apply to new and unknown situations. It is enough for present purposes that this case falls within the scope of the earlier decisions and that the exercise of legislative power now considered was not arbitrary. The question as stated is not one of reasonable prices, but of the constitutional right in the circumstances of this case to exact exorbitant profits beyond reasonable prices. The economic consequence of this regulation upon individual ownership is no greater, nor is it essentially different from that inflicted by regulating rates to be charged by laundries, *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331 (*semble*), by anti-monopoly laws, Sunday laws, usury statutes, *Griffith* v. *Connecticut,* 218 U. S. 563; Workmen's Compensation Acts, *New York Central R. R.* v. *White,* 243 U. S. 188; the zoning ordinance upheld in *Village of Euclid* v. *Ambler Realty Co., supra;* or state statutes restraining the owner of land

from leasing it to Japanese or Chinese aliens, upheld in *Terrace* v. *Thompson,* 263 U. S. 197; *Webb* v. *O'Brien,* 263 U. S. 313; or state prohibition laws upheld in *Mugler* v. *Kansas,* 123 U. S. 623; or legislation prohibiting option contracts for future sales of grain, *Booth* v. *Illinois,* 184 U. S. 425, or invalidating sales of stock on margin or for "futures," *Otis* v. *Parker,* 187 U. S. 606; or statutes preventing the maintenance of pool parlors, *Murphy* v. *California,* 225 U. S. 623, or in numerous other cases in which the exercise of private rights has been restrained in the public interest. *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269; *Terminal Taxicab Co.* v. *Dist. of Columbia,* 241 U. S. 252; *Mutual Loan Co.* v. *Martell,* 222 U. S. 225; *Schmidinger* v. *Chicago,* 226 U. S. 578; cf. *Green* v. *Frazier,* 253 U. S. 233; *National Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Clark* v. *Nash* 198 U. S. 361. Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life.

The problem sought to be dealt with has been the subject of earlier legislation in New York and has engaged the attention of the legislators of other states.[2] That it is

[2] An earlier ordinance of New York City, substantially similar to the present act, was construed in *People* v. *Newman,* 109 Misc. 622, overruled by *People* v. *Weller,* 237 N. Y. 316. Section 1534 Penal Code, makes it a misdemeanor for brokers to sell tickets on the street.

Acts & Resolves of Mass. 1924, c. 497, controlling resale of tickets with maximum brokerage charges similar to the New York statute was approved in *Opinion of Justices,* 247 Mass. 497. Conn. Pub. Acts,

one involving serious injustice to great numbers of individuals who are powerless to protect themselves cannot be questioned. Its solution turns upon considerations of economics about which there may be reasonable differences of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this Court. Holding these views, I believe the judgment below should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

MR. JUSTICE SANFORD, dissenting.

I regret that I cannot agree with the opinion of the Court in this case. My own view is more nearly that expressed by Mr. Justice Stone. Shortly stated, it is this: The case, I think, does not involve the question whether the business of theatre owners offering their separate entertainments is so affected with a public interest that the price which they themselves charge for tickets is subject to regulation by the legislature, but the very different question whether the business of ticket brokers who intervene between the theatre owners and the general public in the sale of theatre tickets is affected with a public interest, and may, under the circumstances disclosed in this case, be

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1923, c. 48; New Jersey Laws 1923, c. 71; Cal. Penal Code, § 526, make it a misdemeanor to sell tickets in excess of the printed price. The California Act was declared unconstitutional in *Ex parte Quarg*, 149 Cal. 79. A similar statute in Illinois was held invalid, *People* v. *Steele*, 231 Ill. 340. A license ordinance of ticket peddlers was also declared invalid in California. *Ex parte Dees*, 46 Cal. App. 656. Those enactments are clearly more drastic than the New York statute. A Chicago ordinance prohibiting secret alliances and profit sharing between proprietors and scalpers was upheld. *People* v. *Thompson*, 283 Ill. 87. See also, Laws of Ill. 1923, p. 322.

regulated by the legislature to the extent of preventing them from selling tickets at more than a reasonable advance upon the theatre prices. The facts stated by Mr. Justice Stone are substantially those found by the District Court. They show, as I think, clearly, that the ticket brokers, by virtue of arrangements which they make with the theatre owners, ordinarily acquire an absolute control of the most desirable seats in the theatres, by which they deprive the public of access to the theatres themselves for the purpose of buying such tickets at the regular prices, and are enabled to exact an extortionate advance in prices for the sale of such tickets to the public.

In *Munn* v. *Illinois,* 94 U. S. 113, 132—although there was no holding that the sale of grain was in itself a business affected with a public interest which could be regulated by the legislature—it was held that the separate business of grain elevators, which " stood in the very gateway of commerce " in grain, " taking toll " from all who passed and tending to a common charge, had become, by the facts, clothed " with a public interest " and was subject to public regulation limiting the charges to a reasonable toll. So, I think, that here—without reference to the character of the business of the theatres themselves—the business of the ticket brokers, who stand in " the very gateway " between the theatres and the public, depriving the public of access to the theatres for the purchase of desirable seats at the regular prices, and exacting toll from patrons of the theatres desiring to purchase such seats, has become clothed with a public interest and is subject to regulation by the legislature limiting their charges to reasonable exactions and protecting the public from extortion and exorbitant rates. See *People* v. *Weller,* 207 App. Div. 337, 343, and 237 N. Y. 316, 331, in which the constitutionality of this statute was sustained by the New York courts; and *Opinion of the Justices to the Senate,* 247 Mass. 589, 598. And in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 535, it was recognized that a business,

although not public at its inception, might become clothed with a public interest justifying some government regulation, by coming "to hold such a peculiar relation to the public that this is superimposed" upon it. This, I think, is the case here.

PAN AMERICAN PETROLEUM AND TRANSPORT COMPANY ET AL. *v.* UNITED STATES.

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

No. 305. Argued October 4, 5, 1926.—Decided February 28, 1927.

1. The evidence sustains findings that the making of the leases and contracts involved herein was dominated by the Secretary of the Interior, acting collusively with the representative of the two defendant oil companies; that the Secretary of the Navy took no active part in the negotiations; and that the leases and contracts were procured by corruption and fraud. P. 498.
2. The finding that the Secretary of the Navy signed the documents under misapprehension and without full knowledge of their contents is not sustained. An opposite finding is required by the record. P. 498.
3. In a suit by the United States to annul contracts made through its officials with private corporations, the *bona fides* of which had been investigated by a committee of the Senate, statements made to the committee by the companies' representative, who voluntarily appeared in defense of their interests, showing that he gave money to one of the officials who dominated the procurement and participated in the execution of the contracts, were admissible against the defendant corporations in proof of fraud. P. 498.

   So held where he who made the statements was the representative of both companies in procuring the contracts; was at that time president of one company and chairman of the board of directors of the other, having been its president also; controlled both companies through stock ownership; and was chairman of both boards of directors when he testified.

4. A lease of the land of a naval reserve and related contracts, which were procured by private corporations as the result of collusion and corrupt conspiracy between their representative and a high government official who, under an executive order, dominated the administration of the reserve, may be avoided by the United States without regard to whether money paid the official by the representative constituted bribery as defined in the Criminal Code, or whether the official was financially interested in the transaction, or the United States suffered or was liable to suffer any financial loss or disadvantage as a result of the contracts and leases. It is enough if the official's interest and dominating influence were corruptly obtained. It was shown that he so favored the lease and contracts that he could not loyally serve the interests of the United States. P. 500.
5. The Secretary of the Navy was not empowered by the Appropriation Act of June 4, 1920, to enter into contracts involving the leasing of all the unleased land of a naval petroleum reserve, and providing for the use of the crude oil, to be derived by the United States as royalties under such leases, for the acquisition of extensive storage facilities filled with fuel oil for the Navy. Pp. 501, 502, 508.
6. Under the proviso of the Naval Appropriation Act of June 4, 1920, the authority of the Secretary of the Navy to provide facilities in which to "store" naval reserve petroleum or its products did not extend beyond those that might be provided by use of the money made available by that act. P. 509.
7. While the general principles of equity are applicable in a suit by the United States to secure the cancelation of a conveyance or the rescission of a contract, they will not be applied to frustrate the purpose of its laws or to thwart public policy. P. 505.
8. In this suit brought by the United States to set aside illegal and fraudulent leases and contracts, which were made for the purpose of circumventing its laws and defeating its policy for the conservation of its naval petroleum reserves, the United States does not stand on the footing of an individual suing to annul a deed for fraud; its position is not that of a mere seller or lessor of land; the purpose is to vindicate the policy mentioned, the financial element being secondary; the defendants are wrong-doers, and have no equity to reimbursement for their expenditures as a condition to the granting of the relief sought by the Government. Pp. 503, 508.

9. In a suit by the United States to set aside for illegality and fraud leases made, in contravention of the policy of conserving naval petroleum reserves, and contracts made, as part of the same transaction, for erection of oil storage facilities for the Navy, not authorized by Congress, on land of the United States and for storing them with fuel oil, equity does not exact as a condition to the relief prayed that the defendants be compensated for the cost to them, or the value to the Government, of the construction work performed or fuel oil furnished under the contracts, or for the amount they expended in drilling or operating oil wells or in other improvements on the leased premises; but their compensation, if any, must depend on Congress. Pp. 503, 508.

9 F. (2d) 761, affirmed.

CERTIORARI (270 U. S. 640) to a decree of the Circuit Court of Appeals which affirmed in part and in part reversed a decree of the District Court (6 F. (2d) 43), in a suit by the United States to cancel two leases of land in a naval petroleum reserve, and two contracts for erecting storage facilities and supplying fuel oil for the Navy. The bill also prayed an account. The decree of the District Court canceled the leases and contracts for fraud and illegality, but, in the accounting, allowed credits to the two corporations for their expenditures under the leases and contracts, with interest. The Circuit Court of Appeals denied such credits, but in other respects affirmed the decree.

Messrs. Frank J. Hogan and *Frederic R. Kellogg,* with whom *Messrs. Joseph J. Cotter, Dean Emery, Harold Walker, Charles Wellborn, Olin Wellborn, Jr., Henry W. O'Melveny,* and *Walter K. Tuller* were on the brief, for petitioners.

Under the Act of June 4, 1920, the Secretary of the Navy had authority to make the exchange contracts and the leases. This was a special enactment, complete in itself, relating to a subject which was not included in the general leasing act, and simply placed in the form of a proviso for legislative convenience, or for some other reason which does not affect its meaning and scope. *Amer. Express Co.* v. *United States,* 212 U. S. 522; *I. C. C.* v. *Baird,* 194 U. S. 25; *C. & P. Tel. Co.* v. *Manning,* 186 U. S. 238. The Act contains within itself a complete and comprehensive legislative scheme to repose exclusive control in the Secretary of the Navy as to all matters in connection with naval reserve affairs. The entire responsibility for the handling of these naval reserves was vested in him, and he was given full discretion.

He could theoretically leave them as they were and take chances with regard both to the loss of oil from adjacent drilling and as to the unavailability of petroleum products for naval use when needed. This is covered by the use of the word " conserve " in its narrow sense. This was not what Congress had primarily in mind, because it could have been accomplished without any new legislation; and the law had been passed with the idea that active and not inactive methods should be thereafter pursued in order to protect both the oil reserves and the strategic interests of the United States Navy. The word " conserve " must be construed together with the other language used—and is immediately followed by the words " develop, use and operate." Hence, it is submitted to be clear that an active conservation and not merely a passive conservation was intended by Congress, and that Congress recognized that truest conservation of oil which was intended for the use of the Navy might well be accomplished by operating and developing the oil fields—using them—getting the oil to the surface either by lease, development, contract—or otherwise taking such steps

that this oil should be transmuted into something which the Navy could actually consume, and so locating it that when necessary it would be available for naval service.

The word "develop" can have but one meaning as applied to oil territory, and that is to cause oil to be produced from that territory. The Secretary could do this directly by hiring drillers and organizing a field force, if he saw fit, which would be an "operation" of the property. Or he could develop the same property indirectly or by contract—that is to say, by hiring the services of skilled oil men to do the necessary work and produce all oil possible, for the account and risk of the United States. Or he could "lease" all or any part of this property. To emphasize the extent of his discretion as to how these lands should be handled, the words "or otherwise" are added after the specific words hereinbefore mentioned.

As to the leasing power, it is absolutely unlimited and unconditional. There is no limit as to the area which could be leased in any or all of the reserves. In this respect the statute is notably different from certain of the sections of the law of February 25, 1920, in which definite limitations were placed upon the power of the Secretary of the Interior to lease lands. The contrast between these two laws is so clear that it is inconceivable that Congress intended to hamper the Secretary of the Navy with any such limitations as to areas as those by which the Secretary of the Interior was bound under portions of the prior statute. Nor is the Secretary of the Navy limited as to the time for which any lease might be made.

There is no limitation as to the terms and conditions, as to royalty or otherwise, which may be introduced in any lease made by the Secretary of the Navy. Here again this law differs notably from certain provisions of the Leasing Act. There is no limitation as to the purpose for which leases shall be made, except that they

must be, in the discretion of the Secretary of the Navy, "for the benefit of the United States." There is no condition fixing any particular set of circumstances or motives or reasons which must exist in order to give the Secretary of the Navy power to make any such lease.

On behalf of the plaintiff it is urged that the power given the Secretary of the Navy to "conserve, develop, use and operate" the lands in the naval petroleum reserves "in his discretion, directly or by contract, lease or otherwise," is limited by an implied condition that such development and operation could only be undertaken if drainage from outside sources was threatened. We submit that to so hold would be to write into the law a limitation and condition which it does not contain, and which if thus written in would absolutely prevent the taking out of oil from the land at times when, even if no drainage danger existed, the oil was needed either for the present or the future operations of the Navy.

Plaintiff's counsel further contend that the law did not give the Secretary of the Navy any power to establish, above ground, reserves of petroleum products, but only permitted him, if and when he had any available oil, to "use the oil for current use or exchange it for current use oil." Any such attempted limitation is inconsistent with the reserve idea for national defense embodied in the designation "Naval Reserves." Any such limitation would at once strike down one of the important strategical and practical purposes for which these reserves were to be created, i. e., to create something which would not merely theoretically, but practically, be available for the uses of the Navy at such time as its exigencies might require. As a practical matter, if this construction were adopted, where would the line be drawn?

The Secretary had the right to lease if he believed that the development of the property and the taking of the oil by means of a lease, would operate to the best in-

terests of the Navy, either by the establishment of an above-ground reserve of fuel oil, into which the crude might be exchanged, or otherwise. His discretion will not be reviewed by the courts. *Ness* v. *Fisher,* 223 U. S. 683.

The power to exchange: The word "exchange" is clearly the most important word in this branch of the statute, so far as the practical operation of the statute for the benefit of the Navy itself is concerned. For, remembering that under the former law royalty oils must always be sold, but that this would immediately make the operation of the naval reserves a commercial proposition, rather than a Navy fuel proposition, obviously the only way in which any royalty oils could be turned to account for naval benefit under the terms of the Act was by the exercise of the power to exchange them for other things.

The Act as originally drawn contained the word "refine" so as to give the Secretary power to "use, refine," etc., but in its final form as adopted the word "refine" was stricken out. This left, as the sole and only mode by which royalty oils could be turned to account for naval purposes, the exercise of the exchange power. The well recognized meaning of "exchange" contains no limitation whatsoever as to the character or quality of the things which may be the subject of the exchange, or the terms or conditions of the contract. The only requisite is that the subject matter must be property other than money. *Postal Tel. Co.* v. *R. R. Co.,* 248 U. S. 471; *B. & O. R. R.* v. *Western Union,* 241 Fed. 170; 23 Cor. Jur. 186–7; Words and Phrases, 1st series, p. 2546. There is no logical basis for limiting the exchange practice to current fuel oil or to facilities for the storage of royalty oils only.

The court holds that the Secretary may exchange royalty oil for fuel oil, but qualifies this by insisting that

he must intend this fuel oil for current use. And the court also holds that the Secretary had power to exchange royalty oil for storage facilities, but again qualifies this by saying that these storage facilities must be intended "for the storage of royalty oils." We submit that distinctions of this nature have no basis in the law or in logic. There is but one logical limitation of the exchange power contained in these general words, and that is that it must be exercised in the discretion of the Secretary for some purpose not merely relating to the Navy Department as an entirety, but related to the Naval Reserve, petroleum and petroleum products problems of the Navy Department.

The power to store: The power to acquire storage facilities as well as petroleum products through the exercise of the exchange power is directly within the many cases holding that, where a particular power is granted, everything necessary to carry out the power and make it effective and complete will be implied from the language of the statute. *Tel. Co.* v. *Eyser,* 19 Wall. 427; *Wilson* v. *Bank,* 103 U. S. 778; *Dooley* v. *Railroad,* 250 Fed. 143; *Ex parte Yarbrough,* 110 U. S. 658; and other cases. To deny that this power was granted by the express use of the word "store," as well as by the necessary and proper interpretation of the word "exchange" as an incidental thereto, would be to limit the exchange power to cases and places where containers already exist—a construction which, in view of the comprehensive plan to administer the Naval Reserves and to supply the needs of the Navy as to fuel and other petroleum products, would simply defeat and not effectuate the clear intent of Congress.

The idea of an available fuel reserve was one of the ideas which led to the passage of the statute. The question of the proper interpretation of the statute cannot be affected by the amount of royalty oil which the Secretary may determine to exchange for fuel oil and its containers.

The appropriation clause does not limit the power of the Secretary of the Navy under the Act, except in the expenditure of cash. This appropriation was not intended as a limitation upon any power, but solely as an aid to the execution of such powers as might require the use of cash. Even under the Circuit Court of Appeals' interpretation of this clause, the $500,000 cannot be the final limit, because in a proper case it could be renewed and re-renewed under the last clause of the statute by being reimbursed out of any other "proper appropriations." The clause refers to the "use" of royalty oil for fuel and the use of a part of some fuel appropriation to reimburse the $500,000 appropriation if some part has been spent. The draftsman of the clause doubtless had in mind the possibility that the Secretary might himself refine some of the royalty oil and use for current consumption a part of the products therefrom, in which case he would be saving the Government a part of the cash appropriation which otherwise would be called upon to furnish fuel for the Navy.

The contracts of April 25 and December 11, 1922, were intended to be and were exchange contracts within the meaning of the law. This is true despite the provisions thereof by which the quantities of crude oil and fuel oil to be delivered were made variable in cases of variance of the reference prices of these two commodities. *Postal Tel. Co.* v. *Tonopah R. R. Co.*, 248 U. S. 471; *B. & O. R. R.* v. *Western Union Tel. Co.*, 241 Fed. 162; *id.*, 242 Fed. 914; *Chicago R. R. Co.* v. *Postal Tel. Co.*, 245 Fed. 592. If the Court should hold that this transaction presented any of the elements of a sale, then the plaintiff is no nearer success; for the reason that the plaintiff would have also proved that such a sale, even though the price is payable in property or rights, was likewise within the power of the Secretary to make. The statute as to

payment of cash into the Treasury applies only if there is cash.

The power to lease naval reserve lands, conferred by the Act of June 4, 1920, supports the contracts as well as the leases in suit. The Secretary could have agreed that the consideration to the Government under any lease should be fuel oil, a refined product of crude oil, rather than the oil in its crude state at the time of original production; and that as part of the consideration from the lessee to the Government the former should provide storage tanks or other necessary improvements on the reserves. There was nothing in the law to prevent the Secretary from making the lease of December 11th upon consideration of a percentage of crude oil produced from the leased lands by the lessee, and a specified quantity of fuel oil and other pertroleum products in storage. In his judgment, exercising the discretion committed to him by law, it was "for the benefit of the United States" to lease, upon the above mentioned considerations, the lands in Naval Reserve No. 1. That judgment is unreviewable. *Ness* v. *Fisher,* 223 U. S. 683.

The contracts of April 25 and December 11, 1922, are not void because providing for the establishment of a new naval fuel depot without express authority from Congress. They only provided for an enlargement of an existing fuel depot and not the establishment of a new one. It was nothing more than an amplification of a previously established fuel depot. The Act of June 4, 1920, gave the Secretary absolute power to provide for the construction of such storage tanks as he might see fit, whether these were constructed in connection with the depot already established or at a new depot. If these new tanks could not have been constructed without the prior express approval of Congress, then the Secretary could not have used any of the $500,000 general appropriation contained in the Act for the construction of a storage

tank at any place whatsoever unless Congress had passed a subsequent act approving the particular location for the tank.

The contracts were not invalidated by reason of any lack of public advertisement. Neither § 3709 Rev. Stats., nor any other general law of the United States provides that competitive bidding or public advertisement should take place in cases of acquisition of property through exchange contracts. There are no general statutes requiring public advertisements as to sales. None of the statutes has anything to do with exchanges, which are covered by entirely different rules, and which would not usually be the subject of competitive bidding. In the absence of express statutory requirement, no competitive bidding is necessary in connection with governmental contracts. *Price* v. *Fargo* 24 N. D. 440; *Crowder* v. *Sullivan,* 128 Ind. 486. The Act of June 4, 1920, vested in the Secretary ample discretion to enter into contracts pursuant to such methods as seemed to him best. This special statute contains the only measure of his authority, and general enactments contained in prior laws have no bearing in such case. *Fowler* v. *United States,* 3 Ct. Cls. 43; *In re Snow & Ice Transp. Co.,* 22 Op. Atty. Gen. 437; *In re Claim of Leach,* 9 Comp. Dec. 457; *Pacific Whaling Co.* v. *United States,* 36 Ct. Cls. 105; *In re Claim of Iowa,* 9 Comp. Dec. 656; *United States* v. *Matthews,* 173 U. S. 381; *State* v. *Stoll,* 17 Wall. 425; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1; *New York C. & H. R. R.* v. *United States,* 21 Ct. Cls. 368; *Cobb* v. *United States,* 7 Ct. Cls. 470; *Townsend* v. *Little,* 109 U. S. 504; *French* v. *Spencer,* 21 How. 237; *Kepner* v. *United States,* 195 U. S. 125; *Rodgers* v. *United States,* 185 U. S. 87; *Hemmer* v. *United States,* 204 Fed. 906; *Jackson* v. *Graves,* 238 Fed. 117; *United States* v. *Chase,* 135 U. S. 255; *Priddy* v. *Thompson,* 204 Fed. 955; *Anchor Oil Co.*

v. *Gray,* 257 Fed. 283; *Magone* v. *King,* 51 Fed. 525. If Congress had intended to limit the inclusive provisions of the Act, it would have so provided in the law itself.

The Secretary was not required to resort to competitive bidding as a condition precedent to the making of the leases of June 5 and December 11, 1922. *Teapot Dome Lease Case,* 5 F. (2d) 330; *United States* v. *Belridge Oil Co.,* D. C. S. D. Cal., July 17, 1925, unreported; affirmed, 13 F. (2d) 562; Shealey, Law of Government Contracts, p. 159.

The Secretary of the Navy, in connection with the contracts and leases involved, exercised the power conferred upon him by the Act of June 4, 1920.

The District Court found that the Secretary of the Navy did not in fact really make the contracts which in law he was authorized to make. The Circuit Court of Appeals did not approve or even discuss this finding of fact. Assuming the legal power of the Secretary of the Navy, then if he in fact exercised it, the instruments here in suit are unassailable. There was no claim in the courts below and there can be none here, that he was party to any conspiracy, to the commission of any fraud, that he was bribed or that on the subject of these contracts there was any misrepresentation made to him, any deceit practiced upon him, or any improper influence exerted over him, by Secretary Fall, on the one hand, or by any person connected with these defendants, on the other. The record is bare of any representations of any kind made by Secretary Fall to Secretary Denby in connection with the making of these contracts. And this statement is true as regards any and every officer of the Navy Department who had any connection with, or performed any duty in relation to, these contracts or the departmental plans, decisions, or negotiations which brought about their making.

One who signs a document is presumed to have knowledge of its contents. There is always a presumption that official acts or duties have been properly performed. *Ross* v. *Stewart,* 227 U. S. 530; *Cincinnati Ry.* v. *Rankin,* 241 U. S. 319; *Delassus* v. *United States,* 9 Pet. 117; *Phila. & T. R. Co.* v. *Stimpson,* 14 Pet. 448; *Bank of U. S.* v. *Dandridge,* 12 Wheat. 65; *Quinlan* v. *Green Co.,* 205 U. S. 410. The evidence shows that so far as the matters in issue are concerned the Secretary of the Navy exercised the powers and discretion conferred upon him by Congress, and that the Executive Order, except for the purpose of enlisting the aid of Interior Department officials, became immaterial. See *Bostwick* v. *United States,* 94 U. S. 53; *Harker* v. *Harvey,* 181 U. S. 481; *Cook* v. *United States,* 91 U. S. 389. The Navy Department had in the person of Robison, acting always under the immediate direction and supervision of Secretary Denby, complete domination, direction and control of leases and contracts in respect of the naval reserves.

Secretary Fall did not make, or dominate the making of, the contracts and leases in suit.

The contracts were not invalid because of any illegal delegation to the Secretary of the Interior of discretionary powers which could only be exercised by the Secretary of the Navy. The discretion which cannot be delegated is the discretion which involves the exercise of original power as to whether or not a public enterprise shall be undertaken. Such element of discretion as is involved in the performance of merely executive and business acts does not go to the essence of the matter and is not within any such prohibition. *Cass County* v. *Gibson,* 107 Fed. 363; *Klamroth* v. *Albany,* 127 N. Y. 575; *Hitchcock* v. *Galveston,* 96 U. S. 341. The meaning of the words "ministerial" and "administrative" cannot be construed as excluding all judgment and discretion.

An executory contract containing a void clause—unauthorized and *ultra vires*—may be modified by the parties so that the clause is no longer operative. The rights of the defendants under the leases do not depend upon whether the Secretary of the Interior could be delegated as the agent to carry out the intent of the preferential right clauses, which were not essential parts of the contracts. A contract is not affected by a clause which, although void in itself, is of such a nature that it does not appear that the contract would not have been made without it. *United States* v. *Bradley,* 10 Pet. 343; *Navigation Co.* v. *Windsor,* 20 Wall. 70; *Gelpcke* v. *Dubuque,* 1 Wall. 222; *United States* v. *Hodson,* 10 Wall. 408; *Reagan* v. *Trust Co.,* 154 U. S. 395; *Topliff* v. *Topliff,* 122 U. S. 121; *McCullough* v. *Smith,* 243 Fed. 823; *Trustees* v. *Spitzer,* 255 Fed. 126; *In re Johnson,* 224 Fed. 185. See also *Burke* v. *Southern Pac. Co.,* 234 U. S. 669. An authorized officer may ratify contracts made, or containing clauses that are *ultra vires. Gas Co.* v. *Dunn,* 62 Cal. 580; *Hitchcock* v. *Galveston, supra.* Contracts void in part are not wholly void, *Gas Co.* v. *Dunn, supra,* and in this respect there is no difference between the rule applicable to contracts and to statutes. *Albany Co.* v. *Stanley,* 105 U. S. 305; *Baldwin* v. *Franks,* 120 U. S. 678; *Field* v. *Clark,* 143 U. S. 649; *Poindexter* v. *Greenhow,* 114 U. S. 270.

There is no merit in the contention that there must have been a conspiracy because of the "secrecy" in connection with the transactions here involved.

The loan of $100,000 by Mr. Doheny to Mr. Fall in no way affected the transactions; it was a *bona fide* loan and not a bribe; and it was not proved by any evidence competent and admissible against the defendants.

The voluntary statement made by Mr. Doheny in 1924 was no part of the *res gestae* of the litigated acts. *Vicks-*

burg R. R. Co. v. *O'Brien,* 119 U. S. 99; *Goetz* v. *Bank,* 119 U. S. 551; *Packet Co.* v. *Clough,* 20 Wall. 528; Jones on Evidence, § 344. The declarant was no longer president of the companies and declarations made after he ceased to hold that office are not admissible against the companies. *Walker Mfg. Co.* v. *Knox,* 136 Fed. 334; *Kenah* v. *Markee,* 3 Fed. 45; *Woolsey* v. *Haynes,* 165 Fed. 391; *Hudson Co.* v. *Higgins,* 85 N. J. L. 268. There is no implied authority for a director or chairman of a board of directors to make statements binding a corporation, except when acting as a board. *Farmers Co.* v. *Thrasher,* 144 Ga. 598; *Allington Co.* v. *Reduction Co.,* 133 Mich. 437; *Kalamazoo Co.* v. *McAlester,* 36 Mich. 326; *Soper* v. *Buffalo R. R. Co.,* 19 Barb. 310; *Peek* v. *Novelty Works,* 29 Mich. 313; *Niagara Bridge Co.* v. *Bachman,* 66 N. Y. 61; Cook, Corporations, vol. 4, § 726; Breen's Brice's Ultra Vires, p. 503. A majority stockholder as such cannot by his statements bind a corporate entity. Statements made by a "witness" while testifying are not admissible in any subsequent proceedings against the corporation of which he is an officer or agent. *Vohs* v. *Shorthill,* 124 Iowa 476; *Columbia Bank* v. *Rice,* 48 Neb. 431; *Estey* v. *Birnbaum,* 9 S. D. 176; *Salley* v. *R. R. Co.,* 62 S. C. 128; *Louisa Bank* v. *Burr,* 198 Ia. 4; *Bangs Co.* v. *Burns,* 152 Mo. 350; *Byrne* v. *Hafner Co.,* 143 Mo. App. 85; *Rush* v. *Burns,* 152 Mo. 660; *St. Charles Bank* v. *Denker,* 275 Mo. 607; *Silzer Co.* v. *Melton,* 129 Ga. 143; *Harrison* v. *Bank,* 127 Iowa 242; Fletcher, Corporations, vol. 3, § 2163.

The evidence was not admissible as a declaration against interest and does not measure up to any test prescribed for this extreme exception to the hearsay rule. *Mahaska* v. *Ingalls,* 16 Iowa 81; *Smith* v. *Moore,* 142 N. C. 277, 7 L. R. A. (N. S.) 684; *Halvansen* v. *Moon,* 87 Minn. 18; *Rand* v. *Dodge,* 17 N. H. 343; *Churchill* v. *Smith,* 16 Vt. 560; *Humes* v. *O'Brien,* 74 Ala. 64; *Berke-*

ley Peerage Case, 4 Camp. Rep. 401; *Sussex Peerage Case,* 2 C. & F. 85; *Estate of Baird,* 193 Cal. 225; *Smith* v. *Hansen,* 34 Utah 171, 18 L. R. A. (N. S.) 520; *Ins. Co.* v. *Hairston,* 108 Va. 832, 128 A. S. R. 989; *Tate* v. *Tate,* 75 Va. 522; *Massey* v. *Allen,* 13 Ch. Div. 558; *United States* v. *Donnelly,* 228 U. S. 242; *Xenia Bank* v. *Stewart,* 114 U. S. 224; Jones, Evidence, 3d ed., § 323. There was no evidence of the transmission of any sum by Doheny to Fall, except hearsay. *United States* v. *Donnelly, supra; Queen* v. *Hepburn,* 7 Cr. 290.

Neither the personal loan made by Mr. Doheny to Mr. Fall, nor any other fact proven in this case, constitutes a violation of public policy of such a nature as to render void or voidable the contracts and leases made and executed by Secretary Denby. No evidence of conspiracy or wrongdoing is afforded by correspondence between applicants for leases and various government officials, nor was it legally admissible.

The suit cannot be maintained without proof of pecuniary damage to the United States resulting from the contracts and leases attacked. *Smith* v. *Bolls,* 132 U. S. 125; *Sigafus* v. *Porter,* 179 U. S. 116; *Atlantic Co.* v. *James,* 94 U. S. 207; *Ming* v. *Woolfolk,* 116 U. S. 599; *Ins. Co.* v. *Bailey,* 13 Wall. 616; *Garrow* v. *Davis,* 15 How. 272; *Hyde* v. *Shine,* 199 U. S. 62; *United States* v. *Tin Co.,* 125 U. S. 273; *United States* v. *Conklin,* 177 Fed. 55; *Clarke* v. *White,* 12 Pet. 178.

The Transport Company is entitled to be credited with the value of the royalty oil delivered to it by the United States up to the amount of the expenditures made by it upon the property of the Government under the terms of the contracts. In equitable suits to rescind contracts, a defendant who has expended money or parted with value pursuant to the terms of the contract, has an equity by reason thereof which a court of equity will recognize and enforce as a condition of granting relief to the plain-

tiff. *Neblet* v. *McFarland,* 92 U. S. 101; *Marsh* v. *Fulton County,* 10 Wall. 684; *Stoffela* v. *Nugent,* 217 U. S. 499; *Levy* v. *Kress,* 285 Fed. 838; *Dold Packing Co.* v. *Doermann,* 293 Fed. 315; *Twin Lakes Co.* v. *Dohner,* 242 Fed. 402; *Shafer* v. *Spruks,* 225 Fed. 482; *Shearer* v. *Ins. Co.,* 262 Fed. 868; *United States* v. *Royer,* 268 U. S. 394; 2 Pomeroy, Eq. Jur., 3d ed., §§ 910, 1627; Story, Eq. Jur., 14th ed., § 957. This principle applies whether or not fraud or other form of bad faith be present. *Stoffela* v. *Nugent, supra; Dold Co.* v. *Doermann, supra.* It is not limited to cases where the plaintiff is wholly without remedy at law. *Canal Bank* v. *Hudson,* 111 U. S. 66; *Armstrong* v. *Ashland,* 204 U. S. 285. The maxim applies even though the contracts and leases were void because of lack of power to make them. If the innocent party sues in equity, the court will always recognize such equities as the guilty party possesses. *Diamond Coal Co.* v. *Payne,* 271 Fed. 362; *United States* v. *Royer, supra.* Even if there were a complete absence of power in the Secretary of the Navy to authorize the construction of the Pearl Harbor plant, nevertheless, there is no warrant for holding that the Transport Company, which actually went ahead and constructed the plant, is barred by any consideration of "public policy" from being entitled to retain the value which the Government delivered to it as against such construction, and from thereby avoiding the necessity of paying the Government twice for the value of all royalty oil received by it.

The United States was acting in its commercial capacity and not as a sovereign. *Cook* v. *United States,* 91 U. S. 389; *Hollerbach* v. *United States,* 233 U. S. 165; *Mann* v. *United States,* 3 Ct. Cls. 404; *United States* v. *N. Amer. Com. Co.,* 74 Fed. 151; *United States* v. *Fuller Co.,* 296 Fed. 180; *United States* v. *Bentley,* 293 Fed. 235; *United States* v. *Products Co.,* 300 Fed. 451; *Lyons* v. *United States,* 30 Ct. Cls. 352; *Bostwick* v. *United*

States, 94 U. S. 53. The United States is also bound by all rules regulating the remedy invoked which would apply if an individual were the plaintiff. *United States* v. *Thekla,* 266 U. S. 340; *The Western Maid,* 257 U. S. 419; *United States* v. *Stinson,* 197 U. S. 205; *McKnight* v. *United States,* 98 U. S. 179; *Brent* v. *Bank,* 10 Pet. 614; *United States* v. *Arredondo,* 6 Pet. 712. If the United States seeks to rescind a contract, it must restore or maintain the *status quo,* even though the defendant could not bring an affirmative action in equity or at law to reimburse himself. Cf. *Heckman* v. *United States,* 224 U. S. 447; *The Thekla, supra.*

The Circuit Court of Appeals also erred in refusing to the Petroleum Company the credit allowed by the District Court. Distinguishing, *Pine River Co.* v. *United States,* 186 U. S. 279; *Woodenware Co.* v. *United States,* 106 U. S. 432; *Union Stores* v. *United States,* 240 U. S. 284. None of these cases is applicable because in none of them did the party sued by the Government take possession and make expenditures pursuant to the terms of any contract which the Government had executed. In this case the United States is suing in its private capacity as a property owner. *Denver R. R. Co.* v. *United States,* 241 Fed. 614.

Messrs. Owen J. Roberts and *Atlee Pomerene* for the United States.

Where two courts have reached the same conclusion upon a question of fact it will be accepted here unless clearly erroneous. *Norton* v. *Larney,* 266 U. S. 511; *Adamson* v. *Gilliland,* 242 U. S. 350.

We have attempted to show that Secretary Denby was not informed and active in what he did in this connection; but it matters not whether he was informed or ignorant, if a corrupt money transaction took place with a Government official, thought and believed to have in-

fluence or power in connection with the making of these contracts and leases.

Nobody can read the record without being impressed with the constant activity of Fall in these matters, with the fact that whenever any critical situation arose Fall stepped in, and that it was his final say which made it possible for any of these papers to be placed before Secretary Denby for his signature; that always they went to Denby from Fall through Robison, and never direct, and that Robison, as the trial court has found, was so obsessed with getting storage facilities built with royalty oil rather than with appropriations by Congress that he was facile to do Fall's bidding and to bring about what he wanted by whatever means Fall suggested and approved. It will not do for a company whose president had an improper financial transaction with a government official, to say that upon the government rests the burden of proof that that transaction was the final and efficient cause of the execution of the contract between the company and the government. Nor will it do for it to assert that, even if the burden remains upon it, it has carried the burden by proving that the corrupt and improper bargain made between its president and the government official was ineffectual because, forsooth, that improper financial transaction took place between the president of the corporation and the wrong official of the government,—the one not in final control.

The moment a court is convinced by clear and indubitable proof that such a transaction occurred between a government official and a contracting party, it will nullify and set aside the dealings between the government and such contracting party, in which such official participated, on the ground that they are all infected by the improper transaction, and that no court, in ease of the contracting party, will stop to appraise the effect and the harm that has been done by such improper transaction.

Mechem, Public Officers, p. 246, § 368; Kerr, Fraud and Mistake, 5th ed., p. 180.

Whether a "loan" or "gift," the money was paid with a full realization that it would tend to influence Fall in his official capacity. And it is clear that the transaction put Fall irrevocably in Doheny's power. Such a transaction was certainly a "bargain for a benefit" and certainly tended to induce Fall to neglect, ignore, exceed or violate his public duty. Whatever Fall's actual and legal relation to the contracts of April and December, he was then in fact an officer of the United States and active in the consummation of the contracts. Any duty he sustained in this behalf was a public duty, whether he acted *de facto* or *de jure*. In connection with appellants' contention that if Fall had not the legal power to act Doheny's transaction with him can have no effect upon the validity of the contract, see *Crocker* v. *United States,* 240 U. S. 74; *Garman* v. *United States,* 34 Ct. Cls. 237; *Atlantic Contr. Co.* v. *United States,* 57 Ct. Cls. 185; *Hume* v. *United States,* 132 U. S. 406; *Seltzer* v. *Met. Elec. Co.,* 199 Pa. 100; *Herman* v. *Oconto,* 100 Wis. 391; *Weston* v. *Syracuse,* 158 N. Y. 274; *Wash. Irr. Co.* v. *Krutz,* 119 Fed. 279.

The statements of Doheny made before the Senate Committee on Public Lands were properly admitted in evidence, because he was an officer of the appellant corporations, acting for them and within the scope of his authority. *Xenia Bank* v. *Stewart,* 114 U. S. 224; *Fidelity Co.* v. *Courtney,* 186 U. S. 342; *Chicago* v. *Greer,* 9 Wall. 726; *Aetna Co.* v. *Auto Co.,* 147 Fed. 95; *Joslyn* v. *Cadillac Co.,* 177 Fed. 863; *Rosenberger* v. *Wilcox Co.,* 145 Minn. 408; *Kirkstall Co.* v. *Furness Ry. Co.,* L. R. 9 Q. B. 468; *Chicago Ry. Co.* v. *Coleman,* 18 Ill. 297; 2 Wigmore, Evidence, § 1048.

The statements were likewise properly admitted as declarations against interest. The pecuniary and pro-

prietary detriment to Mr. Doheny personally resulting from these statements is obvious. It is likewise clear that by claiming his constitutional privilege he made himself as though he were dead. Under these circumstances the statements were properly received in evidence as declarations against interest. *Weber* v. *R. R. Co.,* 175 Iowa 358; *Harriman* v. *Brown,* 8 Leigh 697; *Griffith* v. *Sauls,* 77 Tex. 630; 3 Wigmore, Evidence, § 1456; 4 Chamberlayne, Evidence, § 2771. These statements, however, are not the only testimony upon which the finding with regard to the $100,000 transaction rests.

The trial court properly admitted the evidence of Mrs. Edward L. Doheny, and evidence of communications between applicants for leases and various government officials during the period covered by the negotiation and execution of the contracts and leases in question.

Pecuniary damage to the United States was shown; but in the absence of any such showing the decree against the appellants was justified and required. Appellants have entered into possession and extracted large quantities of oil, gas, and other petroleum products. This waste not only runs into several millions of dollars, but also has impaired the value of the leased lands by reason of the mineral extracted therefrom. No burden rests upon the United States to establish as a condition precedent to its right to relief that the contracts and leases are not commercially good ones and that better ones might have been obtained. Because of its baneful tendency, equity is eager to do all it can to redress this kind of a fraud by a fiduciary. *United States* v. *Carter,* 217 U. S. 286; *Findlay* v. *Pertz,* 66 Fed. 427; *Michoud* v. *Girod,* 4 How. 502; *Robertson* v. *Chapman,* 152 U. S. 673; *Com. S. S. Co.* v. *Amer. Ship Co.,* 197 Fed. 780. The books are full of cases where the United States has brought suit to cancel patents granted illegally or fraudulently. *Causey* v. *United States,* 240 U. S. 399; *United States* v. *Trinidad*

Co., 137 U. S. 160; *Diamond Co.* v. *Payne,* 271 Fed. 362; *United States* v. *Poland,* 251 U. S. 221; *Heckman* v. *United States,* 224 U. S. 413; *Curtis Co.* v. *United States,* 262 U. S. 215; *United States* v. *Sou. Pac. Co.,* 251 U. S. 1; *Wright Co.* v. *United States,* 236 U. S. 397; *Wash. Sec. Co.* v. *United States,* 234 U. S. 76; *Diamond Coal Co.* v. *United States,* 233 U. S. 236; *United States* v. *Kettenbach,* 208 Fed. 209. A violation of the public statutes is in itself ground for cancellation and rescission in equity. See *Hammerschmidt* v. *United States,* 265 U. S. 182. A court will always presume injury where favoritism was shown to the contracting party by government officials, and will more readily do so where, as here, there is an admission of an enormous profit to be made out of a contract granted by private negotiation to a favored party and where, also, performance under the contract shows that the expected profits will, in all probability, be realized.

The Act of June 4, 1920, did not authorize the execution of the contracts and leases. The purpose of the Act was to enlarge the powers of the Secretary of the Navy so that he might at will provide adequate protection against drainage where such was needed. The underground reserve idea had been in well known effect in the case of reserves Nos. 1 and 2 since their withdrawal by President Taft in 1912. It was impliedly ratified by Congress in 1920, in that the Leasing Act of February 25, 1920, conferred a right to lease land in the naval reserves only where there were already producing wells and in compromise of valid existing claims. Had Congress intended or expected a sharp departure from this established policy presumably some definite indication to that effect would be found in the Act of June 4th. Instead, this short enactment, which is itself a mere rider to the Naval Appropriation Act for the fiscal year 1921, begins its operative language with reference to the naval re-

serves by the word "conserve." The further language of the Act does give the Secretary of the Navy an unrestricted power as to how much of the lands he shall lease. We think, however, that it shows an assumption on the part of Congress that this power was needed, and presumably therefore would be exercised, for more adequately protecting the reserves against drainage from neighboring drillers.

That this would render advisable development of certain portions of the land by leases under which royalty oils would accrue to the United States, and that such oils, or part of them, would be sold, is apparent from the Act. From the sales of royalty oil a sum of $500,000 is made available to enable the Secretary to carry out the necessary development and storage which might be incident to protection of the reserves. This was a reasonable provision for such purpose if Congress contemplated only such development as was needed for protection. It was a wholly and ridiculously insignificant appropriation if Congress contemplated that the Secretary of the Navy would suddenly throw the reserves open to unlimited exploitation. There were, in all, three petroleum reserves with a total acreage of nearly eighty thousand acres, and in addition two shale-oil reserves. Had Congress anticipated the full development of such a vast and rich reservoir of oil, some indication of that expectation and some provision for the disposal of the resulting products or money would be found in the Act; something on such a subject would have found its way into the debates of Congress or the reports of committees.

If we look to departmental construction of the purpose of the Act, we find that the established policy of an underground reserve was rigidly adhered to. Not until Secretary Fall kindled the imagination of certain enthusiasts in the Navy Department in the summer of 1921, with the idea of an exchange for storage proposition, did the thought occur to anyone even to investigate as to

whether the Act permitted such a policy. Further, the record shows that down to the very end of all the transactions here involved, the Secretary of the Navy maintained a fixed purpose of leasing only where such leasing was required as a protective measure. Robison knew this was the policy of his chief and the policy of Congress.

Prior to the Act of June 4, 1920, the royalty oil accruing to the Government from compromise leases made on Naval Reserve Lands, was, pursuant to the Leasing Act of February 25, 1920, sold; and the receipts from such sales were paid into the Treasury. This was the express mandate of the Act of February 25, 1920. After the passage of the Act of June 4, 1920, any cash received from sales of royalty oil from leases made pursuant to it would also go into the Treasury as miscellaneous receipts (Rev. Stats. §§ 3617, 3618), providing that all moneys received from the sale of government property, shall be covered into the Treasury. Everyone recognized that under the Act of June 4, 1920, the royalty crude oil coming to the Government under any leases theretofore made or thereafter to be made on lands in the naval reserves could be exchanged for fuel oil and other petroleum products useable by the Navy in its current operations. Nobody suspected or suggested apparently that the royalty oil could itself be used as a consideration for the procurement by the Navy of other physical property and assets, until more than a year after the Act of June 4, 1920, became law.

In the latter part of 1921, Fall and Robison developed the plan of so using royalty oil and attempted to justify its use under the Act of June 4, 1920. This plan soon enlarged itself into a program for the taking out of all the petroleum in the reserves, thus reversing the policy adopted by Congress and adhered to for many years, and using the royalty oil coming from the lessees for the construction of structures and filling them with petroleum

products useable by the Navy. The expedient was adopted of "exchanging" the crude oil for so-called reserve fuel oil and petroleum products, and, as an ancillary matter, "exchanging" this royalty crude oil also, and in addition, under construction contracts for the building of naval fuel depots in which the fuel oil and petroleum products acquired were to be stored at various points in the United States and its possessions.

Not only was the Act passed in pursuance of a conservation policy, but, disregarding all other statutory and constitutional provisions, and supposing it stood alone, it does not confer an authority for the making of the contracts under attack. "To use" connotes consumption, but when we examine the last two provisos of the Act, we find the "use" specifically limited. The one proviso appropriates "not exceeding $500,000" of the moneys turned in or to be turned into the Treasury from royalties on Naval Reserve lands prior to July 1, 1921, "for this purpose." So that any "use" that is to be made of the oil must not cost in excess of that sum. The other proviso makes clear that "use" means "consumption" for it requires that the $500,000 appropriation shall be "reimbursed from the proper appropriations, on account of the oil and gas products from said properties used by the United States at such rate not to exceed the market value of the oil as the Secretary of the Navy may direct." It is, therefore, clear that if the Government "uses" this oil for any purpose for which Congress has appropriated money for the purchase of oil, such appropriation must be debited and the appropriation made in the Act of June 4, 1920, must be credited with the value of the royalty oil so "used."

The power to "store" covers both royalty crude oil and products of the royalty oil. There are certain products, such as gasoline and gas, which are obtained from royalty crude oil. As the Secretary is given power to operate the

reserves by contract or otherwise, he might make a contract whereby the operator would turn over to him crude oil and products of the crude oil, which he might store. What may be spent for this purpose? The answer is found in the next proviso. There is "made available" "not exceeding $500,000" "for this purpose." Moreover, these contracts are not for the storage of "the oil and gas products" of the naval reserve lands, nor for the storage of the "products" of such oil and gas.

The "exchange" contemplated was limited to fuel oil and other derivatives of petroleum. It could not extend to the acquisition of anything which might be of benefit to the United States. In holding that it did so extend, the Judge Advocate General of the Navy fell into grave error. He held the word to be unlimited.

The transactions under the contracts of April 25 and December 11, 1922, are not in fact exchanges within the meaning of the Act. Not only the nature of the transaction, but the language used by the parties, shows that they realized a sale was being consummated, and not an exchange. The legal concept of an exchange as distinguished from a sale is a transaction whereby little or no emphasis is placed upon value; whereby the parties intend to trade one specific article for another specific article or articles of property. When the element of value creeps in as a primary consideration we have a sale and purchase rather than an exchange. The power "to sell" was to sell for a money consideration only.

The Act itself, by an appropriation, provides the means of storage. The following acts: Rev. Stats. §§ 3732, 3733; 1906, c. 3078, 34 Stat. 255; 1906, c. 3914, 34 Stat. 764, § 9, forbid any contract being entered into, such as those in issue in this case, which will bind the Government to pay a larger sum than the amount in the Treasury appropriated for the specific purpose, un-

less the Act shall in specific terms declare that such contract may be executed. *Sutton* v. *United States,* 256 U. S. 575; *Hooe* v. *United States,* 218 U. S. 322; *Chase* v. *United States,* 155 U. S. 489; *Bradley* v. *United States,* 98 U. S. 104, are typical cases showing that this Court construes this matter strictly and never from a general authority to contract or to do a certain act conferred upon an executive official draws the conclusion that the policy of Congress touching the limitation of projects by appropriation was intended to be overruled or an exception created. The last proviso requires the appropriation of $500,000 to be reimbursed from the proper appropriation on account of the use of the royalty oil. The appropriation of $500,000 is itself an appropriation for the procurement of storage.

The contracts were violative of the law as to the location and establishment of fuel depots. The power to establish depots of coal and other fuel was delegated to the Secretary of the Navy under the Act of August 31, 1842, 5 Stat. 577, which later became Rev. Stats. § 1552. This delegation was subsequently revoked. Act of March 4, 1913, 37 Stat. 898. See House Report, 62d Cong., 3d Sess. In appropriation acts from 1914 onward, the various fuel depot projects are specifically mentioned and a separate appropriation is made for each. Upon the repeal of Rev. Stats. § 1552, the exclusive authority to locate and establish fuel depots was revested in Congress by virtue of the Constitution.

The contracts of April 25 and December 11, 1922, were not made by advertisement and competitive bidding, as required by law. Rev. Stats. § 3709; *United States* v. *Purcell Co.,* 249 U. S. 313; *United States* v. *Ellicott,* 223 U. S. 524. The Act of June 4, 1920, did not repeal or supersede prior general statutes on fuel depots, competitive bidding, Government contracts, and the sale of Gov-

ernment property. See *Gt. Nor. Ry.* v. *United States,* 208 U. S. 452; *Erie Coal Corp.* v. *United States,* 266 U. S. 518; *United States* v. *Barnes,* 222 U. S. 513; *Robertson* v. *Labor Board,* 268 U. S. 619; *In re East River Co.,* 266 U. S. 355; *United States* v. *Sweet,* 245 U. S. 563; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *United States* v. *Greathouse,* 166 U. S. 601; *Ex parte Webb,* 225 U. S. 663; *Washington* v. *Miller,* 235 U. S. 422; *Bookbinder* v. *United States,* 287 Fed. 790; *Witte* v. *Shelton,* 240 Fed. 265; *United States* v. *Noce,* 268 U. S. 613.

The provisions of the contracts and leases constituted an illegal attempt to delegate the power conferred upon the Secretary of the Navy by the Act of June 4, 1920. The trial court held that the Executive Order, so far as it attempted to transfer the administration of the reserves to the Secretary of the Interior and pass over to him discretionary powers vested in the Secretary of the Navy, was void and of no effect. We understand that counsel for appellants concur in this view. By the contract of April 25, 1922, the Secretary of the Navy purported to transfer the procurement of fuel oil and of storage tankage therefor, dredging, docking, etc., at the Pearl Harbor Naval Station to the Secretary of the Interior. He further purported to transfer the entire administration over half of Naval Reserve No. 1 and its leasing to the Secretary of the Interior. Under the contract and lease of December 11, 1922, no power of any kind is left in the Secretary of the Navy.

The United States is not estopped to have these contracts rescinded because they have been executed. *Filor* v. *United States,* 9 Wall. 45; *Utah Power Co.* v. *United States,* 243 U. S. 389; *Chanslor-Canfield Co.* v. *United States,* 266 Fed. 145; *Bayou Club* v. *United States,* 260 U. S. 561. That there is no power in an official, in whom discretionary powers have been vested by law, to delegate them is well settled. *Light Co.* v. *Dunn,* 62 Cal. 580;

Brummett v. *Ogden Co.,* 33 Utah 285; *Oakland* v. *Carpentier,* 13 Cal. 540; *Mann* v. *Richardson,* 66 Ill. 481; *Mullarky* v. *Cedar Falls,* 19 Iowa 21; *Clark* v. *Washington,* 12 Wheat. 40; *People* v. *Street Co.,* 225 Ill. 470.

The contracts of April 25 and December 11, 1922, are not in any proper sense of the word *ultra vires* contracts. They are contracts contrary to public policy, violative of the expressed will of the legislative branch of the Government and on their face utterly null and void.

The companies are not entitled to be credited with their respective disbursements under the fraudulent and illegal contracts and leases. Allowance of credit for the Pearl Harbor project would be subversive of the "fuel depot" policy of the United States and in violation of the law of illegal public contracts. This Court has repeatedly held that the equitable maxim, "He who seeks equity must do equity," should have no place in an equitable proceeding brought by the United States to enforce a public statute and its underlying policy. *Causey* v. *United States,* 240 U. S. 399; *United States* v. *Trinidad Coal Co.,* 137 U. S. 160; *Heckman* v. *United States,* 224 U. S. 413; *Wash. Sec. Co.* v. *United States,* 234 U. S. 76; *United States* v. *Poland,* 251 U. S. 221; *Diamond Co.* v. *Payne,* 271 Fed. 362. One dealing with public officers is bound to take notice of the extent of their powers and assumes the risk of their acting strictly within their official authority. *Sutton* v. *United States,* 256 U. S. 575; *Whiteside* v. *United States,* 93 U. S. 247; *The Floyd Acceptances,* 7 Wall. 666; *Chase* v. *United States,* 155 U. S. 489; *Hooe* v. *United States,* 218 U. S. 322; *Utah Power Co.* v. *United States,* 243 U. S. 389; *United States* v. *Levinson,* 267 Fed. 692; *United States* v. *Bentley,* 293 Fed. 229.

That the United States received full value for every dollar spent, does not save an illegal government contract.

Filor v. *United States,* 9 Wall. 45. The United States may not be estopped by the unlawful acts of its public officers. *Bayou Club* v. *United States,* 260 U. S. 561.

Allowance of credit for expenditures and improvements on Naval Petroleum Reserve No. 1 would be in violation of the law governing *mala fide* trespasses upon the public domain. The wilful trespasser not only must account for the full market value of all minerals extracted from public lands, together with any and all accretions thereto, but also forfeits all permanent improvements to the realty. In no event is he permitted to improve the United States out of its lawful property or to make a profit at its expense, and his actual costs in extracting the mineral are never recoverable. *Pine River Co.* v. *United States,* 186 U. S. 279; *Woodenware Co.* v. *United States,* 106 U. S. 432; *Benson Co.* v. *Atla Min. Co.,* 145 U. S. 428; *Guffey* v. *Smith,* 237 U. S. 101; *Union Stores* v. *United States,* 240 U. S. 284; *Big Sespe Co.* v. *Cochran,* 276 Fed. 216. The shield of "color of title" may never be raised by fraudulent trespassers in their own defense. *Big Sespe Co.* v. *Cochran, supra.*

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by the United States in the northern division of the southern district of California against the petitioners, Pan American Petroleum and Transport Company and Pan American Petroleum Company. The former will be called the Transport Company and the latter the Petroleum Company. The relief sought is the cancelation of two contracts with the Transport Company, dated April 25, and December 11, 1922, and two leases of lands in Naval Petroleum Reserve No. 1, to the Petroleum Company, dated June 5 and December 11, 1922, an injunction, the appointment of receivers, and an accounting. The complaint alleges that the con-

tracts and leases were obtained and consummated by means of conspiracy, fraud and bribery, and that they were made without authority of law. Receivers were appointed to take possession of and operate the properties pending the suit. At the trial the court heard much evidence and later made findings of fact; stated its conclusions of law; announced an opinion, 6 F. (2d) 43, and entered its decree. It adjudged the contracts and leases void and ordered them canceled; it directed the Petroleum Company to surrender the lands and equipment, and stated an account between the United States and each of the companies. The Transport Company was charged the value of petroleum products received by it and the amount of profits derived upon their resale, and was given credit for the actual cost of construction work performed and of fuel oil delivered under the contracts. The Petroleum Company was charged the value of the petroleum products taken under the leases and given credit for actual expenditures in drilling and operating wells and making other useful improvements. Interest was added to each of the items. The companies appealed to the Circuit Court of Appeals, and the United States took a cross appeal. That court affirmed the decree so far as its awards affirmative relief to the United States and reversed that part which gives credit to the companies. 9 F. (2d) 761.

Under R. S. §§ 2319, 2329, and the Act of February 11, 1897, c. 216, 29 Stat. 526, public lands containing oil were open to settlement, exploration and purchase. Exploration and location were permitted without charge, and title could be obtained for a nominal amount. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 466. Prior to the autumn of 1909 large areas of public land in California were explored; petroleum was found, patents were obtained, and large quantities of oil were taken. In September of that year, the director of the Geological Survey

reported that, at the rate oil lands in California were being patented, all would be taken within a few months. and that, in view of the increased use of fuel oil by the Navy, there appeared to be immediate need for conservation. Then the President, without specific authorization of Congress, by proclamation withdrew from disposition in any manner specified areas of public lands in California and Wyoming amounting to 3,041,000 acres. By the Act of June 25, 1910, c. 421, 36 Stat. 847, Congress expressly authorized the President to withdraw public lands containing oil, gas and other minerals. An executive order of July 2, 1910, confirmed the withdrawals then in force. By a later order, September 2, 1912, the President directed that some of these lands "constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by Act of Congress." This Reserve includes all the lands involved in this suit. By a similar order, December 13, 1912, the President created the Naval Petroleum Reserve No. 2.

The Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, regulates the exploration and mining of public lands, and authorizes the Secretary of the Interior to grant permits for exploration and make leases covering oil and gas lands, exclusive of those withdrawn or reserved for military or naval purposes. The Act of June 4, 1920, c. 228, 41 Stat. 812, 813, appropriated $30,000 to be used, among other things, for investigating fuel for the Navy and the availability of the supply allowed by naval reserves in the public domain. It contains the following: "*Provided,* That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves . . . to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all roy-

alty oil from lands in the naval reserves, for the benefit of the United States: . . . *And provided further,* That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed $500,000, are hereby made available for this purpose until July 1, 1922: *Provided further,* That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct."

March 5, 1921, Edwin Denby became Secretary of the Navy and Albert B. Fall, Secretary of the Interior. May 31, 1921, the President promulgated an executive order purporting to commit the administration and conservation of all oil and gas bearing lands in the Reserves to the Secretary of the Interior, subject to the supervision of the President.

The contract, dated April 25, 1922, was executed on behalf of the United States by the Acting Secretary of the Interior and by the Secretary of the Navy. The Transport Company agreed to furnish at the Naval Station at Pearl Harbor, Hawaii, 1,500,000 barrels of fuel oil and deliver it into storage facilities there to be contructed by the company according to specifications of the Navy. The Company was to receive its compensation in crude oil to be taken from the Reserves. The quantity, on the basis of the posted field prices of crude oil prevailing during the life of the contract, was to be the equivalent of the market value of the fuel oil and also sufficient to cover the cost of the storage facilities. The United States agreed to deliver to the company at the place of production month by month all the royalty oil furnished by lessees in Reserves Nos. 1 and 2 until all claims under the contract were satisfied. It was stipulated that if production of crude oil

should decrease so as unduly to prolong performance, " then the Government will, in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum." And, by Article XI of the contract, it was agreed that, if during the life of the contract such additional leases should be granted within specified areas, " the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance . . . the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree . . . then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding."

The lease of June 5, 1922, was signed by the Assistant Secretary of the Interior. It was made in accordance with a letter of April 25, 1922, signed by the Acting Secretary of the Interior and the Secretary of the Navy, and sent to J. J. Cotter, who was Vice-President of the Transport Company. It covered the quarter section described in the letter. This lease was assigned to the Petroleum Company.

The contract dated December 11, 1922, is signed for the United States by the Secretary of the Interior and the Secretary of the Navy. It declares that it is desired to fill storage tanks at Pearl Harbor promptly as they are completed and also to procure additional fuel oil and other petroleum products in storage there and elsewhere; that the Secretary of the Navy requested the Secretary of the

Interior as administrator of the Naval Petroleum Reserves to arrange for such products in storage and to exchange therefor additional royalty crude oil, "the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars more or less"; that this cannot be done on the basis of exchange for the crude oil coming to the Government under the present leases; that, under the contract of April 25, 1922, the company is granted preferential right to leases to certain lands in Naval Reserve No. 1; and that the company was planning to provide refinery facilities at Los Angeles, together with pipe lines from the field to the refinery and docks, and to erect storage having capacity of 2,000,000 barrels or more. The company agreed to furnish, as directed by the Secretary of the Interior, the fuel oil in storage at Pearl Harbor covered by the earlier contract; to construct for actual cost additional storage facilities there, as required, up to 2,700,000 barrels; to furnish fuel oil and other petroleum products in the proposed storage as and when completed on the basis of market prices plus transportation cost at going rates; to furnish without charge, until expiration of the contract, storage for 1,000,000 barrels of fuel oil at Los Angeles; to fill it with fuel oil for the Navy at such time as Government royalty oil should be available for exchange, and to bunker Government ships from such oil at cost; to maintain for 15 years subject to the demands of the Navy 3,000,000 barrels of fuel oil in the company's depots at Atlantic Coast points; to furnish crude oil products and storage facilities at other points, designated by the Government, when sufficient crude oil has been delivered to satisfy the Pearl Harbor contract; to sell the Navy at ten per cent. less than market price additional available fuel oil produced from the reserves and manufactured products from its California refineries; to credit the Navy for crude oil at published prices and for gas and casinghead gasoline at prices fixed

in the leases, and to satisfy any surplus credits of the Government by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or by payment in cash as the Government might elect. The United States agreed to deliver to the company in exchange all royalty oil, gas, and casinghead gasoline produced on Reserves Nos. 1 and 2 until its obligations were discharged and in any event for fifteen years after the expiration of the contract of April 25, 1922 [which was without specified time limit], and to lease to the company all the unleased lands in Reserve No. 1.

The lease of December 11, 1922, is signed for the United States by the Secretary of the Interior and the Secretary of the Navy. It covers all unleased lands in Reserve No. 1, but with a provision that no drilling shall be done on approximately the western half without the lessor's consent. It runs for twenty years and so long thereafter as oil or gas is produced in paying quantities. The royalties range from 12½ to 35 per cent.

A Joint Resolution adopted by the Senate and House of Representatives and approved by the President, February 8, 1924, 43 Stat. 5, stated that it appeared from evidence taken by the Committee on Public Lands and Surveys of the Senate that the contract of April 25, 1922, and the lease of December 11, 1922, were executed under circumstances indicating fraud and corruption, without authority on the part of the officers purporting to act for the United States and in defiance of the settled policy of the Government to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy. It declared the contracts and leases to be against public interest and that the lands should be recovered and held for the purposes to which they were dedicated. And it authorized and directed the President to cause suit to be prosecuted for the annulment and cancelation of the lease and all contracts incidental and supplementary thereto,

and to prosecute such other action or proceedings, civil and criminal, as might be warranted.

The findings contain what in abridged substance follows:

E. L. Doheny controlled both companies. Fall was active in procuring the transfer of the administration of naval petroleum reserves from the Navy Department to the Interior. And, after the executive order was made, he dominated the negotiations that eventuated in the contracts and leases. From the inception no matter of policy or action of importance was determined without his consent. Denby was passive throughout, and signed the contracts and lease and the letter of April 25, 1922, under misapprehension and without full knowledge of their contents. July 8, 1921, Fall wrote Doheny: "There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his Department, but only with himself, and such consultation will be confined strictly and entirely to matters of general policy." After that Doheny and his companies acted upon the belief that Fall had authority to make the contracts and leases. Doheny and Fall conferred as to a proposal to be made by the Transport Company whereby it should receive from the United States royalty oil for constructing storage facilities at Pearl Harbor and filling them with fuel oil. They discussed the matter of granting other leases in Reserve No. 1. They also discussed a petition of the Petroleum Company for reduction of royalties under an existing lease. Fall and Admiral John K. Robison, per-

sonal representative of the Secretary of the Navy in naval reserve matters, agreed that the proposed contract should be kept secret so that Congress and the public should not know what was being done. [But it is to be said that Robison's motives in this were not the same as Fall's.]

November 28, 1921, Doheny submitted to Fall a proposal stating that, in accordance with a suggestion from Fall, he had made inquiries as to cost of constructing storage for 1,500,000 barrels of fuel oil at Pearl Harbor. He gave in detail figures relating to such cost, the price of crude oil in the field and of fuel oil at Pearl Harbor, and stated the total amount of crude oil necessary to pay for the tanks and fuel oil " on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserves and to be leased to us." The letter concluded: " I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney." And the next day Fall wrote Robison: " Mr. Cotter will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands. I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a résumé of the data. Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American." The letter stated that the gas pressure was lessening and that the companies were suffering loss in the payment of the

55 per cent. royalty. "If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient."

Doheny had agreed to advance $100,000 to Fall as and when he should need it. November 30, at Fall's request, Doheny sent him $100,000 in currency. The money was obtained in New York on the check of Doheny's son who carried it to Washington and gave it to Fall. And Fall sent to Doheny by the son a demand note for $100,000. No entry of the advance was made in the accounts of Doheny or the petitioners. Nothing has been paid on account of principal or interest. At that time it was understood between Doheny and Fall that the latter need not repay it in kind. Doheny intended, if Fall did not dispose of a certain ranch in New Mexico, to cause the Transport Company to employ him at a salary sufficient to enable him, out of one-half of it, to pay off the amount in five or six years; and he knew that Fall expected to leave the service of the Government and accept employment with one of his companies. A few weeks after it was given, Doheny tore Fall's signature off the note so that it would not be enforceable in the hands of others. December 1, Fall gave instructions to subordinates that the petition of the Petroleum Company for reduction of royalties should not be granted but that, as relief, the company be given another lease at regulation royalties.

Long in advance of receipt of bids Fall knew that the Transport Company would offer to construct storage facilities at cost and to fill them with fuel oil in exchange for royalty oil and for the assurance that other leases on lands in Reserve No. 1 would be granted to it. Others were not advised that the United States would consider a bid conditioned on assurance to the bidder of other leases or preferential right to leases. Due to the interest of Fall, the Transport Company had opportunities for conference with

and advice from those acting for the United States which were not given to others. There were five other oil companies with which officers or employees of the United States conferred as to the proposed contract. Fall knew that two of these would not bid because they considered the proposed contract illegal; that two of the others had not been invited to bid, and that the other one would refuse to bid unless authority for the contract should be obtained from Congress. Invitation for proposals was sent two construction companies; but Fall understood and stated that it was impossible for either of them to bid because payment had to be made in royalty oil. April 13, Fall left Washington for Three Rivers, New Mexico. Before leaving he gave instructions that no bids should be accepted or contract awarded without his consent. The bids were opened April 15. Four were received; one was conditioned upon Congressional approval of the contract; one did not cover the construction work and applied only to furnishing the fuel oil; the other two proposals were from the Transport Company: one of them, designated A, was in accordance with the invitation for bids, but the other, called B, was not. The latter named the smaller lump sum in barrels of crude oil; it stated that if actual cost was less than a specified amount the saving should be credited to the Government; and it was conditioned upon granting the bidder preferential right to become lessee in all leases that thereafter might be granted by the United States for recovery of oil and gas in Reserve No. 1. On April 18, Edward C. Finney, Acting Secretary of the Interior, telegraphed Fall that certain officials and employees of the United States recommended acceptance of proposal B; on the same day Fall consented by telegram, and Finney sent a letter to the company purporting to award the contract to it. Cotter then stated that the Transport Company did not desire to make the contract unless the United States would agree, within twelve

months, to grant the company a lease or leases of lands in Reserve No. 1. He also raised the question whether the executive order of May 31, 1921, had any legal force and refused to permit the company to make the contract unless Denby should sign as Secretary of the Navy. April 20, Arthur W. Ambrose of the Bureau of Mines was sent from Washington to Three Rivers with the papers in the case. He was instructed to consult Fall as to whether Denby should be made a party to the contract. April 23, Fall by telegram agreed that Denby should be made a party and directed Finney to execute the contract for the Department of the Interior. While it is not clearly shown that Ambrose took with him a draft of the letter of April 25, signed by Denby and Finney and sent to Cotter, he was instructed to, and did, consult Fall concerning it. That letter declares that the company's proposals were the lowest received by the Government. After stating that, expressed in money, proposal B is the better by $235,-184.40, and by the possible saving by performance for less than the estimated cost of construction, it said: "It is evident from our conversation of April 18 that your interpretation of preferential right was to the effect that the . . . Transport Co. desired the right to lease certain specified land in naval petroleum reserve No. 1 as well as preferential right to lease other land in naval petroleum reserve No. 1 to the extent described in Article XI of contract. It is also my understanding from your conversation that unless the . . . Transport Co. could get a lease to certain lands, your company would not desire to enter into a contract under the terms outlined in proposal (B) and preferred the government would accept proposal (A)." The letter then stated that the Department favored proposal B and reiterated its stated advantages over the other proposal. Then it said: "In order that the Government may take advantage of a contract embodying the terms outlined in proposal (B), I wish to advise you that

the Department of the Interior will agree to grant to the . . . Transport Co. within one year from the date of the delivery of a contract relative to the Pearl Harbor project leases to drill the following tracts of land." The letter specified the quarter section covered by the lease of June 5, 1922, and an additional strip, and stated that the royalties to be required would not be greater than specified rates ranging from 12½ to 35 per cent. The preferential right was inserted to prevent competition. The assurance that additional leases would be given was not necessary or required under proposal B.

After the making of the contract of April 25, the posted field price of crude oil declined rapidly. In the autumn of 1922 the Transport Company and Doheny were in correspondence or consultation with Fall for the purpose of at once securing additional leases in Reserve No. 1. Doheny submitted a proposition to Fall which the latter delivered to his subordinates with his favorable recommendation. Later Doheny enlarged the proposition, and there followed negotiations concerning the proposed lease. Doheny and Fall agreed upon a schedule of royalties. The lease of December 11 was arranged without competition of any kind. Plans for the proposed construction work had not been prepared. Before the contract and lease were made Fall and others in his Department stated to persons making inquiries that it was not the intention to make leases or to drill in that Reserve. The danger of drainage had been eliminated by agreement between the United States and oil companies operating in the vicinity that no drilling should be done by either except on six months' notice to the other.

The District Court concluded that the contracts and leases were obtained by corruption and fraud. On their appeal, petitioners challenged practically all the findings of the trial court. The Circuit Court of Appeals, after

stating the issue and the substance of the facts found and conclusions reached below, said: "We find no ground for disturbing the findings of fact which we deem essential to the decision of the case, and while the evidence may be insufficient to support certain contested findings the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance." The petitioners here argue that the Secretary of the Navy did in fact exert the authority conferred by the Act of June 4, 1920, and that Fall did not dominate the making of the contracts and leases; that it was not proved by any evidence competent or admissible against the companies that Doheny gave Fall $100,000; that the giving of the money did not affect the transaction; that it was a loan and not a bribe, and that the record does not sustain the conclusion of the District Court.

We have considered the evidence, and we are satisfied that the findings as to the matters of fact here controverted are fully sustained, except the statement that Denby signed the contracts and leases under misapprehension and without full knowledge of the contents of the documents. As to that the record requires an opposite finding. Under the Act of June 4, 1920, it was his official duty to administer the oil reserves; he was not called as a witness, and it is not to be assumed that he was without knowledge of the disposition to be made of them or of the means employed to get storage facilities and fuel oil for the Navy. He is presumed to have had knowledge of what he signed; there are direct evidence and proven circumstances to show that he had. But the evidence sustains the finding that he took no active part in the negotiations, and that Fall, acting collusively with Doheny, dominated the making of the contracts and leases.

The finding that Doheny caused the $100,000 to be given to Fall is adequately sustained by the evidence.

Early in 1924, during the investigation of these contracts and leases by the Senate Committee, Doheny voluntarily appeared as witness and there gave testimony for the purpose of explaining the money transaction between him and Fall at the time the initial contract was being negotiated. At the trial of this case, over objections of the companies, his statements before the committee were received in evidence. Petitioners insist that they were not admissible. But Doheny acted for both companies when the contracts and leases were negotiated. He controlled the voting power of one that owned all the shares of the other. He was President of the Petroleum Company up to July 24, 1922, and then became Chairman of its board. He was President of the Transport Company until December 7, 1923, when he became Chairman of its board. He was Chairman of both when he testified. There is no evidence that his control over or authority to act for these companies was less in 1924, when he appeared for them before the committee, than it was in 1921 and 1922, when he negotiated and executed the contracts and leases. The companies were much concerned as to the investigation lest it might result in an effort to set aside the transaction. The hearing before the committee was an occasion where it was proper for them to be represented. Doheny had acted for them from the inception of the venture. The facts and circumstances disclosed by the record justified the lower courts in holding that, when he testified before the committee, he was acting for the companies within the scope of his authority. His statements on that occasion are properly to be taken as theirs, and are admissible in evidence against them. *Chicago* v. *Greer,* 9 Wall. 726, 732; *Xenia Bank* v. *Stewart,* 114 U. S. 224, 229; *Fidelity & Deposit Co.* v. *Courtney,* 186 U. S. 342, 349, 351; *Aetna Indemnity Co.* v. *Auto-Traction Co.,* 147 Fed. 95, 98; *Joslyn* v. *Cadillac Co.,*

177 Fed. 863, 865; *Chicago, Burlington & Quincy R. R. Co.* v. *Coleman,* 18 Ill. 297, 298.

The facts and circumstances disclosed by the record show clearly that the interest and influence of Fall as well as his official action were corruptly secured by Doheny for the making of the contracts and leases; that, after the executive order of May 31, 1921, Fall dominated the administration of the Naval Reserves, and that the consummation of the transaction was brought about by means of collusion and corrupt conspiracy between him and Doheny. Their purpose was to get for petitioners oil and gas leases covering all the unleased lands in the Reserve. The making of the contracts was a means to that end. The whole transaction was tainted with corruption. It was not necessary to show that the money transaction between Doheny and Fall constituted bribery as defined in the Criminal Code or that Fall was financially interested in the transaction or that the United States suffered or was liable to suffer any financial loss or disadvantage as a result of the contracts and leases. It is enough that these companies sought and corruptly obtained Fall's dominating influence in furtherance of the venture. It is clear that, at the instance of Doheny, Fall so favored the making of these contracts and leases that it was impossible for him loyally or faithfully to serve the interests of the United States. The lower courts for that reason rightly held the United States entitled to have them adjudged illegal and void. *Crocker* v. *United States,* 240 U. S. 74, 80, 81; *Garman* v. *United States,* 34 Ct. Cls. 237, 242; *Herman* v. *City of Oconto,* 100 Wis. 391, 399; *Harrington* v. *Victoria Graving Dock Co.,* L. R. 3 Q. B. D. 549; *Tool Company* v. *Norris,* 2 Wall. 45, 54, 56; *Trist* v. *Child,* 21 Wall. 441, 448, 452; *Meguire* v. *Corwine,* 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 275; *Washington Irr. Co.* v. *Krutz,* 119 Fed. 279, 286.

The transaction evidenced by the contracts and leases was not authorized by the Act of June 4, 1920. The grant of authority to the Secretary of the Navy did not indicate a change of policy as to conservation of the reserves. The Act of June 25, 1910, the Act of February 25, 1920, the executive orders, and the Joint Resolution of February 8, 1924, show that it has been and is the policy of the United States to maintain a great naval petroleum reserve in the ground. While the possibility of loss by drainage might be a reason for legislation enabling the Secretary to take any appropriate action that at any time might become necessary to save the petroleum, it is certain that the contracts and leases have no such purpose. The work to be paid for in crude products contemplated the construction of fuel depots. The one covered by the first contract was a complete unit sufficient for 1,500,000 barrels including pumping stations, fire protection and its own wharf and channel. It is not necessary to consider the possible extent of the construction that might be required under the later contract. Indeed it could not then be known how much work and products in storage it would take to exhaust the reserve. The record shows that the Navy Department estimated the cost of proposed storage plants and contents at approximately $103,000,000. Congress has not authorized any such program. The Department tried and failed to secure additional appropriations for the Pearl Harbor storage facilities. The Act of August 31, 1842, 5 Stat. 577 (R. S. § 1552), gave the Secretary authority to construct fuel depots. But it was taken away by the Act of March 4, 1913, 37 Stat. 898. Since that time Congress has made separate appropriations for fuel stations at places specifically named.[1] And it has

[1] March 4, 1913, c. 148, 37 Stat. 891, 898; June 30, 1914, c. 130, 38 Stat. 392, 401; March 3, 1915, c. 83, 38 Stat. 928, 937; August 29, 1916, c. 417, 39 Stat. 556, 570; March 4, 1917, c. 180, 39 Stat. 1168,

long been its policy to prohibit the making of contracts of purchase or for construction work in the absence of express authority and adequate appropriations therefor. R. S. §§ 3732, 3733; Act of June 12, 1906, 34 Stat. 255; Act of June 30, 1906, 34 Stat. 764. The Secretary was not authorized to use money received from the sale of gas products. All such sums are required to be paid into the Treasury. R. S. §§ 3617, 3618, as amended, 19 Stat. 249.

The words granting authority to the Secretary are "use, store, exchange, or sell" the oil and gas products. As the Secretary, among other things, was authorized until July 1, 1922, to use money out of the appropriation to "store" oil and gas products from these lands, it will not be held, in the absence of language clearly requiring it, that he was also empowered without limit to use crude oil to pay for additional storage facilities. Unless given him by "exchange" the Secretary had no power by such contracts to locate or construct fuel depots. It is not contended that the clause confers unlimited authority, and the petitioners say that the word "exchange" must have some reasonable limitation. But they insist that it is broad enough to authorize the contracts. If it is, there is no reason why crude oil may not be used to pay for any kind of construction work or to purchase any property that may be desired by the Department for the use of the Navy.

The purpose and scope of the provision are limited to the administration of the reserves. The clause is found in a proviso to an appropriation for an investigation of fuel adapted to naval requirements and the availability of the supply in the naval reserves. If "exchange" has

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1179; June 15, 1917, c. 29, 40 Stat. 182, 207; July 1, 1918, c. 114, 40 Stat. 704, 726; November 4, 1918, c. 201, 40 Stat. 1020, 1034; July 11, 1919, c. 9, 41 Stat. 131, 145; June 5, 1920, c. 253, 41 Stat. 1015, 1030; July 12, 1921, c. 44, 42 Stat. 122, 130.

the meaning contended for by petitioners, it must be taken to indicate that Congress intended by the clause in question not only to restore to the Secretary authority in respect of fuel depots that had been taken from him by the Act of March 4, 1913, but also to enable him by means of contracts and leases such as these to reverse, if he saw fit, the established policy of the Government as to the petroleum reserves. The circumstances of the enactment as well as the terms of the provision indicate a purpose to authorize exchange of crude petroleum from these reserves for fuel oil and other petroleum products suitable for use by the Navy. The Secretary was not authorized to refine the crude product. A draft of the Act included that authority, but the word "refine" was stricken out. This made necessary the exchange of the crude product for fuel oil and other products suitable for use. Whatever the meaning rightly to be attributed to the words employed, it is clear that they stop short of authorizing the Secretary to pay for improvements such as were covered by the contracts.

The petitioners insist that, in any event, they are entitled to credit for the cost of construction work performed and of the fuel oil furnished at Pearl Harbor, and also for the amount they expended to drill and operate oil wells and to make other improvements on the leased lands.

The substance of the account, as stated in the decree of the District Court, is printed in the margin.[2] The

[2] A. Transport Company is debited:

1. All royalty oil, etc., delivered under contracts of April 25, 1922, and December 11, 1922, to May 31, 1925	$7,889,759.21
2. Profit on their resale	791,012.03
3. Interest on #1	684,625.55
4. Interest on #2	94,351.36
Total	$9,459,748.15

findings show that the storage facilities at Pearl Harbor covered by the contracts were economically completed on the lands of the United States under the direction of the companies and the supervision of officers of the Navy; that they are of benefit to the United States and are now available for use and should be retained by it; that the

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B. Transport Company is credited:	
1. Actual cost of storage facilities at Pearl Harbor, under contracts of April 25, 1922, and December 11, 1922	$7,350,814.11
2. Interest on #1	820,922.43
3. Cost of fuel oil delivered to tanks	1,986,142.47
4. Interest on #3	259,569.11
Total	$10,417,448.12
Balance due Transport Company	$957,699.97
C. Petroleum Company is debited:	
1. Value of petroleum products taken under leases of June 5, 1922, and December 11, 1922 (other than those included in the account of the Transport Co.)	$1,556,861.17
2. Interest on #1	170,650.02
Total	$1,727,511.19
D. Petroleum Company is credited:	
1. Actual cost of drilling, putting on production, maintaining and operating wells, and other useful improvements to property under leases	$1,013,428.75
2. Actual cost of constructing, maintaining and operating compressor and absorption plant less value of use for products of other lands and less gasoline manufactured and sold from gas produced from lands in controversy	194,991.01
3. Interest on #1 and #2	161,060.43
Total	$1,369,480.19
Balance due United States	$358,031.00

NOTE: Interest is at the rate of 7% and is calculated on monthly balances to May 31, 1925.

Transport Company delivered into the storage constructed a specified quantity of fuel oil of value to the United States equal to what it cost the company; that under the supervision of Government officials the Petroleum Company economically expended money for development of the leased lands to produce oil, gas and gasoline and to make thereon permanent improvements that resulted in benefit to the United States equal to the amount expended.

They maintain that, as a condition of granting the United States the relief it claims, equity requires it to give credit to them for their expenditures; that if this be denied, they will be required to pay double the value of the royalty oil they have received, and that the United States thereby will be unjustly enriched; that, except the balance shown by the account, they have paid in full for such oil; that the United States has fully paid for the benefits it received from petitioner's expenditures, and that, in effect, it now seeks to recover the payments it made voluntarily. And they insist that the United States must be made to bear these amounts even if the contracts were made without authority of law or were tainted with fraud, violation of public policy, conspiracy or other wrongful act.

In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. "The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction." *Neblett* v. *Macfarland,* 92 U. S. 101, 103. And, while the perpetrator of the fraud has no standing to rescind, he is not regarded as an outlaw; and, if the trans-

action is rescinded by one who has the right to do so, "the courts will endeavor to do substantial justice so far as is consistent with adherence to law." *Stoffela* v. *Nugent,* 217 U. S. 499, 501. The general principles of equity are applicable in a suit by the United States to secure the cancelation of a conveyance or the rescission of a contract. *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 339; *United States* v. *Stinson,* 197 U. S. 200, 204; *State of Iowa* v. *Carr,* 191 Fed. 257, 266; cf. *Mason* v. *United States,* 260 U. S. 545, 557, *et seq.* But they will not be applied to frustrate the purpose of its laws or to thwart public policy.

Causey v. *United States,* 240 U. S. 399, was a suit in equity brought by the United States to recover title to public lands conveyed to defendant under the homestead laws. The patent was obtained by fraud. The defendant paid the United States for the land in scrip at the rate of $1.25 per acre. The complaint did not contain an offer to return the scrip, and it was insisted by the defendant that, because of such failure, the suit could not be maintained. The court said (p. 402): "This objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the

ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded."

Heckman v. *United States,* 224 U. S. 413, was a suit by the United States to cancel conveyances of allotted lands made by members of the Cherokee Nation and to have the title decreed to be in the allottees and their heirs, upon the ground that the conveyances were made in violation of restrictions upon the power of alienation. On demurrer to the complaint it was insisted that the allottees had received considerations for the conveyances and should be made parties to the suit in order that equitable restoration might be enforced. The court said (p. 446): "Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute."

United States v. *Trinidad Coal Co.,* 137 U. S. 160, was a suit brought by the United States to set aside patents conveying certain coal lands on the ground that they were obtained by fraud and in violation of R. S. §§ 2347,

2348, 2350. The company, in furtherance of a fraudulent scheme to get the lands, furnished the money that was paid to the United States by the fraudulent patentees who conveyed the lands to the company. The complaint did not contain an offer by the United States to return the money. The company contended that the United States was subject to the rules that apply to individuals and that relief should be conditioned upon return of the money. The court held that the rule should not be applied in a case like that one. It laid down and applied the principles on which rest the decisions in *Causey* v. *United States, supra,* and *Heckman* v. *United States, supra.* Among other things, the court said (p. 170): "If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fradulent scheme formed by its officers, stockholders and employes in violation of law."

It was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the naval petroleum reserves. The purpose of the representatives of the Department was to get for the Navy fuel

depots or storage facilities that had not been authorized by Congress. The leases were made to obtain the crude products for use as a substitute for money to make good the amounts advanced by petitioners to pay for such improvements. The Secretary's authority to provide facilities in which to "store" naval reserve petroleum or its products did not extend beyond those that might be provided by use of the money made available by the Act of June 4, 1920. And, in order to get control of the oil lands covered by the leases, the companies agreed to pay for these unauthorized works of construction and to furnish fuel oil and other products of petroleum suitable for naval use to fill the storage facilities so added. The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud. The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made or fuel oil furnished as all were done without authority and as means to circumvent the law and wrongfully to obtain the leases in question. As Congress had not authorized them, it must be assumed that the United States did not want the improvements made or was not ready to bear the cost of making them. No storage of fuel oil at Pearl Harbor was authorized to be made in excess of the

capacity of, or in any places other than, the facilities provided for that purpose pursuant to authorization by Congress. Whatever their usefulness or value, it is not for the courts to decide whether any of these things are needed or should be retained or used by the United States. Such questions are for the determination of Congress. It would be unjust to require the United States to account for them until Congress acts; and petitioners must abide its judgment in respect of the compensation, if any, to be made. And this applies to the claim on account of the fuel oil as well as to the other items. Clearly petitioners are in no better position than they would be if they had paid money to the United States, instead of putting the fuel oil in storage. Equity does not condition the relief here sought by the United States upon a return of the consideration. *United States* v. *Trinidad Coal Co., supra; Heckman* v. *United States, supra; Causey* v. *United States, supra.*

Decree affirmed.

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

TUMEY *v.* OHIO.

ERROR TO THE SUPREME COURT OF OHIO.

No. 527. Argued November 29, 30, 1926.—Decided March 7, 1927.

1. To subject a defendant to trial in a criminal case involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him is a denial of due process of law. P. 522.
2. A system by which an inferior judge is paid for his service only when he convicts the defendant, has not become so customary in the common law or in this country that it can be regarded as due process where the costs usually imposed are not so small as to be within the maxim *de minimis non curat lex.* Pp. 523, 531.

3. Under statutes of Ohio, offenses against state prohibition, involving a wide range of fines enforcible by imprisonment, may be tried without a jury, before the mayor of any rural village situate in the county (however populous) in which offenses occur; his judgment upon the facts is final and conclusive unless so clearly unsupported as to indicate mistake, bias, or wilful disregard of duty; the fines are divided between the State and village; the village by means of the fines collected hires attorneys and detectives to arrest alleged offenders anywhere in the county and prosecute them before the mayor; in addition to his salary, the mayor, when he convicts, but not otherwise, receives his fees and costs amounting to a substantial income; the fines offer a means of adding materially to the financial prosperity of the village, for which the mayor, in his executive capacity, is responsible. *Held* violative of the Fourteenth Amendment. Pp. 520, 531.

115 Oh. St. 701, reversed.

ERROR to a judgment of the Supreme Court of Ohio, which declined to review a judgment of the State Court of Appeals, 22 Oh. L. Rep. 634, reversing a judgment of the Court of Common Pleas of Hamilton County, 25 Oh. Nisi Prius (N. S.) 580, which reversed a judgment of the Mayor of the Village of North College Hill convicting and fining Tumey for violation of the Ohio Prohibition Act and ordering that he be imprisoned until the fine and costs were paid.

Messrs. Edward P. Moulinier and *James L. Magrish, pro hac vice,* with whom *Mr. Harry H. Shafer* was on the brief, for plaintiff in error.

When a state deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives him of liberty and property without due process of law. *Moore* v. *Dempsey,* 261 U. S. 86; *Frank* v. *Mangum,* 237 U. S. 309.

A financial interest of a court in its decision constitutes that court an unfair and partial tribunal within the prohibition of the Fourteenth Amendment. *Grand Stahl* v. *Supervisors,* 187 Iowa 1342; *Re Ryers,* 72 N. Y. 1; *Case* v. *Hoffmann,* 100 Wis. 314; *Commrs.* v. *Smith,* 233 Ill.

417; *Meyers* v. *Shields,* 61 Fed. 713; Cooley, Const. Lim., p. 356. The mayor who tried this case was personally, financially interested in his decision, for under the Ohio law the mayor can receive no fee unless he finds the defendant guilty. Op. Atty. Gen. (Ohio), 1915, p. 148. When the question is merely whether the cost should be paid by the plaintiff or defendant, it is held that the judge is not disqualified because of financial interest. Under the Ohio law, however, since the mayors of the villages, sitting as courts of justice, do not receive any fees unless they convict, an entirely different situation is created.

Distinguishing, *Probasco* v. *Raine,* 50 Oh. St. 378. Cf. *Meyers* v. *Shields,* 61 Fed. 713.

Aside from the personal financial interest of the mayor, the record is clear that the mayor was operating the court in order to make money for the village, of which he was executive head, and which was in bad financial condition. The greater the fine assessed by the court, the greater the amount of money which the village would receive. The mayor's interest as an executive head, his operation of the court as a commercial venture to make money for the village, made his so-called court but a mask and a sham, in which there were the forms of judicial proceedings, but in fact no real judicial hearing.

A trial before a tribunal financially interested in the result of its decision constitutes a denial of due process of law. *Day* v. *Savadge,* Hobart 87; *London* v. *Wood,* 12 Mod. 669; *Landfear* v. *Mayor,* 4 La. 97. The following cases show various degrees of money and other interest which were held to disqualify: *Pierson* v. *Atwood,* 13 Mass. 324; *Gregory* v. *Railroad,* 4 Oh. St. 675; *State* v. *Young,* 31 Fla. 594; *Nettleton's Appeal,* 28 Conn. 267; *Dimes* v. *Canal,* 3 H. L. 759; *Moses* v. *Julian* 45 N. H. 52; *Stockwell* v. *Township,* 22 Mich. 341; *State* v. *Crane,* 36 N. J. L. 394; *Stuart* v. *Commonwealth,* 91 Va. 152;

Findley v. *Smith,* 42 W. Va. 299; *State* v. *Seattle,* 19 Wash. 8; *Ex parte Cornwell,* 144 Ala. 497; *Yazoo R. R.* v. *Kirk,* 102 Miss. 41.

Messrs. Wayne B. Wheeler and *Edward B. Dunford,* with whom *Messrs. D. W. Murphy* and *Charles M. Earhart* were on the brief, for defendant in error.

It is well settled that this court will not review the findings of a state court upon questions of fact. *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158; *Hedrick* v. *A. T. & S. F. R. R. Co.,* 167 U. S. 673; 63 L. R. A. 577. The state court opinion shows no federal question necessary to its decision. Sec. 237(a), Jud. Code, as amended February 13, 1925.

Every step taken was authorized by legislative enactment. Imprisonment was not a part of the penalty and therefore the mayor had final jurisdiction and the defendant was not entitled to a jury trial. *Work* v. *State,* 2 Oh. St. 296; *Inwood* v. *State,* 42 Oh. St. 186; *State* v. *Borham,* 72 Oh. St. 358; *Hoffrichter* v. *State,* 102 Oh. St. 65; *Stiess* v. *State,* 103 Oh. St. 33; *State* v. *Pape,* 105 Oh. St. 515; *Cochran* v. *State,* 105 Oh. St. 541. Fees which the mayor and marshal of College Hill received belonged to them by virtue of the general statutes of the State applying to all state cases, liquor and otherwise. *Nead* v. *Nolte,* 111 Oh. St. 486.

The mayor's interest in costs, allowed by law upon conviction, did not disqualify him. His remuneration was the same whether the maximum or minimum fine was imposed. The minimum fine was imposed in this case, which negatives the suggestion of a conspiracy to mulct the accused for the benefit of the prosecuting witnesses and attorney.

Costs in criminal cases at common law were unknown. They were created by statute. That there was no provision for taxing costs in the event of acquittal, and that

the mayor could assess costs only upon conviction, except as he might require bond for costs from unofficial prosecutors, as provided in § 13499 of the General Code, did not *per se* disqualify him to try the offense. It is the almost universal rule that in the absence of specific legislation the State is not liable for costs. It is the general practice to provide for the assessment of trial fees in the event of conviction. That such costs are collectible only upon conviction does not constitute a denial of due process of law. *Ex parte Guerrero,* 69 Cal. 88; *Bennett* v. *State,* 4 Tex. App. 72; *People* v. *Edmunds,* 15 Barb. 529; *Commonwealth* v. *Keenan,* 97 Mass. 589; *Wellmaker* v. *Terrell,* 3 Ga. App. 791; *Pace* v. *Hazelhurst,* 9 Ga. App. 203; *Longston* v. *Hazelhurst, id.* 449. Legislation providing for the taxation of costs against the accused upon conviction is predicated upon the theory of making the violator bear the expense to which he has placed the State in securing his apprehension and punishment.

The mayor's interest as taxpayer in municipal revenue from state fines did not disqualify him. *Ex parte Guerrero, supra; State* v. *Intoxicating Liquors,* 54 Me. 564; *State* v. *Craig,* 80 Me. 85; *Commonwealth* v. *Emery,* 11 Cush. 406; *Hanscarrib* v. *Russell,* 11 Gray 373; *State* v. *Batchelder,* 6 Vt. 479; *Colgate* v. *Hill,* 20 Vt. 56. The courts cannot declare a policy different from that fixed by the legislature. *Allen* v. *Smith,* 84 Oh. St. 283; *Vidal* v. *Girard's Executors,* 2 How. 128; *Dewey* v. *United States,* 178 U. S. 510.

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

The question in this case is whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitu-

tion, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial.

Tumey, the plaintiff in error, hereafter to be called the defendant, was arrested and brought before Mayor Pugh, of the Village of North College Hill, charged with unlawfully possessing intoxicating liquor. He moved for his dismissal because of the disqualification of the Mayor to try him, under the Fourteenth Amendment. The Mayor denied the motion, proceeded to the trial, convicted the defendant of unlawfully possessing intoxicating liquor within Hamilton County, as charged, fined him $100, and ordered that he be imprisoned until the fine and costs were paid. He obtained a bill of exceptions and carried the case on error to the Court of Common Pleas of Hamilton County. That court heard the case and reversed the judgment, on the ground that the Mayor was disqualified, as claimed. 25 Ohio Nisi Prius (N. S.) 580. The State sought review by the Court of Appeals of the first appellate district of Ohio, which reversed the Common Pleas and affirmed the judgment of the Mayor. 23 Ohio Law Reporter, 634.

On May 4, 1926, the State Supreme Court refused defendant's application to require the Court of Appeals to certify its record in the case. The defendant then filed a petition in error in that court as of right, asking that the judgment of the Mayor's Court and of the Appellate Court be reversed, on constitutional grounds. On May 11, 1926, the Supreme Court adjudged that the petition be dismissed for the reason that no debatable constitutional question was involved in the cause. The judgment was then brought here upon a writ of error allowed by the Chief Justice of the State Supreme Court, to which it was rightly directed. *Matthews* v. *Huwe, Treasurer,* 269 U. S. 262; *Hetrick* v. *Village of Lindsey,* 265 U. S. 384. This brings us to the merits of the case.

The defendant was arrested and charged with the unlawful possession of intoxicating liquor at White Oak, another village in Hamilton County, Ohio, on a warrant issued by the Mayor of North College Hill. The Mayor acted under the sections of the State Prohibition Act, and Ordinance No. 125 of the Village of North College Hill adopted in pursuance thereof.

Section 6212–15 (Ohio General Code) provides that "No person shall after the passage of this act manufacture . . . possess . . . any intoxicating liquors . . ."

Section 6212–17 provides that ". . . any person who violates the provisions of this act (General Code, Sections 6212–13 to 6212–20) for a first offense shall be fined not less than one hundred dollars nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense he shall be fined not less than five hundred dollars nor more than two thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years. . . ."

The Mayor has authority, which he exercised in this case, to order that the person sentenced to pay a fine shall remain in prison until the fine and costs are paid. At the time of this sentence, the prisoner received a credit of sixty cents a day for each day's imprisonment. By a recent amendment, that credit has been increased to one dollar and a half a day. Sections 13716, 13717, Ohio Gen. Code.

Section 6212–18 provides, in part, that "Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act (G. C. Sections 6212–13 to 6212–20) when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge

may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided."

Error from the Mayor's Court lies to the court of Common Pleas of the County, and a bill of exceptions is necessary to present questions arising on the evidence. Sections 10359, 10361, Ohio General Code. The appellate review in respect of evidence is such that the judgment can only be set aside by the reviewing court on the ground that it is so clearly unsupported by the weight of the evidence as to indicate some misapprehension or mistake or bias on the part of the trial court, or a wilful disregard of duties. *Datesh* v. *State,* 23 Ohio Nisi Prius (N. S.) 273.

Section 6212–19, provides that " Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

Section 6212–37 provides that " The council of any city or village may by ordinance, authorize the use of any part of the fines collected for the violation of any law prohibiting the manufacture and sale of intoxicating liquors, for the purpose of hiring attorneys, detectives, or secret service officers to secure the enforcement of such prohibition law. And such council are hereby authorized to appropriate not more than five hundred dollars annually from the general revenue funds, for the purpose of enforcing the law prohibiting the manufacture and sale of intoxicating liquors, when there are no funds available from the fines collected for the violation of such prohibitory law."

Under the authority of the last section, the Village Council of North College Hill passed Ordinance No. 125, as follows:

"An ordinance to provide for compensation to be paid from the secret service funds of the Village of North College Hill, Hamilton County, Ohio, created by authority of Section 6212–37, of the General Code of Ohio, to detectives, secret service officers, deputy marshals' and attorneys' fees, costs, etc., for services in securing evidence necessary to conviction and prosecuting violation of the law of the state of Ohio prohibiting the liquor traffic.

"Be it ordained by the Council of the Village of North College Hill, Hamilton County, Ohio:

"Section I. That fifty per cent of all moneys hereafter paid into the treasury of said village of North College Hill, Ohio, that is one-half of the share of all fines collected and paid into and belonging to said village of North College Hill, Ohio, received from fines collected under any law of the state of Ohio, prohibiting the liquor traffic, shall constitute a separate fund to be called the Secret Service Fund to be used for the purpose of securing the enforcement of any prohibition law.

"Section II. That deputy marshals of the village of North College Hill, Ohio, shall receive as compensation for their services in securing the evidence necessary to secure the conviction of persons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15 per cent. of the fine collected, and other fees allowed by law.

"Section III. That the attorney at law of record prosecuting persons charged with violating the law of the state of Ohio, prohibiting the liquor traffic, shall receive as compensation for legal services an amount equal to 10 per cent. of the fine collected, in all cases, whether the plea be guilty or not guilty.

"Section IV. That detectives and secret service officers shall receive as compensation for their services in securing the evidence necessary to secure the conviction of

persons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15 per cent. of the fine collected.

"Section V. That the mayor of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.

"Section VI. This ordinance is hereby declared to be an emergency ordinance, necessary to the immediate preservation of the public peace and safety, made necessary by reason of the flagrant violation of the laws of Ohio, enacted to prohibit traffic in intoxicating liquors, and shall be in effect from and after its passage."

The duties of the Mayor of a village in Ohio are primarily executive. Sections of the General Code of Ohio provide as follows:

"Section 4248. The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.

"Section 4255. . . . He (the Mayor) shall be the chief conservator of the peace within the corporation. . . . He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

"Section 4258. . . . He shall see that all ordinances, by-laws and resolutions are faithfully obeyed and enforced. . . .

"Section 4259. The mayor shall communicate to council from time to time a statement of the finances of the municipality, and such other information relating thereto and to the general condition of affairs of the municipality as he deems proper or as may be required by council.

"Section 4262. The mayor shall supervise the conduct of all the officers of the corporation. . . ."

The fees which the Mayor and Marshal received in this case came to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise. The Mayor was entitled to hold the legal fees taxed in his favor. Ohio General Code, § 4270; *State* v. *Nolte,* 111 O. S. 486. Moreover, the North College Hill village council sought to remove all doubt on this point by providing (§ 5, Ord. 125, *supra*), that he should receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases. But no fees or costs in such cases are paid him except by the defendant if convicted. There is, therefore, no way by which the Mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and furnishing the evidence to convict in such cases, except it be from the initial $500 which the village may vote from its treasury to set the court going, or from a fund created by the fines thereafter collected from convicted defendants.

By an Act of 1913 (103 O. L. 290), the Mayor's court in villages in Hamilton County and in half a dozen other counties with large cities, was deprived of jurisdiction to hear and punish misdemeanors committed in the county beyond the limits of the corporation. The Prohibition Act, known as the Crabbe Act, adopted in 1920 (108 O. L., Pt. 1, 388 and Pt. 2, 1182) changed this, and gave to the Mayor of every village in the State jurisdiction within the county in which it was situate to try violations of that Act.

Counsel for the State in their brief explain the vesting by state legislatures of this country of jurisdiction in village courts as follows: "The purpose of extending the jurisdiction in the first instance was to break up places of outlawry that were located on the municipal boundary just outside of the city. The Legislature also

faced the situation that in some of the cities the law enforcement agencies were failing to perform their duty, and, therefore, in order that those forces that believe in enforcement and upholding of law might have some courts through which process could be had, it gave to mayors county-wide jurisdiction." It was further pointed out in argument that the system by which the fines to be collected were to be divided between the State and the village was for the proper purpose of stimulating the activities of the village officers to such due enforcement.

The Village of North College Hill in Hamilton County, Ohio, is shown by the federal census to have a population of 1104. That of Hamilton County, including the City of Cincinnati, is more than half a million. The evidence discloses that Mayor Pugh came to office after ordinance No. 125 was adopted, and that there was a division of public sentiment in the village as to whether the ordinance should continue in effect. A petition opposing it and signed by a majority of the voters was presented to Mayor Pugh. To this the Mayor answered with the declaration that, if the village was in need of finances, he was in favor of and would carry on "the Liquor Court," as it was popularly called, but that if the court was not needed for village financial reasons, he would not do so. It appears that substantial sums were expended out of the village treasury, from the fund made up of the fines thus collected, for village improvements and repairs. The Mayor was the owner of a house in the village.

Between May 11, 1923 and December 31, 1923, the total amount of fines for violation of the prohibition law, collected by this village court, was upwards of $20,000, from which the State received $8,992.50, North College Hill received $4,471.25 for its general uses, $2,697.25 was placed to the credit of the village safety fund, and the balance was put in the secret service fund. Out of this, the person acting as prosecutor in the liquor court re-

ceived in that period $1,796.50; the deputy marshals, inspectors and other employees, including the detectives, received $2,697.75, and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of these cases. Mayor Pugh received $696.35 from these liquor cases during that period, as his fees and costs, in addition to his regular salary.

That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759; *Gregory* v. *Railroad,* 4 O. S. 675; *Peace* v. *Atwood,* 13 Mass. 324; *Taylor* v. *Commissioners,* 105 Mass. 225; *Kentish Artillery* v. *Gardiner,* 15 R. I. 296; *Moses* v. *Julian,* 45 N. H. 52; *State* v. *Crane,* 36 N. J. L. 394; *Railroad Company* v. *Howard,* 20 Mich. 18; *Stockwell* v. *Township,* 22 Mich. 341; *Findley* v. *Smith,* 42 W. Va. 299; *Nettleton's Appeal,* 28 Conn. 268; Cooley's Constitutional Limitations, 7th ed., p. 592, *et seq.* Nice questions, however, often arise as to what the degree or nature of the interest must be. One is in respect of the effect of the membership of a judge in a class of taxpayers or others to be affected by a principle of law, statutory or constitutional, to be applied in a case between other parties and in which the judge has no other interest. Then the circumstance that there is no judge not equally disqualified to act in such a case has been held to affect the question. *Wheeling* v. *Black,* 25 W. Va. 266, 280; *Peck* v. *Freeholders of Essex,* 20 N. J. L. 457; *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759 (see Baron Parke's Answer for the Judges, pp. 785, 787); Year Book, 8 Henry 6, 19, s. c. 2 Roll. Abridg. 93; *Evans* v. *Gore,* 253 U. S. 245, 247; *Stuart* v. *Mechanics' & Farmers' Bank,* 19 Johns. 496; *Ranger* v. *Railroad,* 5 H. L. C. 72. We are not embarrassed by such considerations here, for there were available in this case other judicial officers who had

no disqualification either by reason of the character of their compensation or their relation to the village government.

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling* v. *Black,* 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

The Mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance. Counsel for the State do not deny this, but assert the validity of the practice as an exception to the general rule. They rely upon the cases of *Ownbey* v. *Morgan,* 256 U. S. 94; *Murray's Lessee* v. *Hoboken Land and Improvement Company,* 18 How. 272, 276–280. These cases show that, in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. Counsel contend that in Ohio and in other States, in the economy which it is found necessary to maintain in the administration of justice in the inferior courts by justices of the peace and by judicial officers of like jurisdiction, the only compensation which the State and county

and township can afford is the fees and costs earned by them, and that such compensation is so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty, or as prejudicing the defendant in securing justice, even though the magistrate will receive nothing if the defendant is not convicted.

We have been referred to no cases at common law in England prior to the separation of colonies from the mother country showing a practice that inferior judicial officers were dependent upon the conviction of the defendant for receiving their compensation. Indeed, in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable. *Bonham's Case,* 8 Coke, 118a; s. c. 2 Brownlow and Goldesborough's Rep. 255; *City of London* v. *Wood,* 12 Modern Rep. 669, 687; *Day* v. *Savage,* Hobart 85, 87; *Hesketh* v. *Braddock,* 3 Burrows 1847, 1856, 1857 and 1858.

As early as the 12th Richard II, A. D. 1388, it was provided that there should be a commission of the justices of the peace, with six justices in the county once a quarter, which might sit for three days, and that the justices should receive four shillings a day " as wages," to be paid by the sheriffs out of a fund made up of fines and amercements, and that that fund should be added to out of the fines and amercements from the courts of the Lords of the Franchises, which were hundred courts allowed by the King by grant to individuals.

It was required that the justices of the peace should be knights, esquires or gentlemen of the land,—qualifications that were not modified until 1906. The wages paid were used " to defray their common diet," and soon became obsolete. 1 Holdsworth's History of English Law, 288, 289. The wages paid were not dependent on con-

viction of the defendant. They were paid at a time when the distinction between torts and criminal cases was not clear, Holdsworth, Vol. 2, 363, 365; Vol. 3, 328; and they came from a fund which was created by fines and amercements collected from both sides in the controversy. There was always a plaintiff, whether in the action for a tort or the prosecution for an offense. In the latter he was called the prosecutor. If he failed to prove his case, whether civil or criminal, he was subject to amercement *pro falso clamore,* while if he succeeded, the defendant was *in misericordia.* See *Comm.* v. *Johnson,* 5 S. & R. (Pa.) 195, 198; *Musser* v. *Good,* 11 *Id.* 247. Thus in the outcome someone would be amerced in every case, and the amercements generally went to the Crown, and the fund was considerable. The Statute of Richard II remained on the statute book until 1855, when it was repealed by the 18th and 19th Victoria. Meantime the hundred courts by franchise had largely disappeared. The wages referred to were not part of the costs. The costs at common law were the amounts paid either by the plaintiff or prosecutor or by the defendant for the witnesses or services of the court officers. Burn's Justice, Vol. 1, p. 628. Chitty's Criminal Law, 4 ed. 1841, Vol. 1, 829. See also 14 George III, ch. 20, 1774. For hundreds of years the justices of the peace of England seem not to have received compensation for court work. Instead of that, they were required, upon entering upon the office, to pay certain fees. Holdsworth, Vol. 1, p. 289; 19 Halsbury's Laws of England, § 1152. Local judges in towns are paid salaries.

There was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace. In Hawkins, 2 Pleas of the Crown, we find the following:

"The general rule of law certainly is that justices of the peace ought not to execute their office in their own case [citing 1 Salk. 396]; and even in cases where such

proceeding seems indispensably necessary, as in being publicly assaulted or personally abused, or their authority otherwise contemned while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender (Stra. 240).

"And by the common law, if an order of removal were made by two justices, and one of them was an inhabitant of the parish from which the pauper was removed, such order was illegal and bad, on the ground that the justice who was an inhabitant was interested, as being liable to the poor's rate. (*Rex.* v. *Great Chart,* Burr. S. C. 194, Stra. 1173.)"

And this strict principle, unless there is relief by the statute, is seen in modern cases. *Queen* v. *The Recorder of Cambridge,* 8 Ellis & Blackburn, 637; *Regina* v. *Hammond,* 9 Law Times Reports (N. S.) 423; *The Queen* v. *Rand,* Law Reports, 1st Queen's Bench, 230; *Queen* v. *Gaisford,* 1st Queen's Bench Division, 381; 19 Halsbury's Laws of England 1156.

There was, then, no usage at common law by which justices of the peace or inferior judicial officers were paid fees on condition that they convicted the defendants, and such a practice certainly can not find support as due process of law in English precedent. It may be that the principle, as stated in Blackstone, Book 3rd, page 400, that the King shall neither pay nor receive costs, because it is the King's prerogative not to pay them to a subject and is beneath his dignity to receive them, was misunderstood and led, as suggested by Mr. Lewis in his edition of Blackstone, Vol. 3, p. 400, n. 60, to the practice in some States, in minor cases, of allowing inferior judges no compensation except by fees collected of the convicted defendant; but whether it did or not, the principle relied on did not support the practice. That practice has prevailed, and still prevails, in Arkansas, Kentucky, Nebraska, North Carolina, Georgia, Ohio and Texas, and it seems

at one time to have obtained in Indiana, Oregon, Illinois and Alabama.

In two of these States only has the question been considered by their courts, and it has been held that provision for payment to the judge of fees, only in case of conviction, does not disqualify him. Those are *Bennett* v. *State,* 4 Tex. App. 72; *Wellmaker* v. *Terrell,* 3 Ga. App. 791. There is no discussion in either of the question of due process of law. The existence of a statute authorizing the practice seems to have been the controlling consideration. Two other cases are cited. In *Ex parte Guerrero,* 69 Cal. 88, the judge was paid a regular salary, fixed by law. The fund out of which this was paid was increased by fees and fines collected in his court, but there is no evidence that payment of his salary was dependent on the amount of his collections or convictions. In *Herbert* v. *Baltimore County,* 97 Md. 639, the action was by a justice of the peace against a county for services in criminal cases. A new law limited him to $10 a month. The statement of the case does not distinctly show that in convictions he would have had a larger compensation from his costs collected out of the defendant, but this may be assumed from the argument. His contention was that the new law was invalid because it did not give the defendants before him due process. The court held against him, chiefly on the ground that he must be satisfied with the compensation the law afforded him. Responding to his argument that the new law was invalid because justices would be induced to convict when in justice they should acquit, the court said:

"We can not recognize the force of this suggestion, founded as it is upon the assumption that the justices will violate their oaths and the duties of their office and not upon anything that the law authorizes to be done."

So far as the case goes, it is an authority for the contention of the State, but the issue thus raised was not

considered at length and was not one which in such an action the court would be patient to hear pressed by the justice whose constitutional rights were not affected. *Tyler* v. *Court,* 179 U. S. 405, 409; *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306, 318.

In the case of *Probasco* v. *Raine, Auditor,* 50 O. S. 378, the question arose whether the fee of 4 per cent. payable to county auditors for placing omitted property on the duplicate list for taxation, which required investigation and quasi-judicial consideration, was invalid. The court held that it was not, and that the objection urged there could not be based on the argument that a man could not be a judge in his own case; that the auditor had no case to be adjudged, but that on the contrary he was the taxing officer before whom other parties were cited to appear and show cause why they should not bear their equal burden of taxation. The court said that the action of the auditor was not final so as to cut off further inquiry, but that the whole case might be gone into anew by proper proceedings in court. An exactly opposite conclusion was reached by the United States Circuit Court for the Northern District of Ohio in *Meyers* v. *Shields,* 61 Fed. 713, 725 *et seq.*

In other States than those above mentioned, the minor courts are paid for their services by the State or county regardless of acquittal or conviction, except that in Virginia the minor courts receive one-half of the usual fees where there is acquittal. Four States have put into their constitutions a provision that the State must pay the costs in such cases, in case of acquittal. They are California, Florida, Louisiana and South Carolina.

The strict common law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits against the municipal corporation of which they have been residents. *Diveny* v.

Elmira, 51 N. Y. 506; *Corwein* v. *Hames,* 11 Johns. 76; *Clark* v. *Lamb,* 2 Allen 396; *Dively* v. *Cedar Falls,* 21 Iowa 565; *Fulweiler* v. *St. Louis,* 61 Mo. 479; *Petition of New Boston,* 49 N. H. 328; *Commonwealth* v. *McLane,* 4 Gray 427; *Fine* v. *St. Louis Public Schools,* 30 Mo. 166, 173. With other courts, however, and with the legislatures, the strict rule seemed to be inconvenient, impracticable and unnecessary, and the view was taken that such remote or minute interest in the litigation might be declared by the Legislature not to be a reason for disqualification of a judge or juror.

A case, much cited, in which this conclusion was reached and in which the old English corporation cases were considered, was that of *City Council* v. *Pepper,* 1 Richardson (S. C.) 364. The recorder of the City of Charleston sentenced a non-resident of the city for violation of a city ordinance requiring him to take out a license for what he did or to pay a fine not exceeding $20. The contention was that the defendant was a non-corporator and non-resident and not subject to the jurisdiction of the city court; that the recorder was a corporator and interested in the penalty and therefore was not competent to try the cause. The Court said (p. 366) in respect to *Hesketh* v. *Braddock,* 3 Burrows 1847, *supra:*

" It will be remarked that that case depends altogether upon the common law, and if the city court depended upon the same for its jurisdiction, the objection might be fatal. But the establishment and jurisdiction of the city court commences with the Act of 1801. By that Act it is clothed with the power of trying all offences against the by-laws of the city, and for that purpose is given concurrent jurisdiction with the court of Sessions. This grant of power is from all the people of the State, through their Legislature, and surely they have the power to dispense with the common law objection, that the cor-

porators were interested, and ought not to be intrusted with the enforcement of their laws against others. The authority given to the city court to try all offenders against the city ordinances, impliedly declares, that notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. That there was great reason in this can not be doubted, when it is remembered that the interest of the corporators is so minute as not to be even thought of, by sheriff, juror or judge. It is very much like the interest which similar officers would feel in enforcing a State law, the sanction of which was a penalty. The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the mind. It is too slight to excite prejudice against a defendant. The same thing is the case here. For the judge, sheriff and jurors, are members of a corporation of many thousand members. What interest, of value, have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the Legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff and jurors, with authority to try the defendant, and he can not now object to it."

And the same view is taken in *Commonwealth* v. *Ryan,* 5 Mass. 90; *Commonwealth* v. *Reed,* 1 Gray 472, 475; *Thomas* v. *Mt. Vernon,* 9 Ohio 290; *Commissioners* v. *Lytle,* 3 Ohio 289; *Wheeling* v. *Black,* 25 W. Va. 266, 280; *Board of Justices* v. *Fennimore,* 1 N. J. L. 190; *Foreman* v. *Mariana,* 43 Ark. 324; *Cartersville* v. *Lyon,* 69 Ga. 577; *Omaha* v. *Olmstead,* 5 Neb. 446; *Hill* v. *Wells,* 6 Pickering 104; *Commonwealth* v. *Emery,* 11 Cushing 406; *Barnett*

v. *State,* 4 Tex. App. 72; *Wellmaker* v. *Terrell,* 3 Ga. App. 791; *State* v. *Craig,* 80 Maine 85.

Mr. Justice Cooley, in his work on Constitutional Limitations, 7th edition, page 594, points out that the real ground of the ruling in these cases is that " interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual. And where penalties are imposed, to be recovered only in a municipal court, the judge or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest." But the learned judge then proceeds:

" But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority."

Referring then to a remark in the case of the *Matter of Leefe,* 2 Barb. Ch. 39, that the people of the State when framing their constitution might possibly establish so great an anomaly, if they saw fit, the learned author says:

" Even this must be deemed doubtful since the adoption of the fourteenth article of the amendments to the Federal Constitution, which denies to the state the right to deprive one of life, liberty or property, without due process of law."

From this review we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim *de minimis non curat lex.*

The Mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act

for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal.

These are not cases in which the penalties and the costs are negligible. The field of jurisdiction is not that of a small community engaged in enforcing its own local regulations. The court is a state agency, imposing substantial punishment, and the cases to be considered are gathered from the whole county by the energy of the village marshals, and detectives regularly employed by the village for the purpose. It is not to be treated as a mere village tribunal for village peccadilloes. There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between

the State and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias or willful disregard of duty by the trial court. The statute specifically authorizes the village to employ detectives, deputy marshals and other assistants to detect crime of this kind all over the county, and to bring offenders before the Mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village and can not escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all, and second, having found his guilt, to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses. With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases, cited above, of the

days of Coke and Holt and Mansfield, are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. *City of Boston* v. *Baldwin,* 139 Mass. 315; *Florida ex rel. Colcord* v. *Young,* 31 Fla. 594. It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law. The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact. The difference between such a case and the plan and operation of the statutes before us is so plain as not to call for further elaboration.

Counsel for the State argue that it has been decided by this Court that the legislature of a State may provide such system of courts as it chooses; that there is nothing in the Fourteenth Amendment that requires a jury trial for any offender; that it may give such territorial jurisdiction to its courts as it sees fit; and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of the peace to try misdemeanors committed anywhere in the county, even though the mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this Court in *Missouri* v. *Lewis,* 101 U. S. 22, 30; *In re Claasen,* 140 U. S. 200. See also *Carey* v. *State,* 70 Ohio State 121. It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected

in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the State and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers. *United States* v. *Murphy & Morgan,* 16 Pet. 203. It may authorize the employment of detectives. But these principles do not at all affect the question whether the State by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification.

The judgment of the Supreme Court of Ohio must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

NIXON *v.* HERNDON ET AL.

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

No. 117. Argued January 4, 1927.—Decided March 7, 1927.

1. An action for damages may be maintained against judges of election for unlawfully denying to a qualified voter the right to vote at a state primary election. P. 540.
2. A state statute (Texas, 1923, Art. 3093–a) barring negroes from participation in Democratic party primary elections held in the State for the nomination of candidates for senator and representatives in Congress, and state and other offices, violates the Fourteenth Amendment. P. 540.

Reversed.

ERROR to a judgment of the District Court which dismissed an action for damages brought by a negro against judges of election in Texas, based on their refusal to permit the plaintiff to vote at a primary election.

Messrs. Fred C. Knollenberg and *A. B. Spingarm,* with whom *Messrs. Louis Marshall, Moorfield Storey, James A. Cobb,* and *Robert J. Channell* were on the briefs, for Nixon.

The primary was a public election under the Constitution and laws of the State. Section 8 of Art. 5 of that Constitution provides that the District Court shall have original jurisdiction of contested elections. This provision has been held by the courts of Texas to confer upon the District Court jurisdiction over contested primary elections. *Ashford* v. *Goodwin,* 103 Tex. 491; *Hammond* v. *Ashe,* 103 Tex. 503, *Anderson* v. *Ashe,* 62 Tex. Civ. App. 262; *Waples* v. *Marrast,* 108 Tex. 5, and in *Koy* v. *Schneider,* 110 Tex. 369.

Casting a ballot in a primary election established and regulated by state law is an act of voting within the meaning of the Fifteenth Amendment to the federal Con-

stitution, and the immunity against discrimination on account of race or color which is guaranteed by said Amendment protects the plaintiff in his right to vote in such primary, where the only obstacle interposed is that he is a negro. Rev. Stats. §§ 1978, 2004; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson, id.* 367; *Anderson* v. *Myers,* 182 Fed. 223; *United States* v. *Reese,* 92 U. S. 214; *Strauder* v. *West Virginia,* 100 U. S. 303; *Ex parte Siebold, id.* 371; *Ex parte Yarbrough,* 110 U. S. 651; *Love* v. *Griffith,* 266 U. S. 32.

When the negro, by virtue of the Fifteenth Amendment, acquired immunity from discrimination in voting on account of his race and color, he thereby acquired the right and privilege as a free man to exercise, to the same extent as a white man, his untrammeled choice in the selection of parties or candidates; and when the legislature of a State, solely because of his race and color, undertakes by law to exclude him from any party, or deny him the same latitude in registering his preference as a member of any party of his choice that it allows to white members of such party, it thereby abridges his right to vote under the Amendment, and denies to him the equal protection of the law guaranteed by the Fourteenth Amendment. *United States* v. *Reese,* 92 U. S. 214; *United States* v. *Cruikshank, id.* 542; *Ex parte Virginia,* 100 U. S. 339; *Strauder* v. *West Virginia, id.* 303; *Ex parte Yarbrough,* 110 U. S. 651; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *McPherson* v. *Blacker,* 146 U. S. 1; *G. C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150; *Connolly* v. *United Pipe Co.,* 184 U. S. 558.

No appearance for defendants in error.

Messrs. Claude Pollard, Attorney General of Texas, and *D. A. Simmons,* First Assistant Attorney General, filed a brief for the State of Texas, by special leave of Court.

The nominating primary of a political party is not an election in which everyone may vote.

There are many organized groups of persons, voluntary in character, in the several States of the Union. In many of these the election of officers and the purposes and objects of the organization depend upon the votes of the individual members. Some of these are maintained for charitable purposes, some for the support of religious worship, some for the diffusion of knowledge and the extension of education, some for the promotion of peace, and some for the advancement of political ideas. It clearly appears, therefore, that the right to vote referred to in constitutions, and elections mentioned therein, do not include within their scope all elections and all voting by persons in the United States. The act of the legislature of Texas and the nominating primary in which the vote of plaintiff in error was refused, dealt only with voting within a designated political party, which is but the instrumentality of a group of individuals for the furtherance of their own political ideas.

It must be remembered that "nominating primaries" were unknown at the time of the adoption of the Constitution of the United States and of the Constitution of Texas in 1876. The nominating primary, like its predecessors, the nominating convention and the caucus, is not the "election." Nomination is distinct from election and has been so differentiated from the beginning of our government.

The question of parties and their regulation is a political one rather than legal. The District Court of the United States has no jurisdiction in a case of this character. Political questions are not within its province. *Chandler* v. *Neff,* 298 Fed. 515; 12 C. J. 878.

Because the Democratic party holds a nominating primary, can it be contended that outsiders can be forced upon the party over its expressed dissent? If the party should abandon the primary and go back to the conven-

tion or the caucus system, could it be consistently maintained that the courts could force upon the convention or upon the caucus, the plaintiff in error, if the membership of the party, the convention or the caucus were restricted against negroes? We contend that a nominating primary is purely a political matter and outsiders denied participation by the party councils cannot demand a redress at the hands of the courts. *Waples* v. *Marrast,* 108 Tex. 11. Distinguishing, *Love* v. *Griffith,* 266 U. S. 32.

Chandler v. *Neff,* 298 Fed. 515, disposed of a case almost identical with this one, and holds with the Supreme Court of Texas that a primary of a political party is not an election, and the right of a citizen to vote therein is not within the protection of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Nor is this doctrine limited to Texas. *Riter* v. *Douglass,* 32 Nev. 400; *Gulden* v. *Johnson,* 87 Minn. 223; *Webber* v. *Felton,* 77 Oh. St. 554; *Baer* v. *Gore,* 79 W. Va. 50; *Dooley* v. *Jackson,* 104 Mo. App. 21; *Morrow* v. *Wipf,* 22 S. D. 146; *Montgomery* v. *Chelf,* 118 Ky. 766; *State* v. *Michel,* 121 La. 374; *Socialist Party* v. *Uhl,* 155 Cal. 776; *People* v. *Democratic Committee,* 164 N. Y. 335; *Newberry* v. *United States,* 256 U. S. 232.

Mr. Justice Holmes delivered the opinion of the Court.

This is an action against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. It lays the damages at five thousand dollars. The petition alleges that the plaintiff is a negro, a citizen of the United States and of Texas and a resident of El Paso, and in every way qualified to vote, as set forth in detail, except that the statute to be mentioned interferes with his right; that on July 26, 1924, a primary election was held at El Paso for the nomination of candidates for a senator and representatives in Congress and State and other offices, upon the Democratic ticket; that

the plaintiff, being a member of the Democratic party, sought to vote but was denied the right by defendants; that the denial was based upon a Statute of Texas enacted in May, 1923, and designated Article 3093*a*, by the words of which "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," &c., and that this statute is contrary to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The defendants moved to dismiss upon the ground that the subject matter of the suit was political and not within the jurisdiction of the Court and that no violation of the Amendments was shown. The suit was dismissed and a writ of error was taken directly to this Court. Here no argument was made on behalf of the defendants but a brief was allowed to be filed by the Attorney General of the State.

The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court. *Wiley* v. *Sinkler*, 179 U. S. 58, 64, 65. *Giles* v. *Harris*, 189 U. S. 475, 485. See also Judicial Code, § 24 (11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.

The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, be-

cause it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. *Slaughter House Cases,* 16 Wall. 36. *Strauder* v. *West Virginia,* 100 U. S. 303. That Amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" Quoted from the last case in *Buchanan* v. *Warley,* 245 U. S. 60, 77. See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 374. The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case

Judgment reversed.

INGENOHL *v.* OLSEN & COMPANY, INC.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 174. Argued March 1, 1927.—Decided March 14, 1927.

1. A trade-mark, started elsewhere, has only such validity and protection in a foreign country as the foreign law accords it. P. 544.

2. Section 311(2) of the Philippine Code of Civil Procedure, which provides that a judgment "may be repelled by evidence of . . . clear mistake of law or fact," does not justify refusal to enforce a judgment for costs rendered by the Supreme Court of Hongkong in a trade-mark suit, upon the ground that that court mistakenly denied effect in Hongkong to a sale of the trade-mark with the business of the plaintiff in the Philippine Islands, made by the Alien Property Custodian to the defendant. P. 544.
3. The Alien Property Custodian, under the Trading with the Enemy Act, had no power to transfer trade-mark rights in a foreign country contrary to the foreign law. P. 544.
4. This Court has jurisdiction by certiorari to review a case from the Supreme Court of the Philippine Islands in which the validity of a section of the Philippine Code of Civil Procedure and a construction of the Trading with the Enemy Act are drawn in question. P. 545.

47 P. I. 189, reversed.

CERTIORARI (269 U. S. 542) to a judgment of the Supreme Court of the Philippine Islands which reversed a judgment recovered by the plaintiff, Ingenohl, in the Court of First Instance. The action was based on a judgment for costs, awarded to the plaintiff by the Supreme Court of Hongkong, in a suit to restrain the defendant, Walter E. Olsen & Company Inc., from infringing the plaintiff's trade-mark.

Mr. James M. Beck, with whom *Messrs. O. R. McGuire* and *Joseph C. Meyerstein* were on the briefs, for petitioner.

Mr. Frederic R. Coudert, Jr., with whom *Messrs. Frederic R. Coudert* and *Allison D. Gibbs* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover the costs adjudged to the plaintiff, the petitioner here, in a former suit that was brought by him against the defendant in the British Colony of Hongkong and was determined in his favor by the Su-

preme Court there. The judgment declared the plaintiff to be the owner of certain trade-marks and trade names and entitled to the exclusive use of them in connection with his business as a cigar manufacturer. It restrained the defendants from selling cigars under these trade-marks and awarded the costs now sued for. The Court of First Instance of Manila gave judgment for the plaintiff. On appeal the Supreme Court of the Philippine Islands reversed this decision on the ground that by § 311(2) of the Code of Civil Procedure a judgment against a person "may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact," and that the judgment of the Supreme Court of Hongkong showed such a clear mistake.

The supposed mistake consisted in denying effect in Hongkong to a sale of business and trade-marks by the Alien Property Custodian to the defendant, the circumstances and nature of which may be stated in few words so far as they concern the present case. The plaintiff Ingenohl had built up a great business as a cigar manufacturer and exporter having his factory at Manila. In 1908 he established a factory at Hongkong and thereafter goods from both factories were sold under the same trade-marks, the outside box or package of the Hongkong goods having a label indicating that they came from there. The trade-marks were registered in Hongkong and the cigars covered by them had acquired a reputation. In 1918 the Alien Property Custodian seized and sold all the property "wheresoever situate in the Philippine Islands . . . including the business as going concern, and the good will, trade names and trade-marks thereof, of Syndicat Oriente," being the above mentioned business of the plaintiff in the Philippines. The Supreme Court of the Philippines held that it was plain error in the Supreme Court of the British Colony to hold that this sale did not

carry the exclusive right to use the trade-marks in the latter place.

A trade-mark started elsewhere would depend for its protection in Hongkong upon the law prevailing in Hongkong and would confer no rights except by the consent of that law. *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403. *United Drug Co.* v. *Theodore Rectanus Co.,* 248 U. S. 90. When, then, the judge who, in the absence of an appeal to the Privy Council, is the final exponent of that law, authoritatively declares that the assignment by the Custodian of the assets of the Manila firm cannot and will not be allowed to affect the rights of the party concerned in Hongkong, we do not see how it is possible for a foreign Court to pronounce his decision wrong. It will be acted on and settles the rights of the parties in Hongkong; and in view of that fact it seems somewhat paradoxical to say that it is not the law. If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States.

It is not necessary to consider whether the section of the Code of Civil Procedure relied upon was within the power of the Philippine Commission to pass. In any event as interpreted it involved delicate considerations of international relations and therefore we should not hold ourselves bound to that deference that we show to the judgment of the local Court upon matters of only local concern. We are of opinion that whatever scope may be given to the section it is far from warranting the refusal to enforce this English judgment for costs, obtained after a fair trial before a court having jurisdiction of the parties, when the judgment is unquestionably valid and in other respects will be enforced. Of course a foreign state might accept the Custodian's transfer as good within its jurisdiction, if there were no opposing local interest or right,

and that may be the fact for China outside of Hongkong as seems to have been held in another case not yet finally disposed of, but no principle requires the transfer to be given effect outside of the United States and when as here it has been decided to have been ineffectual it is unnecessary to inquire whether in the other event the Alien Property Custodian was authorized by the statute to use or did use in fact words purporting to have that effect, or what the effect, if any, would be.

Some question was made of the jurisdiction of this Court. The jurisdiction was asserted, at least provisionally, when the writ of certiorari was granted. There are few cases in which it is more important to maintain it, and we confirm it now. The validity of the section of the Code of Civil Procedure is drawn in question, and also the construction of the Trading with the Enemy Act which is treated as purporting to authorize what in our opinion it could not authorize if it tried.

Judgment reversed.

SHUKERT ET AL., EXECUTRICES, *v.* ALLEN, COLLECTOR.

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

No. 193. Argued March 4, 7, 1927.—Decided March 21, 1927.

A conveyance of securities made before the testator's death and not in contemplation of it, in trust to accumulate the income until a distant date specified, and then to divide the fund among his children, designated by name as the beneficiaries, vested the interests of his children when it was executed and was not "intended to take effect in possession or enjoyment at or after his death," within the meaning of § 402(c), Revenue Act of 1918. P. 547.

6 F. (2d) 551, reversed.

CERTIORARI (269 U. S. 543) to a judgment of the Circuit Court of Appeals, which affirmed a judgment of the Dis-

trict Court (300 Fed. 754) directing a verdict for the Collector in an action to recover money paid under protest as a federal estate tax.

Messrs. William B. McIlvaine and *Arthur F. Mullen,* with whom *Mr. J. F. Dammann, Jr.,* was on the briefs, for petitioners.

Mr. Thomas H. Lewis, Jr., with whom *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Mr. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, and *Mr. Sewall Key,* Attorney in the Department of Justice, were on the briefs, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of a federal estate tax paid by the plaintiffs, petitioners, under duress. The District Court directed a verdict for the defendant, the collector, 300 Fed. 754, the judgment upon which was affirmed by the Circuit Court of Appeals. 6 F. (2d) 551. A writ of certiorari was granted by this Court. 269 U. S. 543.

The tax was levied under the Revenue Act of 1918; February 24, 1919, c. 18, § 402(c); 40 Stat. 1057, 1097, which provides that the value of the gross estate of the decedent shall be determined by including all property "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death," &c. By § 401 the tax is laid upon the transfer of the net estate. The transfer taxed in this case was made by the testator on May 5, 1921, and was a conveyance to the United States Trust Company of Omaha of notes and bonds valued at $225,000, par, in trust to accumulate the income (subject to certain small deduc-

tions in case of the extreme destitution of the testator's wife or of any of the beneficiaries named) until February 1, 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date, &c., and then to divide the principal and undistributed income among his three children by name. The testator died on September 29, 1921, a few months after creating this trust, but it is not argued that he created it in contemplation of death as a device to escape taxes. The only question is whether the trust was one intended to take effect in possession or enjoyment after his death, as was ruled below.

The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust. See Gray, The Rule Against Perpetuities, § 108(3). It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. There certainly is no transfer taking effect after his death to be taxed under § 401.

It is not necessary to consider whether the petitioner goes too far in contending that § 402(c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until his death. But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death.

Judgment reversed.

FIRST NATIONAL BANK OF HARTFORD, WISCONSIN, *v.* CITY OF HARTFORD ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 186. Argued December 13, 1926.—Decided March 21, 1927.

1. Upon review of a judgment of a state court sustaining a discriminatory state tax on national bank shares upon the ground that the other moneyed capital, favored by the discrimination, was not employed in competition with the business of the national bank, this Court may review the evidence regarding such competition and is not concluded by the finding of the state court. P. 552.
2. The validity, under Rev. Stats. § 5219, of a state tax on national bank shares at a greater rate than that assessed on other moneyed capital depends upon whether or not the moneyed capital thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks. P. 552.
3. The requirement of approximate equality in taxation (R. S. § 5219) is not limited to moneyed capital invested in state banks or to competing capital employed in private banking; it applies wherever capital, substantial in amount compared with the capitalization of national banks, is employed in a business, or by private investors, in the same sort of transactions as those in which national banks engage and in the same locality in which they do business. Pp. 555, 557.

4. The amendment of § 5219, by Act of March 4, 1923, merely expressed what was previously implied, and by its terms excludes from "moneyed capital" only those personal investments which are not in competition with the business of national banks. P. 557.
5. Proof of competition by untaxed capital involves showing that it is employed in such investments as are open to national banks. P. 558.
6. In this case the evidence shows substantial competition with national banks by untaxed capital in the business of making loans and selling credits and also by capital of private individuals who, as investors of surplus funds, were engaged in lending money at interest on real estate mortgages and other evidences of indebtedness, normal to banking. P. 558.
7. To establish the fact of competition, it is not necessary to show that national banks and the other investors solicit the same customers for the same loans or investments. It is enough if both engage in seeking and securing in the same locality investments of the class described which are substantial in amount. P. 559.
8. The sale of real estate mortgages and other evidences of debt acquired by way of loan or discount with a view to reinvestment is within the incidental powers of national banks. P. 559.
9. The fact that discrimination against national bank shares is not unfriendly or hostile but is induced by the state policy of substituting income taxes for personal property taxes, does not render Rev. Stats. § 5219 inapplicable. P. 560.

187 Wis. 290, reversed.

ERROR to a judgment of the Supreme Court of Wisconsin in a suit brought by the bank to recover from the City of Hartford the amount of a tax assessed and collected upon shares of its stock. The court below reversed a judgment for the plaintiff and directed the trial court to enter a judgment dismissing the complaint.

Mr. Arthur W. Fairchild, with whom *Messrs. George P. Miller, Edwin S. Mack, J. Gilbert Hardgrove,* and *E. W. Sawyer* were on the brief, for plaintiff in error.

Mr. Edward J. Dempsey, with whom *Messrs. Herman L. Ekern,* Attorney General of Wisconsin, *Franklin E. Bump,* Assistant Attorney General, *Edward M. Smart,*

J. C. Russell, and *Lloyd Mitchell* were on the brief, for defendants in error.

Mr. Justice Stone delivered the opinion of the Court.

Plaintiff in error, a national banking association doing business in Wisconsin, brought suit in the circuit court of Washington County, Wisconsin, to recover from the defendant in error, the City of Hartford, a tax assessed and paid for the year 1921 upon shares of stock in plaintiff bank, on the ground that the assessment and tax were prohibited by § 5219 of the Revised Statutes of the United States (Act of June 3, 1864, c. 106, 13 Stat. 99, 112; Act of February 10, 1868, c. 7, 15 Stat. 34). The tax having been paid under protest, a suit for its recovery, raising the legality of the assessment, is permitted by local statutes. Wis. Stat. 1923, § 74.73.

The trial court held the assessment illegal and gave judgment for the plaintiff. On appeal, the Supreme Court of Wisconsin reversed the judgment with a direction to the court below to enter judgment in favor of the defendant, dismissing the complaint. 187 Wis. 290. The case comes here on writ of error under § 237 of the Judicial Code. *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 637; *First National Bank* v. *Anderson,* 269 U. S. 341, 346.

The contention here is that the State Supreme Court erred in holding that these tax statutes are not repugnant to § 5219 Revised Statutes.

"National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent." *First National Bank* v. *Anderson, supra,* 347; *Des Moines Bank* v. *Fairweather,* 263 U. S. 103, 106. Con-

gress, by appropriate legislation, has permitted the taxation of shares in national banks subject to certain restrictions. Section 5219 sanctions such taxation in the state where the bank is located, subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." By decisions of this Court construing this language, it is established that the phrase "other moneyed capital" does not embrace all moneyed capital not invested in bank shares, but "only that which is employed in such way as to bring it into substantial competition with the business of national banks." *First National Bank* v. *Anderson, supra,* 348. Hence the question presented by this record is whether the tax imposed upon the shares of stock of plaintiff under the Wisconsin statutes is at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of Wisconsin employed in substantial competition with national banks.

By § 70.31 of the Wisconsin statutes, an *ad valorem* tax is assessed upon all shares of banks, including national banking associations, as personal property within the assessment district in which the bank is located. Section 70.11 exempts from such taxation "all moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district, or other political subdivision of this state, not otherwise specially provided for."

Acting under these statutes, the taxing authorities imposed the tax now in question, but made no assessment and levied no tax upon credits or intangible property other than the shares of stock in banking corporations. The State of Wisconsin imposes a tax upon incomes, including incomes derived from credits. The court below assumed, and it was not questioned upon the argument here, that this tax is not to be taken as an equivalent or

substitute for the *ad valorem* tax levied upon bank shares and no question of the possible equivalence of the two schemes of taxation is presented. From the sections cited, it appears that the tax statutes of Wisconsin discriminate in favor of moneyed capital and capital investments within the state, represented by credits or intangibles, and against that invested in shares in banking corporations.

But it is not sufficient to show this discrimination alone. The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks.

The question thus raised involves considerations both of fact and of law. To answer it, it is necessary to ascertain the nature and extent of the moneyed capital in the hands of individual citizens within the state and the relation of its employment, in point of competition, to the business of plaintiff and other national banks. It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the particular moneyed capital and the particular competition with which we are here concerned are moneyed capital and competition within the spirit and purpose of the statute. The question is thus a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law. *Truax* v. *Corrigan,* 257 U. S. 312, 325; *Kansas City Southern Ry.* v. *Albers Commission Co.,* 223 U. S. 573, 591; *Northern Pac. Ry.* v. *North Dakota,* 236 U. S. 585, 593; *Jones National Bank* v. *Yates,* 240 U. S. 541, 552, 553; cf. *Merchants' National Bank* v. *Richmond, supra,* 638 The opposite view expressed in *Jenkins* v. *Neff,* 186 U. S. 230, 235, must be considered discarded by the later cases. Also, as the case is brought here from a state court for review on the ground that a federal right there set up

was denied, this Court is not concluded by a finding of the state court that the asserted right is without basis in fact. *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; *Southern Pac. Co.* v. *Schuyler,* 227 U. S. 601, 611.

The evidence shows that plaintiff in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper and acquires real estate mortgages by loan and purchase. On the trial, plaintiff called numerous witnesses who gave testimony, uncontradicted by defendant, tending to show the nature and extent of various classes of moneyed capital in the hands of individuals in the state and the nature of its employment in competition with the business carried on by national banks. There are real estate firms engaged in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from $250,000 to $300,000. According to the testimony, the making of these loans affords the same competition to plaintiff as loans made by banks. And similar conditions obtain throughout the state. There are various individuals, co-partnerships and corporations in the vicinity engaged in the business of acquiring and selling notes, bonds, mortgages and securities. Substantial capital is employed in their business. Others, having their place of business in Milwaukee and in Chicago, are engaged within the state in the business of buying and selling securities both in the vicinity of plaintiff's banking house and elsewhere, and employ capital for that purpose. Securities thus acquired and offered for sale include public utility and other forms of bonds, notes and farm mortgages. In 1921, one company alone, having its place of business in Milwaukee but doing business throughout the state, including the vicinity of plaintiff's bank, sold approximately $25,000,000 of bonds and other securities. This company is shown to be affiliated

with and its stock held principally by stockholders of the First Wisconsin National Bank of Milwaukee, and to have been organized for the purpose of taking over the business of the bank in dealing in securities. Neither the capital employed in these various enterprises by individuals or corporations, so far as invested in the credits, nor the shares held by investors in such corporations is subjected to the *ad valorem* tax.

Upon this evidence, the trial court found that during 1921 moneyed capital in the hands of individual citizens in the vicinity of plaintiff's banking house, amounting to many hundreds of thousands of dollars, which was not assessed for taxation nor taxed, was employed in a manner which brought it into competition with the business conducted by national banks, including that of plaintiff. It also found that moneyed capital to the extent of millions of dollars held by individual citizens throughout the state, and employed in a manner which brought it into competition with such banks, was similarly exempt from this taxation.

The State Supreme Court held that it was not concluded by these findings of mixed law and fact. Since the Wisconsin tax law is one of state-wide application, it took judicial notice of the general conditions within the state to which the law applies, and reached the conclusion that there was no capital in the hands of individual citizens which was invested or used in substantial competition with capital invested in shares of national banks.

In so doing, it pointed out that under § 224.03 (Wis. Stat. 1923) all persons, firms and corporations doing a banking business are required to incorporate as banks and their shares are taxed in the same way and at the same rate as shares in national banks. As the basic ground for its decision, the court stated that in consequence of these statutes, "there are no concerns or individuals

within the state of Wisconsin engaged in enterprises in which the capital employed in carrying on its business, is money, ' where the object of the business is the making of profit by its use as money,' except banks. All such persons, firms and corporations are required under the laws of the state of Wisconsin to organize as banks."

But the Wisconsin statutes requiring those engaged in the banking business to incorporate as banks are expressly limited in their application to those engaged in " soliciting, receiving or accepting of money or its equivalent on deposit as a regular business." Wis. Stat. 1923, § 224.02. They have no application to transactions already described which formed the basis of the trial court's finding that competition existed. It is not denied, and indeed it affirmatively appears from the evidence, that there are individuals, firms and corporations in Wisconsin, not required by its laws to be incorporated as banks, engaged in the business of loaning money on the security of notes, bonds, and mortgages, and buying and selling securities, all involving investment and reinvestment by them and their customers. Through the activities of these business concerns, large investments are made and remade in such securities. Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms do not receive deposits.

The state court did not ignore this evidence. It conceded that the local tax statutes were in fact discriminatory. But it apparently construed the decisions of this Court as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks. Consequently, since that class of business must under the Wisconsin statutes be carried on in corporate form and capital invested in it is taxed at the same rate as national bank shares, other moneyed capital, as defined in § 5219, within

the state, it thought, was not favored. Under this view, if logically pursued, capital invested in businesses engaged in some but not all of the activities of national banks as well as that employed by individuals in investment and reinvestment in securities such as we have described could not be considered in determining the question of competition.

But this Court has recently had occasion, in reviewing the earlier decisions dealing with this subject, to point out that the requirement of approximate equality in taxation is not limited to investment of moneyed capital in shares of state banks or to competing capital employed in private banking. The restriction applies as well where the competition exists only with respect to particular features of the business of national banks or where moneyed capital "is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment." *First National Bank* v. *Anderson, supra,* 348. In so doing, it followed the holding in *Mercantile Bank* v. *New York,* 121 U. S. 138, 157, that,

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed

capital in the hands of individuals is distinguished from what is known generally as personal property, . . ."

The amendment to § 5219 (Act of March 4, 1923, c. 267, 42 Stat. 1499), passed after the present tax was levied, provides that " bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments *not made in competition* with such business, shall not be deemed moneyed capital within the meaning of this section." (Italics ours.) It is said that this enactment is a legislative interpretation of § 5219 as it stood prior to the amendment; that consequently a narrower interpretation must be given to this section than in earlier cases, and that under the section before and as amended, personal investments of individuals should, under no circumstances, be deemed included in the term competing capital. But as was pointed out in *First National Bank* v. *Anderson, supra,* 350, the amendment did no more than put into express words that " which according to repeated decisions of this Court was implied before." By its terms the amendment excludes from moneyed capital only those personal investments which are not in competition with the business of national banks.

Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of § 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. No decision of this Court appears to have so qualified § 5219 as to permit discrimination in taxation in favor of moneyed capital such

as is here contended for. To so restrict the meaning and application of § 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks. *Mercantile Bank* v. *New York, supra,* 155. With the great increase in investments by individuals and the growth of concerns engaged in particular phases of banking shown by the evidence in this case and in *Minnesota* v. *First National Bank of St. Paul,* today decided, *post,* p. 561, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that § 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business.

Some of the cases dealing with the technical significance of the term competition in this field were decided before national banks were permitted to invest in mortgages as they now are. Act of December 23, 1913, c. 6, § 24, 38 Stat. 251, 273; Act of September 7, 1916, c. 461, 39 Stat. 752, 754; Act of February 25, 1927, § 24. And others go no further than to hold that in the absence of allegation and proof of competition with national banking capital, it cannot be said that an offending discrimination exists. And it is not sufficient to show that untaxed capital is invested in loans and securities without showing also that the class of investments favored is open to national banks.

Here, large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business

carried on by national banks. In two fields at least, loans and sales of credits, capital thus employed is shown to be in substantial competition with that of national banks.

The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the State of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is an extensive loan business in the state not subjected to the tax burdens of national banks, and it was testified directly that this business came into competition with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed.

There was also, we think, sufficient evidence that private individuals as investors of surplus funds are engaged in loaning money at interest on real estate mortgages and other evidences of indebtedness such as normally enter into the business of banking and that these investments are of substantial amount. We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount.

It is argued that national banks are not authorized to deal in bonds or other evidences of indebtedness and that § 5219 was not intended to protect them from discriminatory taxation in favor of moneyed capital employed in a business in which they may not engage. But it is not necessary for the purposes of this case to determine the precise limits of their powers. They are given authority, in addition to loaning money, to exercise all such "incidental powers" as shall be necessary to carry on the busi-

ness of banking " by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." § 5136 Revised Statutes. They are authorized, with certain limitations, to loan money on real estate mortgages. Act of December 23, 1913, *supra;* Act of September 7, 1916, *supra;* Act of February 25, 1927, § 24. Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and " other evidences of debt " acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. Compare *First National Bank* v. *Anderson, supra,* 348; *Mercantile National Bank* v. *New York, supra,* 156. To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks. That the exercise of this incidental power has become of great importance in the business of national banks appears from the Report of the Comptroller of the Currency for 1924, 44 *et seq.*, showing that approximately one-third of the investment of national banks consist of Government, railroad, public service corporation and other bonds, and " collateral trust and other corporation notes."

Finally it is said that § 5219 is directed to an unfriendly discrimination or hostile attitude on the part of a state and that here the Wisconsin legislation was not dictated by such considerations, since the challenged exemptions were merely incidental to the adoption of a state policy of substituting, so far as possible, an income for a personal property tax. But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are

intended to be forbidden. The questions here considered arising from the application of an *ad valorem* tax are not affected by the amendment of § 5219 by the Act of March 4, 1923, c. 267, 42 Stat. 1499, which permits in lieu of the *ad valorem* tax on shares of national banks either a non-discriminatory tax on the income of national banks or on the income derived from their shares.

Judgment reversed.

MINNESOTA *v.* FIRST NATIONAL BANK OF ST. PAUL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 245. Argued December 13, 1926.—Decided March 21, 1927.

1. The taxation of national bank shares, authorized by Rev. Stats. § 5219, is against the holders of the shares and is to be measured by the value of the shares, and not by the assets of the bank without deducting its liabilities. P. 564.
2. A tax on national bank shares at a greater rate than that imposed on competing credits in the hands of individuals can not be sustained upon the ground that the discrimination is removed in practice by deducting liabilities of the bank from its assets in valuing its shares, while allowing no deduction of their liabilities to individuals in valuing their credits. P. 564.
3. The shares of corporations employing capital in the note brokerage business or in buying and selling securities are "moneyed capital in the hands of individual citizens" (R. S. § 5219), i. e., the individuals holding the shares. P. 566.
4. The competition guarded against by § 5219 may arise from the employment of capital invested in a business, even though the competition be with some but not all phases of the business of national banks, or it may arise from the employment of capital invested by institutions or individuals in particular operations or investments like those of national banks. P. 566.
5. The evidence sustains a finding by the state court that moneyed capital in the hands of individuals was in competition with the business of national banks, including the plaintiff. P. 567.

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6. Surplus capital of individuals seeking investment and reinvestment in bonds, mortgages, and other evidences of indebtedness, in competition with the capital of national banks, is moneyed capital coming into competition with the business of national banks, within the meaning of Rev. Stats. § 5219. P. 568.

164 Minn. 550, affirmed.

CERTIORARI (269 U. S. 550) to a judgment of the Supreme Court of Minnesota which affirmed a judgment for the bank in an action brought against it by the State to recover taxes assessed against its shareholders.

Mr. Patrick J. Ryan, with whom *Messrs. Clifford L. Hilton,* Attorney General of Minnesota, *G. A. Youngquist,* Assistant Attorney General, *Harry H. Peterson,* and *Roy A. MacDonald* were on the brief, for petitioner.

Mr. Thomas D. O'Brien, with whom *Messrs. Alexander E. Horn* and *Edward S. Stringer* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The State of Minnesota, the petitioner, brought suit in the district court of Ramsey County, Minnesota, to recover from the First National Bank of St. Paul, the respondent, taxes assessed against its shareholders for the years 1921 and 1922. Respondent resisted the payment of the tax on the ground that the assessment was at a higher rate than that on moneyed capital employed in competition with national banks and hence prohibited by § 5219 of the Revised Statutes of the United States. The trial court gave judgment for petitioner. On appeal judgment was reversed by the Supreme Court of Minnesota and a new trial ordered. 164 Minn. 235. Upon the second trial, had upon the record of the first, the district court held that at the time of the assessment of the taxes in question "a substantial and relatively material portion of the money and credits so listed and assessed in said

Ramsey County consisted of moneyed capital in the hands of individual citizens of said county, coming into competition with the business of national banks in said county, and with the business of said defendant." Judgment in respondent's favor was affirmed by the Supreme Court of Minnesota, 164 Minn. 251. This Court granted certiorari. 269 U. S. 550; Jud. Code, § 237 (b).

The questions raised are similar to those considered in *First National Bank of Hartford* v. *City of Hartford, ante,* p. 548, and may be disposed of by the application to the present facts of the principles there considered.

Under the Minnesota statutes, shares of national banks and the moneyed capital of banks or mortgage loan companies organized under the laws of the state are assessed and taxed at forty per cent. of their full value in the district where located. Gen. Stat. 1923, § 2023; Laws of 1921, c. 416. Money and credits are taxed at the rate of three mills on the dollar of their full cash value and are exempt from all other taxation. Gen. Stat. 1913, § 2316; Laws of 1911, c. 285. Mortgages upon real estate and executory contracts for the sale of real estate are separately taxed at a lower rate; 15 cents per one hundred dollars where the period to run is for five years or less, and 25 cents per one hundred dollars on mortgages and contracts for a longer period. Gen. Stat. 1913, § 2301, *et seq.;* Laws of 1921, c. 445. Money is defined as gold and silver coin, all forms of currency, and all deposits subject to withdrawal on demand. Credits include every demand for money or other valuable thing. Gen. Stat. 1923, § 1980; Laws of 1917, c. 130. Under these statutes money and credits, as defined, are taxed at the three-mill rate and mortgages on real estate at a lesser rate.

It appears that the tax assessed upon the shares of respondent was sixty-seven mills in 1921 and sixty-one and one-half mills in 1922. Although based upon a forty per cent. valuation, the actual rate upon the shares was

higher than the prescribed tax of three mills per dollar of full valuation of money and credits and therefore was discriminatory. Petitioner argues that in its actual operation, the tax on national bank shares is no greater than the tax on credits, since under the statute individuals are taxed at the rate of three mills upon the full value of their credits without deducting their liabilities, whereas in taxing bank shares, the liabilities of the banks are deducted from their assets in ascertaining the forty per cent. valuation of their shares. Therefore, it is urged, if bank shares were taxed at the same rate without deducting the bank's liabilities in ascertaining the value of their shares, the amount of the tax would be approximately the same. This argument ignores the fact that the tax authorized by § 5219 is against the holders of the bank shares and is measured by the value of the shares, and not by the assets of the bank without deduction of its liabilities, *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, and that the bank share tax must be compared with the tax assessed on competing moneyed capital of individuals invested in credits, or the tax on capital invested by individuals in the shares of corporations whose business competes with that of national banks. *Mercantile Bank* v. *New York,* 121 U. S. 138, 156, 157; *First National Bank* v. *Anderson,* 269 U. S. 341, 348. Thus compared, the actual tax imposed upon the shares of respondent, like the tax imposed upon credits in the hands of individuals, is assessed without deducting the liabilities of their individual owners, but at different rates. This discrimination is prohibited by § 5219 if moneyed capital in the hands of individuals in Minnesota is employed in substantial competition with national banks within the state.

The evidence shows that there were money and credits listed for taxation in the entire state during each of the years in question in excess of $400,000,000, exclusive of municipal bonds and recorded real estate mortgages, and

in Ramsey County alone, where respondent conducts its banking business, there were like money and credits in excess of $83,000,000, all of which were subject to the three-mill tax. The evidence shows that in Ramsey County there were listed for taxation for 1921 in the hands of individuals, promissory notes amounting to $2,481,446, and bonds, exclusive of tax exempt bonds and real estate mortgages to $7,595,975; for 1922, notes to $1,648,810, bonds to $9,931,955. There was invested in those years in real estate mortgages in Minnesota over $185,000,000 annually. The investment of national banks in Minnesota in those years in real estate mortgages was in excess of $19,000,000; in United States government bonds in excess of $41,000,000, and in other securities $33,800,000. The share value of national banks in Minnesota in those years, not including real estate, was a little more than $60,000,000, and less than two-thirds of their total investment in the securities mentioned.

Note brokers within the state in those years made loans to their customers upon paper which they sell to banks and other investors, amounting to as much as $100,000,000 annually. Much of this paper is sold outside of the state, but the amount sold to banks and to individuals within the state is substantial. One class of this paper known as "cattle loan paper" exceeded $22,000,000 annually in the years in question, and of this $13,000,000 was sold to banks, corporations, firms and individuals in Minnesota. The amount shown to have been sold to individuals approximated $1,000,000. Eleven business concerns to whom respondent made loans, borrowed from their own officers and employers in one of the years in question about $1,500,000.

Individuals and corporations using substantial capital are engaged within the state in business as investment houses, dealing in bonds and mortgages, such as normally enter into the business of banking. Two such corpora-

tions in Ramsey County had a capital aggregating $2,250,000. One of them sold $13,000,000 of bonds in Minnesota in 1922, and had sold prior to May 1, 1921, mortgages which were still outstanding aggregating more than $25,000,000.

Taken as a whole, the evidence tends to show without material contradiction that there is a large amount of moneyed capital in the state employed in normal banking activities such as loans, purchases and sale of notes, bonds and real estate mortgages, and that large amounts of capital are invested and reinvested in such securities by individual investors within the state.

But petitioner asserts that it does not appear from the record whether those engaged in the business of note brokers or in the business of acquiring and selling securities are individuals or corporations, and the amount of capital employed by any of them is not indicated. While this assertion is not borne out completely by the record, in the view we take, its truth is not of controlling consequence. The businesses and activities described could not be carried on in the volume indicated without the employment of large amounts of capital and in fact some corporations engaged in these activities were shown to have a large capitalization. It was not necessary that the particular amounts be specified. That capital, if invested in the business of individuals, is moneyed capital in the hands of individual citizens, within the meaning of § 5219. If invested in corporations, as appears in some instances, the share capital in the hands of shareholders is likewise moneyed capital within the meaning of that section.

It is said also that the evidence as to individuals was that large amounts of credits, including bonds, mortgages and notes were acquired by individuals by loan or purchase in the state and county, but that there is no evidence tending to show that any of these securities were held or employed by individals in banking or investment business

or in any other business. But as we have held in *First National Bank of Hartford* v. *City of Hartford,* the competition guarded against by § 5219 may arise either from the employment of capital invested in a business, even though the competition be with some but not all phases of the business of national banks, or it may arise from the employment of capital invested by institutions or individuals in particular operations or investments like those of national banks.

It is also urged that the record does not admit of a finding that the funds invested in these credits come into competition with national banks within the meaning of § 5219. To this it is answered by respondent that the court is required to take judicial notice of general conditions to which the law applies and that the taxing laws of Minnesota construed in the light of conditions generally known, show upon their face that they create a discrimination against national banks not permitted by the federal act. But it is unnecessary for us to enter upon the field of judicial notice, for it clearly appears from the evidence, as the court below found, that a large proportion of these investments consisted of investments of individuals out of surplus funds which they were investing and reinvesting in bonds, mortgages and other evidences of indebtedness and that these transactions or continued activities are such as normally constitute an important part of the business of banking as conducted by respondent and other national banks in Minnesota. There is direct evidence, also, that the investments of individuals in this type of security aggregating large amounts lessens the opportunity for the investment of capital by national banks. The only witness called by petitioner admitted that to some extent such competition existed. In this state of the record we think the findings of the state court are supported by the evidence.

That capital of individuals thus seeking investment and reinvestment in competition with the capital in national banks is moneyed capital coming into competition with the business of national banks within the meaning of § 5219 is the effect of our decision in *First National Bank of Hartford* v. *City of Hartford, supra,* and other cases there considered.

Judgment affirmed.

GEORGETOWN NATIONAL BANK *v.* McFARLAND ET AL.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 78. Argued December 13, 1926.—Decided March 21, 1927.

Upon the question of fact whether capital invested by individuals in bonds and other securities, was so invested as to come in competition with national banks (Rev. Stats. § 5219), this Court will accept the negative finding of the state court, where the evidence is in some particulars conflicting and the finding is supported by evidence and not certainly against the weight of evidence. P. 570.

So *held* where the evidence fell short of establishing that the capital was employed substantially as in the loan and investment features of banking in making investments by way of loan or discount or in notes, bonds, and other securities, with a view to sale or repayment and reinvestment.

208 Ky. 7, affirmed.

ERROR to a judgment of the Court of Appeals of Kentucky which reversed a judgment for the plaintiff in a suit to enjoin the sheriff and other taxing officials of Scott County, Kentucky, from assessing or collecting taxes on the shares of the Bank.

Mr. T. Kennedy Helm, with whom *Messrs. J. Craig Bradley, Edmund F. Trabue, Victor A. Bradley, James*

Bradley, and *James W. Stites* were on the brief, for plaintiff in error.

Mr. H. Church Ford, with whom *Messrs. James B. Finnell* and *W. S. Kelly* were on the brief, for defendants in error.

Mr. Justice Stone delivered the opinion of the Court.

The plaintiff in error, a national banking association located in Scott County, Kentucky, brought suit in the circuit court of that county to enjoin defendants in error, tax officials of the county, from assessing or collecting taxes on the shares of stock of plaintiff in error on the ground that the assessment and tax were at a higher rate than that assessed on moneyed capital employed in competition with the business of national banks, and hence prohibited by § 5219 of the Revised Statutes of the United States. Judgment for the plaintiff was reversed by the Court of Appeals of Kentucky. The case comes here on writ of error and disposition of it may be made upon the principles applied in *First National Bank of Hartford* v. *City of Hartford, ante,* p. 548.

By § 4019*a,* sub-section 10 (Carroll Ky. Stat. 1922), money in hand, notes, bonds and other credits, whether secured by mortgage, pledge or otherwise, or unsecured, are subject to taxation for state purposes only at the rate of forty cents per one hundred dollars. By § 4092 of the same act, shares in national banks, state banks and trust companies are placed in a separate class and made subject both to the state tax at the forty-cent rate and to local taxes as well. The statute thus discriminates in favor of moneyed capital in the form of credits which are subject only to the state tax.

Plaintiff in error, seeking to establish that the favored capital was in competition with national banks, relied

principally upon the proof that there were substantial amounts of capital invested in the state by individuals in bonds, notes, accounts and mortgages, aggregating approximately $1,500,000, which it is contended represents moneyed capital in competition with national banks. But plaintiff made no attempt to show that there were other businesses or courses of investment in the state employing moneyed capital in competition with its business or that of other national banks. The evidence with respect to capital invested by individuals, taken as a whole, falls short of establishing that the capital thus used is employed substantially as in the loan and investment features of banking in making investments by way of loan or discount or in notes, bonds and other securities, with a view to sale or repayment and reinvestment.

The Court of Appeals of Kentucky, following the state practice, reviewed the evidence, concluding from it that "no material part of the capital held by the individuals is so invested as to come in competition with the national banks."

The evidence is set forth in the record. In some particulars it is conflicting and the conflicts are such that their resolution by the Court of Appeals should be accepted by us. It cannot be said either that the finding is without evidence to support it or that it certainly is against the weight of the evidence. In the course of the opinion the Court of Appeals gave more attention than we think justified to the difference between short-time and long-time loans and to the readiness with which the banks obtain loans, notwithstanding the competition alleged, but even after making due allowance for this we think the finding should not be disturbed. It does not depart from but gives effect to the principles announced in the decision just made in *First National Bank of Hartford* v. *City of Hartford*.

Affirmed.

UNITED STATES *v.* SHELBY IRON COMPANY.

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

No. 123. Argued January 13, 1927.—Decided April 11, 1927.

1. A contract by which land on which improvements have been erected with money advanced by one party to the other is to be deeded to the lender absolutely, and the borrower, as his lessee, in consideration of "rentals" amounting to the aggregate debt, is to have possession and, upon full payment, is to receive a reconveyance of the land and improvements, but, in case of default, may have his rights forfeited by re-entry of the lender, is an equitable mortgage for security of the money unpaid. P. 578.
2. In such case, where the lender, having taken over the premises on the borrower's default, finds that the deed he received is defective, his proper remedy is not to reform it, but to seek a sale under the mortgage, and distribution of the proceeds to those entitled. P. 578.
3. A contract made by the United States for erection and operation of an acetic acid and wood alcohol plant on land to be deeded to it recited that the wood required in the operation of the plant would be obtained by the other party under another contract between that party and a stranger to the first mentioned contract. *Held* that this did not constructively notify the United States of the stranger's rights in the land, as revealed by the contract so referred to, since the matter mentioned in the recital was not such as to arouse any inquiry concerning that title. P. 580.
4. Where a land-owner, as part of a contract, agrees to convey land to the other party for use in performance of the contract, but to be reconveyed thereafter free and clear of liens, and the contract permits the grantee to mortgage and relies only on his responsibility to clear the title before reconveyance, an equitable mortgage made by the grantee in pursuance of the purposes for which the contract was made, and remaining unpaid because of his insolvency, takes priority over the equity of the grantor in the land. So *held* where the attempted conveyance of the land was inoperative because of a mistake, so that the legal title remained in the grantor. P. 581.

4 F. (2d) 829, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court adverse to

the United States in a suit in which it sought to quiet title to a piece of land in Alabama as against the corporation above named, of New Jersey, and another called the Shelby Iron Company of Alabama. The decree denied the relief and declared the title and right of possession, as between the plaintiff and the Shelby Iron Company of New Jersey, to be in the latter; but it gave the plaintiff six months in which to remove from the land buildings and equipment constituting a plant erected thereon by the Shelby Chemical Company under a contract with the plaintiff.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell,* and *Messrs. James E. Morrisette* and *Randolph S. Collins,* Attorneys in the Department of Justice, were on the brief, for the United States.

Mr. Edward H. Cabaniss for appellees.

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

This is a controversy over priority of equities in fifteen acres of land in Alabama, with a wood distillation plant thereon, between the United States and the Shelby Iron Company of New Jersey. The case involves the construction of a contract between the United States and the Shelby Chemical Company, on the one hand, and of a contract between the latter and the Shelby Iron Company of New Jersey, on the other. The first was for the construction and operation of the plant on the land to be conveyed by the Chemical Company to the Government, with money to be furnished by the latter, for the production of acetate of lime and methyl alcohol for use in the War. The second was entered into between the Chemical Company and the Shelby Iron Company of New Jersey in anticipation of the first. The Iron Company agreed to

convey to the Chemical Company the needed land, which was near the works of the Iron Company, and to furnish hard wood, water, workmen's houses and power necessary in the operation of the plant. The benefit which the Iron Company was to derive from the arrangement was the cheapness of cost of the charcoal to be made by the Chemical Company as a by-product of the process of distillation, and to be sold at a fixed price to the Iron Company, for use in its blast furnaces situated in a large tract of timber land, of which the Iron Company was the owner, and of which the fifteen acres here in question was a part.

The Chemical Company executed a warranty deed of the fifteen acres, to the Government, in intended compliance with its contract; but the Iron Company had failed to convey the land to the Chemical Company as agreed by it. A deed was actually executed to the Chemical Company by an Alabama Company of the same name, instead of the New Jersey Company that owned the land. The Alabama Company, a former owner of the land, was then an inactive company, the stock of which was owned by the New Jersey Company, and the directors in the two companies were the same. So the Government's legal title failed for misdescription of the grantor.

This suit was a bill in equity to quiet title in the United States against the two companies, the Alabama Company and the New Jersey Company. The New Jersey Company, relying on the misdescription, answered and denied the title of the United States. Thereupon, the Government amended its bill and asked that the deed be reformed. Then the New Jersey Company, which we shall hereafter call the Iron Company, answered by a recital of facts which, it claimed, showed that it had an equity in the fifteen acres of land stronger in right than that of the United States. This constitutes the issue in this case, for the mistake and misdescription are admitted and the

right of the United States to reformation of the deed is conceded, but for this claim.

The contract between the Iron Company and the Chemical Company was made April 8, 1918, and provided that the Iron Company should by warranty deed, free of all liens and encumbrances, for a nominal consideration, provide sufficient ground on which to build the plant of the Chemical Company. In a subsequent clause, it says: "Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war." And further: "It is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the United States. Therefore, it is distinctly agreed that the foregoing provision as to reconveyance of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government."

By the eighth paragraph, it was provided that the contract should last until April 1, 1933, with the right of the Iron Company to extend it further for five years upon notice to the Chemical Company; and that at the end of the contract, or its renewal, the Chemical Company should reconvey to the Iron Company all of the lands conveyed to it by the Iron Company, without cost to it, free and clear of any encumbrances or liens whatsoever, or, if there were any mortgages on the same not yet due, the Chemical Company should pay over to the Iron Company the amount thereof, or the amount of any bonds outstand-

ing thereunder, with any accrued interest thereon, and should, if the Iron Company so elected, sell to it all the improvements, equipment and other personal property placed on the lands by the Chemical Company.

Thereafter, on April 23, 1918, the government contract with the Chemical Company was made. It was estimated that the plant would cost over $400,000, which the United States agreed to advance and reimburse itself by deductions from payments to be made from the sale by the Chemical Company to the Government of the acetate of lime and the methyl alcohol.

Among the preliminary recitals in the contract is this:

" Whereas the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber land owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom."

This recital becomes important on the question of notice hereafter to be considered.

The government contract, in its first article, provided that the Chemical Company, the contractor, was to convey to the United States a tract of land at Shelby, Alabama, of adequate size and suitable location, for the erection of the plant thereafter described. The conveyance was to be made subject to and upon the completion of an opinion by the Attorney General that, by the conveyance, the Government would derive an absolute title to the premises in fee simple, free and clear of all encumbrances, and that the United States should have the right to expend money for the erection of improvements thereon

By article II the contractor agreed to erect and construct for the Government, on the land, a properly equipped wood chemical plant with a certain capacity, to be completed in five months, to be paid for by the Govern-

ment at cost, the particulars of construction to be embodied in a separate contract.

The third article provided for the retention of 40 per cent. of the price of all sales to the Government of the products of the manufacture, to yield 6 per cent. interest on the government investment in the plant and to constitute a depreciation and amortization fund for the benefit of the Government.

By the fourth article the contractor agreed to sell and deliver to the Government the entire output of acetate of lime and methyl alcohol, and the Government agreed to buy it, during a period of 18 months and then for the duration of the War, at certain agreed prices and on certain conditions.

By the sixth article it was provided that, when the depreciation and amortization fund and the purchase fund provided should together equal the cost to the Government, with interest at 6 per cent., of the Government's investment, or at any earlier date at the option of the contractor, the Government should sell to the contractor, and the contractor should purchase the plant, machinery and equipment, at the then fair market value, to be fixed by appraisement. The obligation of the Government to sell the plant was conditioned upon its having legal authority to make such sale and conveyance.

Article VII provided that the Government might take possession of the plant and operate it, on failure of the contractor to comply with the terms of the contract, but its right to operate should cease and terminate at the end of the War. If at that time the sale of the plant to the contractor should have been consummated, the Government was to surrender possession to the contractor, and if the plant was then still owned by the Government, it should at its own expense, within six months from the end of the War, remove all buildings and equipment, constituting such plant, from the ground upon which the same

were erected, and should without further consideration reconvey such ground to the contractor.

Article XVII provided that, in the event of an armistice, the Government at its option might terminate the agreement; but in such event the contractor should receive from the Government the unpaid purchase price of the product then actually manufactured, and the contractor should receive further from the Government a sum sufficient to protect it against its actual net expenditures and actual net outstanding obligations incurred in the manufacture. Then the value of the plant, machinery and equipment should be determined by appraisal, as already provided, and the Government should sell and the contractor should purchase the plant and equipment at the appraised value; and, in making the settlement, the contractor should be given credit on account of the purchase price for the 35 per cent. of the purchase price of the products theretofore sold to the Government and by it retained for security.

After the plant had been partially constructed, and $260,000 was still owing to the Government from the Chemical Company, a new contract was made between them, dated January 25, 1919, whereby the Government should become the absolute owner of the property free of all claims, and the Government should lease the property to the contractor for three years, the contractor to pay to the Government $50,000 down on account of the rental, and in one year $50,000 more, and in two years $75,000, and in three years $85,000, all of which was to apply as rental for the property. The company was to pay all the taxes. It was further provided that the contractor should complete the plant and, at the expiration of the three years, the Government, for the consideration of one dollar, would convey the whole property to the contractor; or should the contractor, not being then in default for

any unpaid payments required to be paid by it under the terms of the contract, desire at any time to purchase the property, the Government would sell it for a sum equal to the difference between $260,000 and the total sum of rents then paid. It was agreed in the contract that, should the contractor at any time default in any of the payments required to be made to the Government in the lease, the Government might waive such default, or treat and regard the lease and obligation and privilege to purchase as forfeited, or treat and regard the lease as a continuing legal and binding obligation, but the obligation and privilege to purchase was to be forfeited.

The president of the Iron Company denies that it had knowledge of this second contract. The plant was completed under the second contract, and charcoal was made and delivered to the Iron Company till 1922 in March. The Government took over the plant in December, 1922, and the Chemical Company became a bankrupt in 1923.

It is clear that the effect of the purported contract of lease of January, 1919, was that of an equitable mortgage. The rentals to be paid were the installments of the amount due under the original contract from the Chemical Company for the amount of money which the Government had advanced, less that which it had already received, and upon payment of the rental stipulated, the title was to revert to the Chemical Company, while the Government reserved the power to take over the property in case of default or bankruptcy of the Chemical Company. Its default gave to the Government the right to enforce against the land and the plant the debt due under this equitable mortgage. *Peugh* v. *Davis,* 96 U. S. 332, 336; *Robinson* v. *Farrelly,* 16 Ala. 472; *Lowery* v. *Peterson,* 75 Ala. 109, 111; *Moses* v. *Johnson,* 88 Ala. 517, 520; *Love* v. *Butler,* 129 Ala. 531, 537, 538.

The remedy which we think the Government is entitled to, unless it is to be defeated for the reasons about to be

examined, is not the reforming of a deed and a decree compelling the Shelby Iron Company of New Jersey to substitute its own deed to the Chemical Company for the useless and void deed of the Shelby Iron Company of Alabama. It is rather to give to the Government leave to reframe its pleadings so as to set up therein its ownership of an equitable mortgage upon the land and the plant, to be enforced by a sale thereof and the proper distribution of the proceeds. Of course, we might affirm the action of the Circuit Court of Appeals, with a provision in the affirmance that it should be without prejudice to the beginning of an original suit by a new bill in equity setting forth the equitable mortgage as against the Iron Company, and asking its enforcement, and, if need be, its foreclosure against the land and the plant. We think, however, that it is wiser, and better, and shorter, to end the litigation in this one proceeding.

The Iron Company objects to this action by the Court, on the ground that it has conflicting equitable rights that should defeat any recovery under the alleged mortgage. It insists that under the original contract, as construed in the light of its contract with the Chemical Company, the title of the Government to the land and plant, even if it had been perfected as a legal title, was to terminate at the end of the War, and that the Iron Company was entitled as against the Chemical Company and the Government to the reconveyance of the land. It further insists, that the Government knew of this limitation upon its right to retain the ownership of the property as shown in the contract between the Iron Company and the Chemical Company, and that its only security was in the power reserved to it by the original contract between it and the Chemical Company to remove from the land the plant, within six months, and this it has not exercised and refuses to do so. It shows, that it expended $50,000 in preparing for the

changes due to the installation of the plant by the Government, and has suffered loss by failure of the Chemical Company to comply with its contract. It further says, that the fifteen acres of land is so related to the larger tract of which it was a part that its use and control are essential to the Iron Company's operation of its blast furnace, and that it offered to pay the balance of $210,000 for the transfer to it of the Government's whole interest in the land and plant. It urges that as between it and the Chemical Company, it became entitled to a reconveyance and to take possession of the land because of the breach and bankruptcy of the Chemical Company as a termination of the contract, as if it had expired by limitation. This presents an issue as to the notice which the Government had of the Iron Company's claim under its contract.

The argument of the Iron Company is, that the recital in the Government's contract that the Chemical Company would receive, under a contract with the Iron Company, all the lumber it might require from timber lands of the Iron Company in return for all charcoal derived therefrom, put the United States on notice of everything contained in the contract between the Chemical Company and the Iron Company in respect of the title to the land and the future plant. It relies on the principle that the law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it, and that, where one paper refers to another paper within the power of the party, it gives notice of the contents of the other paper to that party. We have no quarrel with this rule as to constructive notice, but we do not think that it applies here. The reference in the first paper, to require examination of the second, must be one that indicates that both are dealing with a subject matter to which inquiry would be relevant. Here the relevant object of the inquiry would have been the title

to the land and the plant upon it. The recital does not refer either to the land or the title to it, but to the furnishing of wood by the Iron Company. To charge one with notice, the facts must be such as ordinarily to excite inquiry as to the particular fact to be elicited. *Rogers* v. *Rawlings,* 298 Fed. 683; *Mueller* v. *Engeln,* 75 Ky. 441; *Hyde Park Supply Company* v. *Peck-Williamson Heating Company,* 176 Ky. 513; 2 Pomeroy's Eq., § 629, pp. 1208, 1209.

We think, therefore, that the question of notice must be reëxamined, and that the issue must be not of implied notice but of actual notice. It was contended that one of the officers acting for the Government was in such a position that he probably knew what the contents and the effect of the contract between the Iron Company and the Chemical Company were in reference to the tenure of the Government in the land, and that the fact that he was not called to testify on the subject was a circumstance tending to sustain the claim that the Government had actual notice. The Iron Company will have the opportunity to present this and other evidence to the trial court, upon the issue of such actual notice, when the pleadings are reframed.

Counsel for the Government make a further argument to show that, even if the Government had had notice of the contents of the contract between the Iron Company and the Chemical Company, its purpose and effect could not in any way impair the effect of the equitable mortgage the Government acquired under its second contract and so-called lease to the Chemical Company. They say that the Iron Company, in its contract with the Chemical Company, and in the 8th paragraph thereof, manifested clearly an expectation and consent that the Chemical Company might encumber the land and the plant with liens or mortgages, and relied only on the credit and

obligation of the Chemical Company, in reconveying to the Iron Company, to clear off mortgage liens or bonds which the Iron Company evidently thought the Chemical Company might create. If this is the correct view, an equitable mortgage of the Government of the land and the plant, in which it had an interest to the extent of $260,000, must be clearly superior to the equity of the Iron Company growing out of the obligation of the Chemical Company to reconvey the land to the Iron Company. Neither the District Court nor the Circuit Court of Appeals considered this phase of the case. It may not have been presented to them. Their consideration was chiefly given to the issue of misdescription, and to the meaning of the clauses providing for reconveyance of the land and improvements by the Government, in the contract between the Government and the Chemical Company. We do not now consider and pass upon the contention of the Government in these regards. We only refer to it to have it clearly understood that, when the cause goes back, nothing in what we have said shall prevent a showing of actual notice to the Government of the claim of the equity of the Iron Company in the land, by virtue of its contract with the Chemical Company on the one hand, or the construction of the 8th paragraph of that contract, as a reason for maintaining the priority of the Government's equitable mortgage, whether it had notice of the Iron Company's contract or not, on the other.

The decree of the Circuit Court of Appeals will therefore be reversed and the cause remanded to the District Court for a reframing of the pleadings and for further proceedings not inconsistent with this opinion.

Reversed.

SHIELDS *v.* UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 944. Petition submitted March 21, 1927.—Decided April 11, 1927.

1. Where a respondent to a petition for certiorari advises the Court that he can find no ground for opposition, and, therefore, will file no opposing brief and, if the writ issues, will submit the case without further hearing, the Court, upon granting the writ, may proceed at once to a decision of the merits. P. 587.
2. A request in chambers, joined in by the district attorney and counsel for defendants in a criminal case, that the jury be held in deliberation until they should agree upon a verdict, should not be construed as authorizing the judge, out of court, and without the presence of the defendants or their counsel, to receive from the jury a verdict announcing their findings of agreement as to some and disagreement as to other defendants, and to return a written instruction that they also find guilty or not guilty those as to whom they had disagreed. P. 587.
3. When a jury has retired to consider its verdict, written instructions should not be sent without notice to the defendant or his counsel. P. 588.

17 F. (2d) 69, reversed.

PETITION for a writ of certiorari to review a judgment of the Circuit Court of Appeals affirming a conviction of conspiracy to violate the Prohibition Act. For reasons explained in the opinion, granting of the writ is accompanied by a disposition of the case under it.

Mr. E. Lowry Humes for petitioner.

Solicitor General Mitchell, Assistant Attorney General Willebrandt, and *Mr. John J. Byrne,* Attorney in the Department of Justice, for the United States.

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

The question here for review is the judgment of the Third Circuit Court of Appeals, of February 14, 1927.

A petition for certiorari was filed in this Court February 28, 1927, and is this day granted. For reasons to be explained, we proceed at once to consider the case on its merits.

Shields, the petitioner, was indicted and tried with eight or nine others for conspiracy to violate the Prohibition Act, and also for direct violations of the Act. He was convicted of conspiracy and acquitted of the other charges. The case had been submitted to the jury, February 12, 1926. Before the court convened the next morning, the jury still being out, counsel for the defendants and the Assistant United States Attorney in charge of the prosecution visited the trial judge in chambers and requested that the jury be held in deliberation until they should agree upon a verdict. Shortly after the opening of the court, the jury returned for additional instructions on the subject of entrapment, and having received the same, retired for further deliberation. At 2.30 o'clock that afternoon, the jury again returned to court, in the absence of petitioner and his counsel, and reported that they could not agree. What instructions, if any, were then given the jury the record does not disclose. It appears that the jury again retired to deliberate, and between 4.30 and 5.00 o'clock in the afternoon sent from their jury room to the judge in chambers the following written communication:

"We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree. Signed, E. B. MILLIGAN,
Foreman."

The judge from his chambers sent back the following written reply:

"The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.
F. P. SCHOONMAKER,
Judge."

These communications were not made in open court, and neither the petitioner Shields nor his counsel was present, nor were they advised of them. Shortly after, the jury returned in court and announced the following verdict:

"We, the jury, find that the defendants John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. L. Simler, J. E. Hunter guilty on all four counts. Daniel J. Shields, Harry Widman, J. M. Gastman guilty on first count and recommended to mercy of court. Not guilty on 2nd, 3rd and 4th counts, this 13th day of February, 1926.

E. B. MILLIGAN,
Foreman."

Upon this verdict the court rendered its judgment sentencing Shields to pay a fine of $2,000 and to be imprisoned in jail for one year. Shields then filed in court a petition alleging that not until April 21, 1926, more than two months later, did he or his counsel have any knowledge of the tentative verdict sent by the jury to the judge in chambers, or of the reply thereto by the judge, and praying that he be allowed an exception to the action of the judge in sending the reply. The court refused to grant the petition, for the reason as stated by it,

"that counsel for the defendant, Daniel J. Shields, requested the court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the court received the communication from the jury, it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

(Sgd) Per Curiam,
S."

An exception was allowed, however, to the foregoing refusal to grant an exception, the record reciting in this respect:

"*Eo die* an exception to the above refusal to grant an exception is hereby noted to the defendant, Daniel J. Shields.

F. P. SCHOONMAKER,
Judge."

Shields took the case to the Circuit Court of Appeals, assigning, among other errors the action of the District Court in sending the communication to the jury and the refusal of the court to grant an exception to that action. The Circuit Court of Appeals, in affirming the judgment, said:

"The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request, for as is said in 17 Corpus Juris 373-4, 'A defendant in a criminal case can not complain of error which he himself has invited.'"

The petitioner urges, first, that the request joined in by counsel for the defendants, that the jury be held in deliberation until they had reached a verdict, could not be properly construed as a consent that the court might communicate with the jury out of court and in the absence of the defendants and their counsel; second, that the action of the District Court in thus communicating with the jury was a denial to petitioner of due process of law; third, that the judgment of the Circuit Court of Appeals upholding that action is in conflict with the decision of this Court in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76; fourth, that the instruction in the

communication to the jury that it "will have to find also whether Shields, Widman and Gastman are guilty or not guilty," was additionally erroneous because in violation of § 1036 of the Revised Statutes, which authorizes a jury to bring in a verdict as to those of the defendants regarding whom they are agreed, and declares that the case as to the other defendants may be tried by another jury; fifth, that in this respect the instruction of the District Court runs counter to the decision of this Court in *Bucklin* v. *United States,* 159 U. S. 682; and, sixth, that the direction to the jury to bring in a verdict of guilty or not guilty as to the three defendants named had the effect of coercing the jury into rendering a verdict which they were plainly reluctant to return.

The Solicitor General advises us that, after a careful study of the record in this case, the Government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari, and that no brief in opposition will therefore be filed, and if the writ issues, the Government will submit the case without being heard further.

In view of this, we deem it proper to dispose of the case at once. On the statement of the case as we have given it, we think the judgment of the Circuit Court of Appeals must be reversed on the first and third grounds urged, and the cause remanded to the District Court for a new trial. The joint request to the court, of counsel for the defendant and the Assistant District Attorney, to hold the jury in deliberation until they should agree upon a verdict, made in chambers without the presence of the defendant, cannot be extended beyond its exact terms. It did not include any agreement that the court should receive a communication from the jury and answer it without giving the defendant and his counsel an opportunity to be present in court to take such action as they might be advised, especially when the communication as

to the result of the deliberations of the jury showed a marked difference in the views which the jury had as to the guilt of the various defendants. Counsel, in making it, necessarily assumed, as they had a right to, that any communication from the jury would be made in open court, and that they must necessarily be offered an opportunity to withdraw the request already preferred, or to vary it. It is hardly fair to say that a general request to hold the jury for a verdict can be properly applied to such a situation as subsequently developed by the communication of the jury showing their views as to the various defendants.

In the case of *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, which was a suit for damages for personal injuries, it appeared that, after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, they sent to the judge a written inquiry on the question of contributory negligence, to which the trial judge replied by sending a written instruction to the jury room, in the absence of the parties and their counsel and without their consent, and without calling the jury into open court. A new trial was ordered on this account. The Court said:

"Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object."

If this be true in a civil case, *a fortiori* is it true in a criminal case. The request made to the court jointly by the counsel for the defendant and for the Government did not justify exception to the rule of orderly conduct

of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict. We reverse the judgment without reference to the other causes of error assigned.

Reversed.

KELLEY v. OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 827. Argued March 9, 1927.—Decided April 11, 1927.

1. Contentions that a defendant, tried for murder, was deprived of rights under the Federal Constitution (due process of law,) by a charge of the state court concerning self-defense and by being kept in custody in and out of the court room during the trial, are frivolous. P. 590.
2. The proposition that, under the Fourteenth Amendment, one who has committed a murder while serving a term of imprisonment in a state penitentiary has a vested right to serve out his term before he can be executed for the murder, is likewise frivolous. P. 591.

Writ of error to 118 Ore. 397, dismissed.

ERROR to a judgment of the Supreme Court of Oregon sustaining a death sentence for murder. In one aspect of the case the writ of error is treated as an application for certiorari; which is denied.

Mr. Will R. King for plaintiff in error, submitted.

Mr. John H. Carson, with whom *Mr. Willis S. Moore* was on the brief, for defendant in error.

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

Ellsworth Kelley, plaintiff in error, James Willos and Tom Murray were jointly indicted by the grand jury of Marion County, Oregon, for the crime of murder in the

first degree, under the provisions of § 1893, Oregon Laws, as follows:

"If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

At the time of the commission of the crime set forth in the indictment, Kelley and the two others accused with him were prisoners in the Oregon State Penitentiary at Salem, Oregon, and the crime was committed by them in their escape from that institution. John Sweeney, named in the indictment, was a guard at the institution and was slain in his attempt to prevent the escape.

The plaintiff in error was arraigned upon the indictment in the manner prescribed by the laws of Oregon, and upon such arraignment he entered a plea of not guilty to the indictment. He and Willos were tried together. The cause came on regularly for trial. The jury returned into court a verdict of guilty as charged in the indictment, without recommendation. On October 30, 1925, plaintiff in error was sentenced to pay the penalty of death as by the law provided. Judgment was entered on the same day. Appeal was taken by the plaintiff in error to the Supreme Court, which affirmed the judgment of the trial court (*State* v. *Kelley,* 118 Ore. 397), and denied two petitions for rehearing. Thereupon the case came here upon writ of error allowed by the Chief Justice of the State Supreme Court.

An examination of the record satisfies us that there is really no federal question in the case, and that the errors assigned purporting to raise questions under the Constitution of the United States are frivolous. An example of these may be given in the assignment of error that the rights of the defendant under the Federal Constitution were invaded by the charge of the court on the question

of self-defense. It is difficult to see how, in any aspect of it, such a question could involve issues under the Federal Constitution, and certainly they do not here.

Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the warden of the penitentiary, inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody, in order that he might fully make his defense, and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely freed from custody. *Ponzi* v. *Fessenden,* 258 U. S. 254, 265; *State* v. *Wilson,* 38 Conn. 126. There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit.

Finally, it is objected that as the plaintiff in error was under sentence to confinement in the penitentiary for twenty years, which had not expired when he committed this murder, he could not be executed until he had served his full term.

Answering this objection, the Supreme Court of Oregon said:

"As stated, the defendants are both convicts imprisoned in the Oregon state penitentiary and it seems from the testimony that they had escaped from prison in other jurisdictions. The defendants claim that the sentence of death imposed upon them by the judgment of the court is forbidden by Section 1576, Or. L., reading thus:

"' If the defendant is convicted of two or more crimes, before judgment on either, the judgment must be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of such crimes; and if the defendant be in imprisonment upon a

previous judgment on a conviction for a crime, the judgment must be that the imprisonment must commence at the expiration of the term limited by such previous judgment.'

"Their theory seems to be that owing to the fact of each of them being then under sentence to imprisonment for other offenses, the trial court had no jurisdiction to punish them for a crime committed while the pending imprisonment was in force. It will be noted that the section just quoted refers only to imprisonment and not to the penalty of death or fine. The section does not purport to exempt a defendant from trial and judgment for the commission of any crime during his confinement in the penitentiary. It would be shocking to all sense of justice and public security to say that a criminal confined in the penitentiary as punishment for his misdeeds could be licensed to commit other crimes with immunity; yet, that is the conclusion to which the argument of the defendants' counsel will lead. If the jury had found such a verdict as would authorize their imprisonment, the section quoted would be the authority for the court to declare that the latest imprisonment should begin at the expiration of the term then being served by the defendants. The punishment of death is an entirely distinctive thing and is not included in the provisions of this section."

It is contended that this construction of the statute, in permitting one who has committed a murder while a convict in the penitentiary to be executed before his term has expired, deprives him of a right secured by the Fourteenth Amendment, in that due process of law secures to him as a privilege the serving out of his sentence before he shall be executed. It is doubtful whether this exception and assignment can be said to be directed to a ruling of the Supreme Court of Oregon such as to draw in question the validity of a statute of Oregon on the ground of its repugnancy to the Constitution, treaties or laws of the

United States and sustain it, as required in § 237a of the Judicial Code, as amended, c. 229, 43 Stat. 936, 937, permitting a writ of error. But assuming that it does, or, if not, treating the writ of error as an application for certiorari, there is not the slightest ground for sustaining the assignment.

A prisoner may certainly be tried, convicted and sentenced for another crime committed either prior to or during his imprisonment, and may suffer capital punishment and be executed during the term. The penitentiary is no sanctuary, and life in it does not confer immunity from capital punishment provided by law. He has no vested constitutional right to serve out his unexpired sentence. *Chapman* v. *Scott,* 10 Fed. (2d) 690, affirming the same case, 10 Fed. (2d) 156; *Ponzi* v. *Fessenden,* 258 U. S. 254; *Rigor* v. *State,* 101 Md. 465; *State* v. *Wilson,* 38 Conn. 126; *Thomas* v. *People,* 67 N. Y. 218, 225; *Peri* v. *People,* 65 Ill. 17; *Commonwealth* v. *Ramunno,* 219 Pa. St. 204; *Kennedy* v. *Howard,* 74 Ind. 87; *Singleton* v. *State,* 71 Miss. 782; *Huffaker* v. *Commonwealth,* 124 Ky. 115; *Clifford* v. *Dryden,* 31 Wash. 545; *People* v. *Flynn,* 7 Utah 378; *Ex parte Ryan,* 10 Nev. 261; *State* v. *Keefe,* 17 Wyo. 227, 252; *Re Wetton,* 1 Crompt. & J. 459; *Regina* v. *Day,* 3 F. & F. 526.

The writ of error is dismissed and the certiorari is denied.

FORD ET AL. *v.* UNITED STATES.

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

No. 312. Argued October 26, 27, 1926.—Decided April 11, 1927.

1. In an indictment charging conspiracy to commit offenses against laws of the United States, an allegation that it was also to violate a treaty (prescribing no offense) may be rejected as surplusage. P. 602.

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2. Ignoring surplusage is not amending the indictment. P. 602.
3. An indictment charging a continuous conspiracy to commit offenses against the United States by introducing and transporting liquor in the United States in violation of the National Prohibition Act, and by importing it into the United States in violation of the Tariff Act, is not bad for duplicity. P. 602.
4. In determining the admissibility in a criminal case of evidence of a seizure of property and persons, questions of fact affecting the legality of the seizure are decided by the court without the jury. P. 605.
5. Where the District Court has jurisdiction of the offense charged, the question whether the defendants were wrongfully brought into its custody through an unlawful seizure on the high seas must be raised by a plea to the jurisdiction over their persons and is waived by a plea of not guilty. P. 606.
6. The treaty of May 22, 1924, with Great Britain, which, within limits stated, permits a British vessel in extraterritorial waters to be boarded and searched by United States authorities, and, if there is reasonable cause for belief that she has committed or is committing or attempting to commit an offense against the laws of the United States prohibiting the importation of alcoholic beverages, to be seized and taken into port "for adjudication in accordance with such laws,"—should be construed liberally, in effectuation of its purpose, as contemplating that not only the ship but the cargo and the persons on board may be taken in for adjudication. Pp. 609, 618.
7. Principle of *Expressio unius est exclusio alterius,* considered. P. 611.
8. It is permissible under the treaty to prosecute the persons so seized and brought into the United States not only for illegal importation but also for conspiracy to commit that offense—where the conspiracy charged (under Crim. Code § 37) included as overt acts actual importation and an attempt. *United States* v. *Rauscher,* 119 U. S. 407, distinguished. Pp. 614, 616.
9. One may be guilty as a party to a conspiracy to import liquors into the United States in violation of the Prohibition Law, followed by overt acts in this country, although he was and remained outside of its territorial jurisdiction. P. 619.

10 F. (2d) 339, affirmed.

CERTIORARI (271 U. S. 652) to a judgment of the Circuit Court of Appeals affirming a conviction of conspir-

acy to import liquor into the United States in violation of the Prohibition Law. See 3 F. (2d) 643.

Messrs. J. Harry Covington, Harold C. Faulkner, and *Marion De Vries,* with whom *Messrs. Dean G. Acheson, George Roscoe Davis,* and *Louis V. Crowley* were on the brief, for petitioners.

The history of the legal and diplomatic situation which led to the treaty of May 22, 1924, shows that friction had developed between the United States and Great Britain because of the seizure of British vessels by the United States beyond the territorial waters of this country, a practice never before attempted by this country in time of peace. The seizure of hovering vessels beyond territorial waters rests upon the acquiescence of the sovereign whose flag is thus violated, and is not a matter of right. Fish, Secretary of State, to Thornton, January 22, 1875; Moore's Digest Int. Law, 731; Buchanan, Secretary of State, to Crampton, August 19, 1848; Evarts, Secretary of State, to Fairchild, March 3, 1881; 1 Moore 732; *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100. In a group of early cases in this Court the subject of seizure beyond the three-mile limit was discussed. *Church* v. *Hubbart,* 2 Cr. 187; *Rose* v. *Himely,* 4 Cr. 241; *Hudson* v. *Guestier,* 6 Cr. 281. See Wheaton, Int. L. 8th ed., § 179; 1 Moore 727. One thing alone appears clearly—the exercise of authority beyond the three-mile limit depends upon its acceptance by other nations, in each instance, as reasonable under the conditions. There has been nothing more provocative of international friction than searches and seizures by one nation of the vessels of another nation on the high seas.

Up to the time of the decision of the cases arising in connection with the enforcement of the national prohibition of intoxicating liquors, there is no case of the seizure and forfeiture of a foreign vessel in time of peace

which had never itself or through its boats come within the territorial waters of the United States, except in the fur seal controversy, and for these seizures the United States paid compensation. *Cunard* v. *Mellon,* 262 U. S. 100; *The Grace and Ruby,* 283 Fed. 475; *The Henry L. Marshall,* 286 Fed. 260. In 1922 the United States began to make seizures beyond the three-mile limit which action evoked protests from Great Britain. The treaty of May 22, 1924, was made to settle in a complete way all questions involving the interference with British vessels beyond territorial waters. 43 Stat. 1761. It granted the right to seize British vessels in certain areas beyond territorial waters for the sole and limited purpose of adjudicating the vessel only in accordance with the laws of the United States prohibiting the importation of alcoholic beverages.

The rules of construction of treaties are the same as those relating to simple contracts. *United States* v. *Choctaw Nation,* 179 U. S. 494, and cases therein cited. Every consideration which may affect construction of the treaty supports the conclusion that Great Britain granted no right to subject to criminal prosecution British subjects brought into the United States as an incident of a seizure under the treaty. *The Sagatind,* 11 Fed. (2d) 673; *Hennings* v. *United States,* 13 Fed. (2d) 74; *The Marjorie E. Bachman,* 4 Fed. (2d) 405. The end sought to be accomplished by the treaty was not the apprehension and punishment of criminals. It was the seizure and forfeiture of hovering vessels used in introducing alcoholic liquors into the United States. By such seizure and forfeiture the United States was seeking to clear its coasts of these vessels and sought the coöperation of Great Britain in extending the area in which it might seize these vessels for the purpose of forfeiting them. So far as appears, nothing more was asked and certainly nothing more was granted.

The defendants, having been brought within the jurisdiction of the United States by virtue of the treaty, may not be proceeded against in a manner not permitted by it. *Foster* v. *Neilson,* 2 Pet. 253. So clear is the treaty as to the rights of British subjects upon the high seas that it has been made the basis of decision in the federal courts. *The Frances Louise,* 1 Fed. (2d) 1004; *The Marjorie E. Bachman,* 4 Fed. (2d) 405; *The Over The Top,* 5 Fed. (2d) 838; *The Pictonian,* 3 Fed. (2d) 145; *The Sagatind,* 11 Fed. (2d) 673; *Hennings* v. *United States,* 13 Fed. (2d) 74. If British subjects, brought into an American port as an incident to the seizure of a British vessel for purposes of adjudicating it under the laws prohibiting the importation of alcoholic liquors, can be indicted and convicted for conspiracy to violate the National Prohibition Act and the Tariff Act they can be similarly dealt with for any offense against American laws, even though, as in case of such a conspiracy, it is not an offence mentioned in the treaty of May 22, 1924, or in the extradition treaty. Such a result could hardly be regarded by Great Britain other than as—"a fraud upon the rights of the parties and bad faith toward the country which permitted the seizure." *United States* v. *Rauscher,* 119 U. S. 407.

The grand jury regarded the treaty as providing the essence of the charge against these defendants. No evidence was adduced at the trial and presumably not before the grand jury that these men had ever come within the generally recognized territorial jurisdiction of the United States. So important did the grand jury regard the treaty in making unlawful the conduct charged against the defendants that in alleging two of the four overt acts it used the exact language of the treaty to place the acts as taking place within the distance from the coast of the United States which the *Quadra* and the motor boats in question could traverse in one hour.

The Circuit Court of Appeals sustained the indictment and conviction by rejecting as surplusage the references to the treaty in the charging paragraphs which made the indictment fatally defective. This was done not only after the grand jury had presented these defendants for trial, but after the trial jury had found them guilty of a conspiracy as alleged in the indictment. This the Court had no power to do. *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531; *Ex parte Bain,* 121 U. S. 1; *Dodge* v. *United States,* 258 Fed. 300; *Stewart* v. *United States,* 12 Fed. (2d) 524; *United States* v. *Howard,* 132 Fed. 325; *Naftsger* v. *United States,* 200 Fed. 494.

Section 37 of the Criminal Code is not operative against British subjects upon a British vessel on the high seas. *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100. The words of § 37 apparently having universal scope must be "taken as a matter of course to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch." Viewed in this light it will hardly be contended that § 37 is to be construed as generally applicable. From whatever angle the present question is approached the problem always remains whether § 37 shall be interpreted, as this Court has declared that all criminal statutes should be interpreted, in accordance with recognized international law. *United States* v. *Bowman,* 260 U. S. 94; *Hyde* v. *United States,* 225 U. S. 347.

Solicitor General Mitchell, with whom *Assistant Attorney General Willebrandt* and *Mr. John J. Byrne,* Attorney in the Department of Justice, were on the brief, for the United States.

The seizure of the *Quadra* was within the terms of the treaty because the circumstances at the time gave reasonable cause for belief that the vessel and those on board had committed or were committing or attempting to commit an offense against the laws of the United States pro-

hibiting the importation of alcoholic beverages, and there was evidence to sustain the finding that a boat intended to convey liquor to shore could traverse the distance to shore within an hour and that the seizure was within the limit of distance fixed by the treaty. *Grace and Ruby,* 283 Fed. 476; *Henry L. Marshall,* 292 Fed. 486.

The treaty contemplates that the vessel, her cargo, and those on board shall be brought into port. When that is done, if it appears that the persons on board have committed an offense, they may be prosecuted therefor. The treaty does not, by its terms, provide that the crew or cargo must be released, and no such stipulation is implied. The implication is to the contrary, and the attempt to establish an analogy between this case and extradition cases fails. There is nothing in the treaty to sustain the claim that the crew may not be tried for any offense, and the treaty should not be narrowly construed only to permit their trial for violation of the substantive offense of introduction of liquors, but not for conspiracy to do so. The treaty should be construed to carry out its purposes and to relate to violations of law on the subject of alcoholic beverages. *United States* v. *Rauscher,* 119 U. S. 407; *Ker* v. *Illinois,* 119 U. S. 436.

Although the officers of the vessel did not physically come within the territorial limits of the United States, they were parties to the conspiracy to commit crime within the United States made by them with those within the United States, and they directly aided, abetted and combined with those within our jurisdiction in the commission of overt acts within the United States and are therefore subject to trial and punishment under our laws. *United States* v. *Davis,* 2 Sumn. 482; *In re Palliser,* 136 U. S. 257; *Horner* v. *United States,* 143 U. S. 207; *Benson* v. *Henkel,* 198 U. S. 1; *Commonwealth* v. *Macloon,* 101 Mass. 1; *People* v. *Adams,* 3 Denio 190; *McLoughlin* v.

Raphael Truck Co., 191 U. S. 267; *Reg.* v. *Garrett*, 1 Dearsly 232.

The statement in the indictment that the defendants conspired to unlawfully introduce liquor into the United States in violation of the treaty may be treated as surplusage.

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

This is a review by certiorari of the conviction of George Ford, George Harris, J. Evelyn, Charles H. Belanger and Vincent Quartararo, of a conspiracy, contrary to § 37 of the Criminal Code, to violate the National Prohibition Act, Title II, §§ 3 and 29, c. 85, 41 Stat. 305, 308, 316, and the Tariff Act of 1922, § 593 (b), c. 356, 42 Stat. 858, 982. The trial and conviction resulted largely from the seizure of the British vessel Quadra, hovering in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco. The ship, her officers, her crew and cargo of liquor were towed into the port of San Francisco. The seizure was made under the authority of the treaty between Great Britain and the United States, proclaimed by the President May 22, 1924, 43 Stat. 1761, as a convention to aid in the prevention of the smuggling of intoxicating liquors into the United States.

The main questions presented are, first, whether the seizure of the vessel was in accordance with the treaty; second, whether the treaty prohibits prosecution of the persons, subjects of Great Britain, on board the seized vessel brought within the jurisdiction of the United States upon the landing of such vessel, for illegal importation of liquor; third, whether the treaty authorizes prosecution of such persons, not only for the substantive offense of illegal importation or attempt to import, but also for conspiracy to effect it; and, fourth, whether such persons,

without the United States, conspiring and coöperating to violate its laws with other persons who are within the United States and to commit overt acts therein, can be prosecuted therefor when thereafter found in the United States.

The petitioners and fifty-five others were indicted in November, 1924, for carrying on a continuous conspiracy at the Bay of San Francisco, in the jurisdiction of the United States, from January 1, 1924 to November of that year, the date of the indictment, to commit offenses against the laws of the United States, first, by introducing into and transporting in the United States intoxicating liquor, in violation of the National Prohibition Act; second, by importing liquor into the United States, in violation of § 593, sub-division (b), of the Tariff Act of 1922, making it a penal offense to introduce merchandise into the United States in violation of law; and, third, by violation of the terms of the treaty. It charged as overt acts: the loading of 12,000 cases of liquor on the Quadra at Vancouver, British Columbia, her proceeding on September 10, 1924, to a point less than twelve miles from the Farallon Islands,—a distance which could be traversed in less than an hour by the Quadra and by the motor boats, 903 B, C–55, Marconi, California, Ocean Queen and divers others, by which the liquor was then delivered from her and imported into the United States; that on the 29th of September, 1924, the defendants landed from the steamer Quadra a barrel containing 100 gallons of whiskey, and, at another time, on October 11, 1924, a large variety of alcohol, gin, brandy, whiskey, and vermouth; and that, at another time, on October 12th, the day of the seizure, they attempted to land 89 sacks of whiskey, but that two of the defendants, who were on the small craft C–55, were arrested and were prevented from carrying out their purpose. Two defendants pleaded guilty. Of twenty-nine defendants tried, nineteen, including all the crew of

the Quadra were acquitted, and ten, including the captain and the first and second officers of the Quadra, were convicted. Of these ten, five, including the three officers, are now before the Court as petitioners. The convictions were affirmed by the Circuit Court of Appeals of the Ninth Circuit. 10 Fed. (2d) 339.

The validity of the indictment is attacked, first, because it charges that the conspiracy was to violate the treaty, although the treaty creates no offense against the law of the United States. This is true, but that part of the indictment is merely surplusage and may be rejected. *Bailey* v. *United States,* 5 F. (2d) 437; *Remus* v. *United States,* 291 Fed. 501; *United States* v. *Weiss,* 293 Fed. 992, 995; *United States* v. *Drawdy,* 288 Fed. 567, 570. The trial court took this view. But it is contended that this is to amend the indictment and comes within the inhibition of the principle of *Ex parte Bain,* 121 U. S. 1. That decision condemns the striking out of words from an indictment. The action here complained of is merely a judicial holding that a useless averment is innocuous and may be ignored. *Goto* v. *Lane,* 265 U. S. 393, 402; *Salinger* v. *United States,* 272 U. S. 542. Next it is said that the indictment is bad for duplicity. It charges a continuous conspiracy by the defendants, at the Bay of San Francisco, between January 1, 1924, and the date of finding the indictment, to import into the United States intoxicating liquor in violation of its laws. It mentions two of such laws, and, as § 37 of the Criminal Code requires, it describes several overt acts in pursuance of the conspiracy alleged. The charge is unitary in relating to one continuous conspiracy, although in proof of it different circumstances constituting it and overt acts in pursuance of it are disclosed. This does not constitute duplicity. *Frohwerk* v. *United States,* 249 U. S. 204, 210; *Joplin Co.* v. *United States,* 236 U. S. 531, 548.

The case on the evidence made by the Government was as follows:

On October 12, 1924, the United States Coast Guard cutter Shawnee, on the lookout for vessels engaged in the illicit importation into the United States of intoxicating liquor, saw the Quadra, a British steamer of Canadian register, near the Farallon Islands. As the Shawnee bore down on her to investigate, she turned and began to move off shore. The captain of the Shawnee signalled her to stop, and she complied. As the Shawnee approached her, a motor boat, C-55, was seen just after the boat had left the Quadra. The Shawnee captain signalled the boat to stop, and because it did not do so, fired a shot across its bow, whereupon it rounded about and came alongside. It had two men and a number of sacks of intoxicating liquor, as well as a partly filled case of beer bottles. It was made fast to the Shawnee and the two men were placed under arrest. The Shawnee captain then sent two officers aboard the Quadra to examine her papers. Ford, her captain, one of the convicted defendants, refused to show his papers or to give any information until he had consulted counsel. The Shawnee officers then took charge of her. She was found to contain a large quantity of intoxicating liquor, and on refusal of Ford to take her by steam into San Francisco, the Shawnee towed her to that port and turned her cargo over to the United States customs officers, while her officers and crew, including Ford, were arrested.

The testimony for the Government tended to show that the Quadra when seized was 5.7 nautical miles from the Farallon Islands, and that the motor boat C-55 could have traversed that distance in less than an hour.

The evidence for the Government at the trial further showed there were three vessels, the Quadra, the Malahat, and the Coal Harbour, chartered by a cargo-owning cor-

poration called the Consolidated Exporters Corporation, Limited, of Canada, and loaded at Vancouver, British Columbia, with large cargoes of miscellaneous liquors; that the Malahat left Vancouver in May officially destined to Buenaventura, Colombia; that the Coal Harbour left the same port in July with a similar cargo officially destined to La Libertad, San Salvador; and that the Quadra left there in September, officially destined to La Libertad. The captains of these vessels, while hovering near the Farallones, were constantly in touch with the convicted defendants Quartararo and Belanger, at San Francisco, and acted to some extent under their orders and directions. Quartararo was the most active agent of the conspiracy on shore. Belanger was a director of the Canadian corporation above named. He arranged for and had sent from San Francisco to the Malahat burlap containers to be used for landing the bottled liquor, thence to be transferred to the Quadra, and also gave the orders to transfer liquor from one vessel to another, and to bring designated liquor from the vessels' cargoes to the shore. The Quadra was supplied with fuel oil from the shore, pursuant to prearrangement. None of the sea-going vessels above named proceeded to their destinations officially described in their ship's papers, but they cruised up and down between the Farallones and the Golden Gate, where the exchanges of liquor and sacks were made and where the needed oil was delivered, and from where the liquor was carried by small boats to a landing place called Oakland Creek, in San Francisco. The evidence of the conspiracy, the landing of the liquor and the complicity of the convicted defendants therein was ample and practically undenied.

There was a preliminary motion to exclude and suppress the evidence of the ship and cargo. It was contended that the seizure was unlawful because not within the zone of the high seas prescribed by the treaty; and that the officers of the Quadra being prosecuted were protected

against its use as evidence against them under the Fourth and Fifth Amendments to the Federal Constitution. The motion was heard by the District Court without a jury and was denied in an opinion reported in 3 Fed. (2d) 643. The evidence of the Government showed that the Quadra was seized at a distance from the Farallon Islands of 5.7 miles, and a test made later of the speed of the motor boat C–55, caught carrying liquor from her, showed that it could traverse 6.6 miles in an hour. There was a conflict as to the exact position of the Quadra at the time of the seizure. It was further objected that the speed of the motor boat was not made under the same conditions as those which existed at the time of the seizure.

The question of the evidential weight of the test as well as of all the circumstances was for the judgment of the trial court. As it has been affirmed by the Circuit Court of Appeals, we see no reason to reverse it.

It is objected that the question of the validity of the seizure should have been submitted to the jury. So far as the objection relates to the admission of evidence, it has already been settled by this Court that the question is for the court and not for the jury. *Steele* v. *United States,* 267 U. S. 505, 511; *Gila Valley Railway Company* v. *Hall,* 232 U. S. 94, 103; *Bartlett* v. *Smith,* 11 M. & W. 483; *Doe dem. Jenkins* v. *Davies,* 10 Ad. & El. N. S. 314; *Cleave* v. *Jones,* 7 Exchequer 421, 425; Wigmore on Evidence, (2nd ed.) vol. V., p. 556, § 2550.

It is further objected, however, that the issue as to the place of the seizure, though submitted to and disposed of by the court in respect of the admissibility of evidence, should also have been submitted to the jury on the general issue. The Solicitor General answers, on the authority of *Ker* v. *Illinois,* 119 U. S. 436, that an illegal seizure would not have ousted the jurisdiction of the court to try the defendants. But the *Ker* case does not apply here. It related to a trial in a state court, and this Court found

that the illegal seizure of the defendant therein violated neither the Federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their trial after alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different.

But there is a reason why this assignment of error can not prevail. The issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence. It only affected the right of the court to hold their persons for trial. It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants. *Dowdell* v. *United States,* 221 U. S. 325, 332; *Albrecht* v. *United States,* 273 U. S. 1; *Gardner* v. *United States,* 5 Indian Territory 150, 156; *Regina* v. *Stone,* 23 Ontario 46, 50; *In re Paul,* 5 Alberta Law 442; *State* v. *Bishop,* 7 Conn. 181; *State* v. *Watson,* 20 R. I. 354; *State* v. *Kinney,* 41 Iowa 424; *In re Roszcynialla,* 99 Wis. 534, 538; *State ex rel. Brown* v. *Fitzgerald,* 51 Minn. 534; *In re Brown,* 62 Kan. 648; *State* v. *Browning,* 70 S. Car. 466; *Hollibaugh* v. *Hehn,* 13 Wyo. 269; *In re Blum,* 9 N. Y. Misc. 571; 1 Bishop Crim. Proc. (2d ed.) §§ 730, 744 and 746; 1 Chitty Criminal Law (5th Am. ed.) p. 438. It was not error therefore to refuse to submit to the jury on the trial the issue as to the place of the seizure.

There was a demurrer to the indictment, on the grounds that it did not state facts sufficient to constitute an offense against the United States, that the court had no jurisdiction to try those who were on the Quadra because seized beyond the three-mile limit, and that the acts charged were not within the jurisdiction of the court. The con-

spiracy was laid at the Bay of San Francisco, which was within the jurisdiction of the court. The conspiracy charged was undoubtedly a conspiracy to violate the laws of the United States under § 37 of the Criminal Code. The court had jurisdiction to try the offense charged in the indictment and the defendants were in its jurisdiction because they were actually in its custody.

The defendants contend that on the face of the indictment and the treaty they are made immune from trial. This requires an examination and construction of the treaty.

The preamble of the treaty recites that the two nations, being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages, have decided to conclude a convention for the purpose. The first four Articles are as follows:

"ARTICLE I.

"The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters.

"ARTICLE II.

"(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force.

When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

"ARTICLE III.

" No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that

no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

"ARTICLE IV.

"Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

" Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided."

The other two articles relate only to duration and ratification.

The treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels, through the waters and in ports of the United States, of sealed sea stores and sealed cargoes of liquor for delivery at other destinations than the United States. The counter-consideration moving to the United States is the enlargement and a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against importation of liquor into this country from

the sea. The treaty did not change the territorial jurisdiction of the United States to try offenses against its importation laws. That remained exactly as it was. If the ship could not have been condemned for such offenses before the treaty, it can not be condemned now. If the persons on board could not have been convicted before the treaty, they can not be convicted now. The treaty provides for the disposition of the vessel after seizure. It has to be taken into port for adjudication. What is to be adjudicated? The vessel. What does that include? The inference that both ship and those on board are to be subjected to prosecution on incriminating evidence is fully justified by paragraph 1 of Article II, in specifically permitting examination of the ship papers and inquiries to those on board to ascertain whether, not only the ship, but also those on board, are endeavoring to import, or have imported, liquor into the United States. If those on board are to be excluded, then by the same narrow construction the cargo of liquor is to escape adjudication, though it is subject to search as the persons on board are to inquiry into their guilt. It is no straining of the language of the article therefore to interpret the phrase "the vessel may be seized and taken into a port of the United States . . . for adjudication in accordance with such laws," as intending that not only the vessel but that all and everything on board are to be adjudicated. The seizure and the taking into port necessarily include the cargo and persons on board. They can not be set adrift or thrown overboard. They must go with the ship—they are identified with it. Their immunity on the high seas from seizure or being taken into port came from the immunity of the vessel by reason of her British nationality. When the vessel lost this immunity, they lost it too, and when they were brought into a port of the United States and into the jurisdiction of its District Court, they were just as much subject to its

adjudication as the ship. If they committed an offense against the United States and its liquor importation laws, they can not escape conviction, unless the treaty affirmatively confers on them immunity from prosecution. There certainly are no express words granting such immunity. Why should it be implied? If it was intended by the parties why should it not have been expressed?

It is urged that the principle of interpretation, *Expressio unius est exclusio alterius,* requires the implication from the reference to the adjudication of the vessel alone. This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. But here, as we have already pointed out, the obvious and necessary association of the seizure and the taking to port of the cargo and those on board with that of the vessel naturally carries the same association with the step of adjudication. This destroys the idea of contrast so that the inference based on the maxim can not here be drawn. The ship, on the one hand, and those on her and her cargo, on the other, are not, in the natural reading of the words, set over against each other. The words "for adjudication" are arranged as incidental to the seizure and taking into port, in which the persons on board and the cargo must be included. Why then should they be excluded from the last of the three steps described in the disposition of the vessel?

The maxim of interpretation relied on is often helpful, but its wise application varies with the circumstances. *United States* v. *Barnes,* 222 U. S. 513, 518-519; *City of New York* v. *Davis,* 7 F. (2d) 566, 575; *Saunders* v. *Evans,* 8 H. L. C. 721, 729; *London Joint Stock Bank* v. *Mayor,* 1 C. P. D. 1, 17; *Colquhoun* v. *Brooks,* 21 Q.

B. D. 52, 65. Broom's Legal Maxims, 7th Ed., p. 653, says:

"It will, however, be proper to observe, before proceeding to give instances in illustration of the maxim, *Expressio unius est exclusio alterius,* that great caution is requisite in dealing with it for, as Lord Campbell observed in *Saunders* v. *Evans,* it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction; thus where general words are used in a written instrument, it is necessary, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied."

Lord Justice Lopes says of the maxim in *Colquhoun* v. *Brooks, supra:*

"It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

What reason could Great Britain have for a stipulation clothing with immunity either contraband liquor which should be condemned or the guilty persons aboard, when the very object of the treaty was to help the United States in its effort to protect itself against such liquor and such persons, from invasion by the sea? To give immunity to the cargo and the guilty persons on board would be to clear those whose guilt should condemn the vessel and to restore to them the liquor, and thus release both for another opportunity to flout the laws of a friendly government which it was the purpose of the

treaty to discourage. The owner of the vessel would thus alone be subjected to penalty, and he would suffer for the primary guilt of the immunized owner of the liquor. Such implication of immunity leads to inconsistency and injustice. The palpable incongruity contended for is such that, without express words, we can not attribute to the high contracting parties intention to bring it about.

Nor have we been advised that Great Britain has ever suggested that under this treaty a crew of a vessel lawfully seized could not be brought into port or tried according to our laws. Diligent as the representatives of that nation have always been in guarding the rights of their people, such a construction of the treaty has not been advanced. It is said by the Solicitor General without contradiction that, following a number of seizures of British ships on our coasts under the treaty, those on board have been indicted and tried for offenses against the laws relating to intoxicating beverages, and that the State Department records show no objection of immunity therefrom to have been claimed for them by the British Government. One instance cited is in respect of the crew of the British schooner Francis E., which was seized off the coast of Alabama, and whose master and crew were arrested and indicted and subsequently tried and convicted for conspiracy to smuggle intoxicating liquors into the United States. Under date of June 30, 1925, pending the trial, the British Embassy communicated to the Secretary of State a complaint, as follows:

"As you are doubtless aware, the British schooner Frances E of Nassau was seized by a United States revenue cutter on April 24th last and was later escorted into the port of Mobile, Alabama, where her master and crew were arrested and charged with conspiracy to violate the National Prohibition laws.

"I am informed that the defendants in this case have now been incarcerated in gaol since April 28th last and are

still awaiting trial and that the long delay, added to their uncertainty as to the future, is causing them considerable suffering."

The request was then made that the trial be expedited, and this was followed by a similar request in October, 1925; but there was no claim that any immunity from trial was secured by the treaty to those who were brought in on the vessel seized.

The case of the *United States v. Rauscher,* 119 U. S. 407, is relied on to establish the immunity contended for in this case. Rauscher was convicted under an indictment in a federal court for cruel and unusual punishment of one of the crew of an American vessel of which Rauscher was an officer. He had been extradited from British territory for murder on the high seas under § 4339 of the Revised Statutes. The question was whether he could be tried in this country for another offense than that for which he was extradited,—for an offense for which the treaty granted no right to extradition. The extradition treaty was that of August 9, 1842, between Great Britain and the United States, 8 Stat. 576, in which each country, upon mutual requisition of the other, agreed to deliver to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, should seek an asylum or should be found, within the territories of the other: provided, that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments were given jurisdiction upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged,

that he might be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality might be heard and considered; and if, on such hearing, the evidence were deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive. The court held that a defendant thus extradited could not be tried for any offense other than the one for which he was extradited. The case was decided at the end of a prolonged controversy between Great Britain and the United States through their State Departments on the same issue presented in several cases.

The opinion of the Court was delivered by Mr. Justice Miller, and his conclusions were based, first, on the ground that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country in the absence of treaty has no right to proceed against him for any other offense than that for which he had been delivered up; second, that the enumeration of the offenses in the treaty there involved marked such a clear line in regard to the magnitude and importance of those offenses that it was impossible to give any other interpretation to it than the exclusion of the right of extradition in others; third, the provisions of the treaty giving a party an examination before a judicial tribunal in which, before he should be delivered up, the offense for which he was to be extradited must be proved to the satisfaction of the tribunal, left no doubt that the purpose of the treaty was that the person delivered up should be tried for that offense and no other; and fourth, that the provisions of §§ 5272 and 5275 of the Revised Statutes required such course in the trial of extradited persons.

This review of the opinion in the *Rauscher* case shows that it affords no support for the implication of immunity

of the smugglers or would-be smugglers, or the contraband cargo, in the case before us. If it were attempted to try the defendants or to forfeit the cargo that was brought into port, for smuggling of forbidden opium, a different question might possibly be presented. But here the subjecting of the defendants and the cargo, by the seizure of the vessel, to the jurisdiction of the courts of the United States is for a conspiracy to do the smuggling of liquor which was the ground for the vessel's seizure. This destroys any real analogy between the *Rauscher* case and this. More than this, the strength of the provisions of the treaty in the *Rauscher* case, as detailed in the opinion, to establish the sound application of the *exclusio* maxim of interpretation, shows how weak by contrast is its application to the circumstances of this case.

It is next objected that the convicted defendants taken from the Quadra were not triable under the indictment, because it charges an offense against them for which under the treaty neither they nor the Quadra could have been seized in the prescribed limit. It is very doubtful whether the objection was made in time and was not waived by the plea of not guilty; but we shall treat it as having been duly made. The contention of counsel on this point is that the treaty permits seizure only for the substantive offense of importing, or attempting to import, liquor illegally, and not for a conspiracy to do so.

These defendants were indicted under § 37 of the Criminal Code of the United States for having conspired at the Bay of San Francisco to violate the National Prohibition Act and the Tariff Act of 1922. Section 37 of the Criminal Code provides that if two or more persons conspire to commit an offense against the United States, and one or more of such parties commit any act to effect the object of the conspiracy, each shall be punished.

The National Prohibition Act, c. 85, § 3, 41 Stat. 305, 308, enacted October 29, 1919, provides:

"No person shall on or after the date when the 18th Amendment to the Constitution goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and 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."

The Tariff Act of September 21, 1922, 42 Stat., c. 356, § 593 (b) provides that if any person fraudulently or knowingly imports or brings into the United States, or assists in doing so, any merchandise contrary to law, he shall be fined or imprisoned. The importation of liquor into the United States is contrary to law, as shown by the Prohibition Act.

The indictment charged as overts acts that the defendants and each of them on the 10th and 29th of September, and October 11th, by small boats from the Quadra landed illegally in San Francisco substantial quantities of liquor, and on the 12th of October, the day of the seizure, attempted to land another lot of liquor but were defeated by the seizure.

The preamble of the treaty recites that the two nations, being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages, have decided to conclude a convention for the purpose. Paragraph (1) of Article II provides for boarding, examination and search to ascertain whether the ship or those on board were "endeavoring to import or have imported alcoholic beverages into the United States in violation of the laws there in force." The second paragraph of Article II permits the seizure on belief that "the vessel has committed or is committing or is attempting to commit

an offense against the laws of the United States prohibiting the importation of alcoholic beverages."

Considering the friendly purpose of both countries in making this treaty, we do not think any narrow construction should be given which would defeat it. The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it, within an hour's sail from its coast, beyond its territorial jurisdiction and on the high seas, to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses, in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them. Plainly, it was the purpose of the contracting parties that vessels and men who are caught under the treaty and are proven to have violated any laws of the United States, by which the importation of liquor is intended to be stopped through forfeiture or punishment, may be prosecuted after the seizure. The National Prohibition Act expressly punishes the importation of intoxicating liquor. The Tariff Act of 1922 declares it an offense to make any illegal importation, and so makes it an offense to import intoxicating liquor. Section 37 of the Criminal Code makes it an offense to conspire to violate the Prohibition Act and the Tariff Act in respect of the importation of liquor, if the conspiracy is accompanied by overt acts in pursuance of it. The conspiracy act is the one most frequently used in the prosecution of liquor importations from the sea, because such smuggling usually necessitates a conspiracy in preparation for the landing. We think that any more limited construction would not satisfy the reasonable expectations of the two parties. Nothing in the words of the treaty makes such an interpretation a difficult one. The penalties under each act differ from

those under the others. The Tariff Act and the conspiracy section each imposes a maximum penalty of two years, while that of the Prohibition Act is only six months, with a lower maximum of fine. The differences are clearly not sufficient to affect the construction. The substantive offense of importing liquor is in law a different one from the preparatory offense of conspiring to import liquor; but where, as here, the overt acts of the conspiracy include an actual importation of liquor and an attempt, it would seem to be quite absurd to hold that the conspiracy set forth does not come within the scope of the treaty. This is not a case for keeping within the technical description of a particular offense. It is not a formal extradition treaty where it is necessary, in protection of the persons to be extradited and carried from one country to another, that the crime for which they are to be tried should be described with nicety and precision to permit the operation of the principles recognized and enforced in the *Rauscher* case. Any law, the enforcement of and punishment under which will specifically prevent smuggling of liquor, should be regarded as embraced by the treaty. The British Government has advanced no contrary view. In the letter from the British Embassy, of June 30, 1925, already referred to, the fact that the master and crew of the British schooner Francis E. of Nassau, were arrested and charged with conspiracy to violate the National Prohibition laws, was not made the basis of complaint or protest but only of a request that the trial be expedited. The error assigned upon this point can not be sustained.

The next objection of the defendants taken from the Quadra is that on all the evidence they were entitled to a directed verdict of not guilty. They argue that they are charged with a conspiracy illegally to import, or to attempt to import, liquor into the United States when they were corporeally at all times during the alleged conspiracy out of the jurisdiction of the United States and

so could commit no offense against it. What they are charged with is conspiring " at the bay of San Francisco " with the defendants Quartararo and Belanger illegally to import liquor, and the overt acts of thus smuggling and attempting to smuggle it. The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States and the fourth failed of its effect only by reason of the intervention of the federal officers. In other words, the conspiring was directed to violation of the United States law within the United States by men within and without it, and everything done was at the procuration and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country.

In *Strassheim* v. *Daily,* 221 U. S. 280, Daily had been convicted of procuring Armstrong, a public official of Michigan, to pay bills presented to the State which Armstrong knew to be fraudulent. It was objected that, during the whole period of the crime, Daily was in Chicago, Illinois, and could not be punished under an indictment found in Michigan for such an offense. This Court denied the claim, saying (pp. 284, 285):

"If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if

he had been present at the effect, if the State should succeed in getting him within its power. *Commonwealth* v. *Smith,* 11 Allen 243, 256, 259; *Simpson* v. *State,* 92 Georgia 41; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 356; *Commonwealth* v. *Macloon,* 101 Mass. 1, 6, 18. We may assume therefore that Daily is a criminal under the laws of Michigan."

Other cases in this Court which sustain the same view are *Benson* v. *Henkel,* 198 U. S. 1; *Re Palliser,* 136 U. S. 257; *Horner* v. *United States,* 143 U. S. 207; *Burton* v. *United States,* 202 U. S. 344, 387; and *Lamar* v. *United States,* 240 U. S. 60, 65, 66.

There has been much discussion of this general principle, and its application has been varied in some courts because of certain rules of the common law with respect to principals and accessories; but in the consideration of such a case as this, we are not controlled by such considerations and regard the principle as settled, as in the passage quoted. It is supported by other authorities: *Commonwealth* v. *Gillespie,* 7 Sargent & Rawle 469, 478; *Rex* v. *Brisac and Scott,* 4 East, 164; *State* v. *Piver,* 74 Wash. 96; *Weil* v. *Black,* 76 W. Va. 685, 694.

In *Regina* v. *Garrett,* Dearsly's Crown Cases Reserved, 232, 241, Lord Campbell said:

"I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the Court"—which was the fact there—"for if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction."

It will be found among the earlier cases that the principle is sometimes qualified by saying that the person out of the State can not be held for a crime committed within the State by his procuration unless it is done by an innocent agent or a mechanical one; but the weight of authority is now against such limitation. Generally the

cases show that jurisdiction exists to try one who is a conspirator whenever the conspiracy is in whole or in part carried on in the country whose laws are conspired against. In *Hyde* v. *United States,* 225 U. S. 347; *Brown* v. *Elliott,* 225 U. S. 392, the question was whether a conspiracy could be tried, not where it was carried on, but in a place where only an overt act under it was performed by one conspirator. There was strong diversity of opinion among the Justices, though a majority sustained the venue following the Court of King's Bench in *Rex* v. *Brisac and Scott,* 4 East, 164. But we have no such ground for difference here, for the conspiracy was being carried on all the time by communications exchanged between the conspirators in San Francisco and on the high seas just beyond the three-mile limit near San Francisco Bay, and the overt acts were in both places.

The whole question was fully considered from the international standpoint in a learned opinion by John Bassett Moore, now Judge of the Permanent Court of International Justice, while he was Assistant Secretary in the State Department, to be found in Moore's International Law Digest, vol. 2, p. 244. The report was made in view of controversy between this Government and the Government of Mexico in reference to the arrest and imprisonment of one Cutting for a libel charged to have been committed by Cutting in the publication of an article in a newspaper in the State of Texas. The prosecution was under Article 186 of the Mexican Penal Code. That code provided that penal offences committed in a foreign country against a Mexican might be punished in Mexico. Our government maintained that it could not recognize the validity of a prosecution in Mexico of an American citizen who happened thereafter to be there, for an offense committed in the United States, merely because it was committed against a Mexican. In the course of the examina-

tion of this question, Mr. Moore, recognizing the principle already stated, said:

"The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

"Its logical soundness and necessity received early recognition in the common law. Thus it was held that a man who erected a nuisance in one county which took effect in another was criminally liable in the county in which the injury was done. (*Bulwer's case,* 7 Co. 2 b. 3 b.; Com. Dig. Action, N. 3, 11.) So, if a man, being in one place, circulates a libel in another, he is answerable at the latter place. (*Seven Bishops' Case,* 12 State Trials, p. 331; *Rex* v. *Johnson,* 7 East. 65.)"

After referring to the doctrine of innocent agent and its dependence on the distinctions between accessories and principal in crime, Judge Moore says (p. 249):

"But, as has been shown, the doctrine of accessoryship has been abolished by statute in many jurisdictions in which it formerly prevailed, and is condemned by many writers as unnecessary and unsound. Referring to accessories before the fact, Mr. Bishop says:

"'The distinction between such accessory and a principal rests solely in authority, being without foundation either in natural reason or in the ordinary doctrines of the law. The general rule of the law is, that what one does through another's agency is to be regarded as done by himself.'

"And on this point he cites Broom's Legal Maxims, 2d ed., p. 643; Co. Lit. 258a; and the opinion of Hosmer, C. J., in *Barkhamsted* v. *Parsons,* 3 Conn. 1, that 'the

principal of common law, *Qui facit per alium, facit per se,* is of universal application, both in criminal and civil cases.' "

The overt acts charged in the conspiracy to justify indictment under § 37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled.

We have thus disposed of the chief objections. There are some objections to the admission of evidence, one with respect to the receipt of a telegram charged by the Government to be from Belanger, a defendant, sent to Dorgan, his co-director of the Canadian corporation which owned the cargoes of liquor; another objection based on the receipt in evidence of eighty-three dollar bills cut in two with liquor orders written on them, associated in the evidence with Quartararo and charged to show that he had used them for the purpose of sending them out to the officers of the rum runners to identify his agents for the safe delivery of the liquor. Another was as to the evidence of a witness who pleaded guilty and who was permitted to testify that at the instance of Quartararo, shown by the evidence to be the chief operator in the conspiracy, he brought into San Francisco liquor in small boats, not only from the Quadra, the Coal Harbour and the Malahat, controlled by the Canadian corporation, but many times during the period of the conspiracy alleged in the indictment also from a vessel called the Norburn, without the direct evidence that the Norburn was controlled by the same Canadian corporation, and therefore that it was irrelevant evidence of another conspiracy rather than the one charged. With respect to all these instances, we think

that there was sufficient probable connection with the conspiracy already shown to allow the items of evidence to be introduced, leaving to the jury the weight of it, but that even if in any of such instances there was error, they were merely cumulative proof of the conspiracy which was practically undenied and their admission was harmless.

The judgment of conviction of the Court of Appeals is *Affirmed.*

RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA ET AL. *v.* DULUTH STREET RAILWAY COMPANY.

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

No. 228. Argued March 14, 15, 1927.—Decided April 11, 1927.

1. A public utility claiming that an order of a state commission fixing its rates deprives it of a fair return, is not bound to exhaust a statutory remedy by appeal to the state court before going into the federal court, when it is possible that such remedy might be held judicial rather than legislative in character, and the decision therefore *res judicata* against the complainant. P. 627.
2. The requirement that state remedies in such cases be exhausted before coming into the federal court is not a fundamental principle of substantive law but merely a requirement of convenience or comity. P. 628.
3. A street railway, in electing to come under a state statute providing that its rates may be fixed by a commission with review by appeal to the state courts, does not thereby contract that it will exhaust the statutory remedy before suing in the federal court when the rate fixed by the commission is confiscatory. P. 628.
4. Where under the state law a street railway and a city both had the right to appeal to the state court from an order of a commission fixing the railway fare, a suit by the railway in the federal court to enjoin enforcement of the order as confiscatory, to which the city is a party, gives the city its day, and is not objectionable as cutting off its right of appeal to the state court. P. 629.

4 F. (2d) 543, affirmed.

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APPEAL from a judgment of the District Court enjoining the enforcement of an order of the above named Commission fixing the rates of the Railway Company. The defendants were the Commission, its members, and the City of Duluth.

Mr. Ernest C. Carman, with whom *Mr. Clifford L. Hilton* was on the brief, for appellant The Railroad and Warehouse Commission.

Mr. John B. Richards for appellant The City of Duluth.

Mr. Oscar Mitchell, with whom *Messrs. W. D. Bailey* and *H. A. Carmichael* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from a decree of the District Court in favor of the plaintiff, the appellee, that prohibits the enforcing of a rate for the carriage of passengers established by the appealing Commission and authorizes the plaintiff to charge not exceeding six cents for carrying passengers within the City of Duluth, subject to conditions not needing mention. 4 F. (2d) 543. The Commission's order allowed a charge of six cents for a single fare but required the plaintiff to issue tickets or tokens at not to exceed twenty-five cents for five rides. The difference, it will be seen, is somewhat narrow and the only question that we have any need to consider is whether the plaintiff had a right to come into the Court of the United States when it did, and whether its suit was not at least premature.

The plaintiff, an existing street railway company, elected to comply with and come under the terms of Chapter 278 General Laws of Minnesota, 1921, by filing the declaration and consent required. Thereby it gained a right to apply to the above mentioned Commission to fix the rates of fare to be charged in place of the five cents

to which it had been limited before it came in under the Act. It applied to the Commission; the City of Duluth was made a party; and after a hearing the Commission determined the value of the plaintiff's property used and useful in the street car service in Duluth, found that a return of seven and one-half per cent. was a reasonable rate of return, and fixed the fares that we have stated as sufficient to yield that rate. This was on July 13, 1922. Five days later the plaintiff filed this bill, setting up that the Commission's order was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States.

The objections to the bill are based on the provisions of the Minnesota statute for an appeal. Both the city and the street railway are given the right to appeal to the District Court of the county, and there the whole matter, fact and law, is to be tried before three judges, without a jury. They are to find all material facts, including the fair value of the property and the reasonable rate of return, and to affirm, modify or reverse the order of the Commission, as may be required by law, the Commission being directed to conform to their judgment in its final order. There is a further resort to the Supreme Court. It is said that plaintiff was bound to exhaust the appeal thus granted before going elsewhere, and that it could not cut off the similar right of the City of Duluth. It is said that this is so not only on general principles but is binding on the plaintiff by its assent to the statute, which, it is said, constituted a contract and amounted to an acceptance of the statutory proceedings as the only mode of relief.

The Supreme Court of the State has declared the proceedings in Court to be judicial not legislative in their nature, and therefore consistent with the constitution of the State. *Duluth* v. *Railroad & Warehouse Commission,* 167 Minn. 311. See *Janvrin, Pet'r,* 174 Mass. 311. If

then the State Court should affirm the rate fixed by the Commission and the matter should become *res judicata,* a resort to the federal Court would be too late. But the plaintiff if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State has a right to do so. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 391. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 228 and cases cited. It might be said that this Court would have to exercise its own judgment as to how the proceedings in the State Court should be characterized and not impossibly might regard them as legislative. *Keller* v. *Potomac Electric Co.,* 261 U. S. 428. Or again it might be said that however characterized the judgment does not operate as such, but is taken up into the subsequent order of the Commission and therefore is subject to review after it has been given that form. But as against these considerations it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States. *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U. S. 196. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290.

The argument that the plaintiff is barred by contract needs but a word. We will assume for the purposes of decision that the plaintiff by coming in under the State law made a contract, and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to say that it did more than adopt that method in its general character and with its ordinary incidents. If apart from the supposed contract a party

would have been entitled to go to the Court of the United States at the stage when the plaintiff went there, no reasonable interpretation of the contract forbade the plaintiff to go, and there is no need to consider whether the contract could have forbidden it if it had tried.

Finally as to the rights of the appellants. It is said that the appeal of the City is cut off by the course the plaintiff has taken. But of course the City would not appeal except on the ground that the plaintiff already was given too favorable terms. The City is in the present case and when as here the plaintiff succeeds in showing that these terms are inadequate on constitutional grounds, the City has had its day and has failed, and the loss of its appeal is merely a consequence of a trial in which it has been heard and has lost.

Decree affirmed.

MR. JUSTICE BUTLER took no part in this case.

BEECH-NUT PACKING COMPANY *v.* P. LORILLARD COMPANY.

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

No. 249. Argued March 17, 18, 1927.—Decided April 11, 1927.

1. A trade-mark is not abandoned and destroyed, as a matter of law, merely through disuse for five years. P. 632.
2. The fact that the good will once associated with a trade-mark has vanished does not end at once the preferential right of the proprietor to try it again on goods of the same class. *Id.*
3. Assuming that, where each of two parties has the right to the same trade name but on different types of goods, the arrangements and accompaniments adopted by the one for its display may not lawfully be imitated by the other, the right to object may be lost by lapse of time and change of circumstances. *Id.*

7 F. (2d) 967, affirmed.

CERTIORARI (269 U. S. 551) to a decree of the Circuit Court of Appeals affirming the District Court (299 Fed. 834) in dismissing the bill of the Beech-Nut Company to enjoin the other party from infringing its right in the registered trade-mark "Beech-Nut," and from acts of alleged unfair competition.

Mr. Charles E. Hughes, with whom *Messrs. Walter A. Scott, James R. Offield,* and *H. McClure Johnson* were on the brief, for petitioner.

Mr. John W. Davis, with whom *Messrs. William R. Perkins* and *John Milton* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit in equity brought by the petitioner, Beech-Nut Packing Company, a corporation of New York, charging the P. Lorillard Company, a corporation of New Jersey, with infringement of its registered trade-mark, 'Beech-Nut,' and with unfair competition. The bill also takes the possibly broader ground that 'Beech-Nut,' being the plaintiff's trade-mark and part of its corporate name, has become the plaintiff's badge and autograph so far that the public seeing the mark on any package of consumable goods will believe that the article is of the plaintiff's make. The trade-mark was first used on ham and bacon but gradually has been extended to many other articles so diverse as chewing gum, peanut butter, and ginger ale, but always, the plaintiff says, as a guaranty of excellence, often expressed by it in advertisements, as 'Beech-Nut Quality.' The defendant uses the words 'Beech-Nut' on chewing tobacco and cigarettes, and the bill takes the hardly consistent positions, on the one hand that the plaintiff's reputation is hurt

with its refined female customers by the belief that it would manufacture a cheap chewing tobacco, and on the other hand that it may wish to extend its business into that domain. The bill was dismissed on the merits by the District Court, 299 Fed. 834, and by the Circuit Court of Appeals. 7 F. (2d) 967. As the principles involved seemed important, and as it was urged that the decision was in conflict with decisions in other Circuit Courts of Appeals, such as *Aunt Jemima Mills Co.* v. *Rigney,* 247 Fed. 407, and *Vogue Co.* v. *Vogue Hat Co.,* 6 F. (2d) 875, a writ of certiorari was granted by this Court. 269 U. S. 551.

The plaintiff's trade-mark goes back to before the beginning of this century. The registration specially relied upon was dated December 31, 1912, and states that the plaintiff has adopted the mark for use upon a large number of specified objects, including those that we have mentioned, "all in Class 46, Foods and ingredients of foods." The defendant claims the mark 'Beechnut' for tobacco through successive assignments from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, which used it from and after 1897. The plaintiff does not contest the original validity of this mark or suggest any distinction on the ground that it originated in a different State, but says that the right has been lost by abandonment. It appears that brands of tobacco have their rise and fall in popular favor, and that the Beechnut had so declined that in 1910 only twenty-five pounds were sold, and the trade-mark was left dormant until after the dissolution of the American Tobacco Company which then held it. This was in 1911, and the Lorillard Company took over the mark with many others. Then, in connection with an effort to get a new brand that would hit the present taste, this mark was picked out, some of the adjuncts were changed, and in 1915 the new tobacco was put upon the market. Nothing had happened in

the meantime to make the defendant's position worse than if it had acted more promptly, and we see no reason to disturb the finding of two Courts that the right to use the mark had not been lost. The mere lapse of time was not such that it could be said to have destroyed the right as matter of law. A trade-mark is not only a symbol of an existing good will, although it commonly is thought of only as that. Primarily it is a distinguishable token devised or picked out with the intent to appropriate it to a particular class of goods and with the hope that it will come to symbolize good will. Apart from nice and exceptional cases, and within the limits of our jurisdiction, a trade-mark and a business may start together, and in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary. Therefore the fact that the good will once associated with it has vanished does not end at once the preferential right of the proprietor to try it again upon goods of the same class with improvements that renew the proprietor's hopes.

It may be true that in a case like the plaintiff's its rights would not be sufficiently protected by an injunction against using the marks upon goods of the same class as those to which the plaintiff now applies it and to which its registration is confined. Upon that we express no opinion. For when it is conceded that whatever its effect the defendant has a right to use 'Beechnut' on tobacco unless the right has been abandoned, that possibility does not matter. Again, it may be true that in putting a hyphen between Beech and Nut, framing its label with an oval and substituting a beechnut for a squirrel in the centre the defendant was trying to get an advantage from the plaintiff's good will and if challenged at once might have been required to make it even plainer than it was

made by the word 'Lorillard's,' in large letters upon the label, that the plaintiff had nothing to do with the goods. But the plaintiff waited until 1921. The Lorillard Company is at least as well known to those who do not despise tobacco as the Beech-Nut Company is to its refined customers, and the time and the need for that additional precaution has gone by. If the plaintiff was misled in its reason for thinking that the defendant's right had been kept alive it was right in its belief, and further, the belief had no bearing on the question whether the mark was presented in an unjustifiable form.

Now that the case has been more fully considered than it could be on the petition for certiorari, it seems to us that the facts do not present the nice question upon which the petitioner wished us to pass. Both Courts having found for the defendant, we see no ground upon which it can be said that they were wrong as matter of law. *Joseph Schlitz Brewing Co.* v. *Houston Ice & Brewing Co.*, 250 U. S. 28, 29.

Decree affirmed.

DECISIONS PER CURIAM, FROM OCTOBER 4, 1926, TO AND INCLUDING APRIL 11, 1927, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 156. WADE JOHNSON *v.* STATE OF GEORGIA; and

No. 157. JARRETT BENFORD *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. October 4, 1926. Dismissed for want of jurisdiction. *Messrs. G. Y. Harrell, W. A. McClennan,* and *William O. Cooper* for plaintiffs in error. *Messrs. George M. Napier* and *T. R. Gress* for defendant in error.

No. 247. NED HARVEY *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. October 4, 1926. Dismissed for the want of jurisdiction. *Messrs. Paul A. Sompayrac* and *A. R. Mitchell* for plaintiff in error. *Messrs. Percy Saint, John J. Robira, P. R. Schomacher,* and *S. H. Jones* for defendant in error.

No. 1224. JOHN LAPIQUE, ASSIGNEE OF THE ESTATE OF MIGUEL LEONIS, ET AL., *v.* DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. October 11, 1926. The petition for a rehearing of (1) the petition for a writ of mandamus; (2) the petition for a writ of certiorari; and (3) the petition for a writ of error are denied. *Mr. John Lapique, pro se.* No appearance for respondents.

No. 327. CHARLES H. SPEAR ET AL., ETC., *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of California. Motion to dismiss submitted May 24, 1926. Decided October 11, 1926.

Per Curiam. This cause is dismissed for lack of jurisdiction in this court under § 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936. *Solicitor General Mitchell* for the United States, in support of the motion. *Messrs. U. S. Webb* and *W. T. Plunkett* for plaintiffs in error, in opposition thereto.

No. 86. Frank Rossi et al. *v.* United States. Error to the District Court of the United States for the Western District of Washington. Motion to transfer cause submitted October 4, 1926. Decided October 11, 1926. *Per Curiam.* This case, the judgments of the District Court in which were entered December 15 and 26, 1924, is transferred to the Circuit Court of Appeals for the Ninth Circuit in accordance with the Act of September 14, 1922, c. 305, 42 Stat. 837, construed as effective as to these judgments by § 14 of the Act of February 13, 1925, c. 229, 43 Stat. 942. *Heitler* v. *United States,* 260 U. S. 438, 439, 440; *Pothier* v. *Rodman,* 261 U. S. 307, 312; *Hoffman* v. *McClelland,* 264 U. S. 552, 555. *Solicitor General Mitchell,* with whom *Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* were on the brief, for the United States, in support of the motion. *Mr. Abner E. Ferguson* for plaintiff in error, in opposition thereto.

No. 194. Dan Bartoncini *v.* United States. Error to the District Court of the United States for the Northern District of California. Motion to dismiss or advance submitted October 4, 1926. Decided October 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195. *Solicitor General Mitchell* for the United States, in support

of the motion. *Mr. Ernest B. D. Spagnoli* for plaintiff in error, in opposition thereto.

No. 522. KATE TENDLER *v.* MORRIS TENDLER. See *post*, p. 693.

No. 13, original. STATE OF MICHIGAN *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. Motion submitted October 4, 1926. Decided October 11, 1926. The motion of the State of Michigan for leave to file an amended bill of complaint making the State of New York a joint complainant therein is denied; but the State of New York is granted leave to file a separate bill of complaint on its own behalf conforming in other respects to the amended bill of complaint tendered with said motion; such separate bill to be filed next Monday. *Mr. Andrew B. Dougherty,* Attorney General of Michigan, for complainant. *Mr. Albert Ottinger,* Attorney General of New York, for the State of New York.

No. 437. DANIEL J. HART *v.* H. B. NORTH ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. October 11, 1926. *Per Curiam.* The motion for leave to proceed further in forma pauperis is denied for the reason that upon examination of the unprinted record the court finds no ground for certiorari, the application for which is also denied. *Mr. Leon Robbins* for petitioner. No appearance for respondent.

No. 248. JACOB GOLDMAN *v.* STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted October 4, 1926. Decided October 11, 1926. *Per Curiam.* Writ of error dismissed for want of

jurisdiction on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195. Application for certiorari is also denied. *Mr. Montgomery S. Winning* in behalf of *Messrs. Oscar E. Carlstrom* and *Edward C. Fitch* for defendant in error, in support of the motion. *Messrs. David D. Stansbury* and *Leslie A. Gilmore* for plaintiff in error, in opposition thereto.

No. 103. W. A. THOMSON *v.* ALEXANDER W. THOMSON ET AL., ETC. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted October 4, 1926. Decided October 11, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195. *Messrs. Henry S. Robbins, Silas H. Strawn,* and *Walter H. Jacobs* for defendants in error, in support of the motion. *Messrs. William M. Bullitt* and *Samuel B. King* for plaintiff in error, in opposition thereto.

No. 524. CANAL-COMMERCIAL TRUST & SAVINGS BANK AND UNION INDEMNITY COMPANY *v.* EARL BREWER. Error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted October 4, 1926. Decided October 11, 1926. *Per Curiam.* Writ of error dismissed on the authority of *Consolidated Turnpike Co.* v. *Norfolk and Ocean View Railway Co.,* 228 U. S. 326, 334. Application for certiorari also denied. *Mr. John W. Cutrer* for defendant in error, in support of the motion. *Messrs. Marcellus Green, Garner W. Green,* and *Chalmers Potter* for plaintiffs in error, in opposition thereto. See *post,* p. 643.

No. 630. ETHEL JONES *v.* STATE OF MISSISSIPPI. Error to the Supreme Court of the State of Mississippi. October 11, 1926. *Per Curiam.* Motion for leave to proceed further in forma pauperis denied for the reason that the court finds upon examination of the unprinted record that there is no jurisdiction of the cause on the writ of error for want of a substantial Federal question. *Trono* v. *United States,* 199 U. S. 521. *Mr. William H. Watkins* for plaintiff in error. No appearance for defendant in error.

No. 657. DAVID F. MITCHELL *v.* UNITED STATES. See *post,* p. 693.

No. 652. THOMAS H. LARKIN *v.* STATE OF NEW YORK. Error to the Supreme Court of the State of New York. October 11, 1926. *Per Curiam.* Motion for leave to proceed further in forma pauperis denied for the reason that the court finds upon examination of the unprinted record that it presents no Federal question and therefore dismisses the writ of error upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham,* 253 U. S. 193, 195. *Mr. Thomas H. Larkin, pro se.* No appearance for defendant in error.

No. 230. STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK *v.* TERRY & TENCH COMPANY, INC., AND UNITED STATES FIDELITY AND GUARANTY COMPANY. Certiorari to the Supreme Court of the State of New York. Argued October 6, 1926. Decided October 11, 1926. *Per Curiam.* Reversed upon the authority of *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59. *Mr. E. C. Aiken,* with whom *Mr. Albert Ottinger,* Attorney General of New York, was on the brief, for petitioner. *Mr. W. W. Dimmick* for respondents.

No. 177. GENERAL PETROLEUM CORPORATION *v.* COUNTY OF KERN. Error to the District Court of the United States for the Southern District of California. Argued October 14, 1926. Decided October 18, 1926. *Per Curiam.* Affirmed on the authority of *Mid-Northern Oil Co.* v. *Walker,* 268 U. S. 45. *Mr. A. L. Weil* for plaintiff in error. *Mr. Samuel Herrick* for defendant in error.

No. 253. ARNOLD H. BREIN *v.* STATE DEPARTMENT OF HEALTH ET AL. Error to the Superior Court of the State of Connecticut. Argued October 14, 1926. Decided October 18, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon authority of *Sayward* v. *Denny,* 158 U. S. 180; *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655. *Mr. John B. Dillon,* with whom *Mr. Arnold H. Brein, pro se,* was on the brief, for plaintiff in error. *Messrs. William E. Egan* and *Frank E. Healy* for defendants in error.

No. —, original. STATE OF NEW YORK *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. October 18, 1926. Bill of complaint filed pursuant to order of October 11, 1926, on motion of *Mr. John Holley Clark, Jr.,* for the complainant, and process ordered to issue returnable on Monday, November 1, 1926.

No. 265. JOSEPH BUCHHALTER ET AL. *v.* FRANK SOLOMON. Error to the Supreme Court of the State of Colorado. Motion to dismiss submitted October 18, 1926. Decided October 25, 1926. *Per Curiam.* Motion to dismiss granted on authority of *Hiriart* v. *Ballon,* 9 Pet. 156, 166; *Beall* v. *New Mexico,* 16 Wall. 535, 539; *Hopkins* v. *Orr,* 124 U. S. 511, 515; *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 278. *Messrs. J. J. Luberman*

and *Chas. Rosenbaum* for defendant in error, in support of the motion. *Mr. John T. Bottom* for plaintiff in error, in opposition thereto.

No. 143. SAM NELSON *v.* STATE OF CALIFORNIA. Error to the District Court of Appeal, Second Appellate District of the State of California. Submitted October 18, 1926. Decided October 25, 1926. *Per Curiam.* Dismissed for want of a Federal question. (1) *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. (2) *Barron* v. *Baltimore,* 7 Pet. 243, 247; *Twining* v. *New Jersey,* 211 U. S. 78, 93. *Messrs. Samuel Herrick* and *J. L. O'Connor* for plaintiff in error. *Mr. U. S. Webb* for defendant in error.

No. 372. R. B. MORRIS, DOING BUSINESS AS MORRIS AND LOWTHER, H. M. HEWITT AND LEW NUNAMAKER, ETC., ET AL. *v.* WILLIAM DUBY, H. B. VAN DUZER, AND W. H. MALONE, ETC. Appeal from the District Court of the United States for the District of Oregon. Argued October 29, 1926. Order entered October 29, 1926. It is now here ordered, adjudged, and decreed by this court that the decree of the District Court of the United States for the District of Oregon, in this cause, be, and the same is hereby, vacated without costs to either party, and that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the bill of complaint on the ground that this case has become moot through the rescission of the assailed order of the Oregon State Highway Commission, subject, however, to leave to the appellants to move for the vacation of this decree within thirty days herefrom if they question the rescission of such order. *Messrs. W. R. Crawford* and *Edwin C. Ewing* for appellants. *Mr. J. M. Devers,* with whom *Mr. I. H. Van Winkle* was on the brief, for appellees. See *post,* p. 651.

No. 175. HERMAN A. UIHLEIN, AUGUST E. UIHLEIN, GEORGE UIHLEIN ET AL. *v.* STATE OF WISCONSIN, NEELE B. NEELEN, PUBLIC ADMINISTRATOR OF MILWAUKEE COUNTY, ET AL. Error to the Supreme Court of the State of Wisconsin. Submitted October 27, 1926. Decided November 1, 1926. *Per Curiam.* Reversed on the authority of *Schlesinger* v. *Wisconsin,* 270 U. S. 230. *Messrs. Edwin S. Mack, George P. Miller,* and *Arthur W. Fairchild* for plaintiffs in error. *Messrs. Herman L. Ekern* and *Franklin E. Bump* for defendants in error.

No. 7, original. STATE OF WISCONSIN *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO;

No. 14, original. STATE OF NEW YORK *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. Motion submitted November 1, 1926. Decided November 23, 1926. Upon motion of the State of New York, it is ordered that the parties to the suit of the *State of New York* v. *State of Illinois and Sanitary District of Chicago* be permitted to participate in the taking of evidence in the hearing before the special master heretofore appointed in the case of the *State of Wisconsin* v. *State of Illinois and Sanitary District of Chicago,* in like manner as if those suits had been consolidated; and the court reserves to itself authority to order such a consolidation if it becomes proper to do so. But this order is made without prejudice to the authority of the court hereafter to make any order which it may deem proper respecting the matters set forth in the third paragraph of the bill of complaint in the case of the *State of New York* v. *State of Illinois and Sanitary District of Chicago,* and respecting the issues that may arise from the presence of that paragraph in that bill of complaint. *Messrs. Albert Ottinger,* Attorney General of New York, and *C. S. Ferris* for New York, in support of the motion. *Messrs. Oscar E. Carlstrom,* Attorney Gen-

eral of Illinois, *Cyrus E. Dietz, Hugh S. Johnson, James M. Beck, Hector A. Brouillet,* and *Morton S. Cressy* for defendants.

No. 146. Southern Surety Company *v.* United States. Error to the District Court of the United States for the District of South Dakota. Motion to transfer submitted November 1, 1926. Decided November 23, 1926. *Per Curiam.* Motion by defendant in error to transfer to the Circuit Court of Appeals for the Eighth Circuit granted on the authority of *Salinger* v. *Loisel,* 265 U. S. 224, and *Salinger* v. *United States,* 272 U. S. 542. *Solicitor General Mitchell* for the United States, in support of the motion. *Mr. L. H. Salinger* for plaintiff in error, in opposition thereto.

No. 553. C. Dewey Brian, Gaither Moore, Joseph E. Brian, and Neal Moore *v.* United States. Error to the District Court of the United States for the Eastern District of Illinois. Motion to dismiss submitted November 1, 1926. Decided November 23, 1926. *Per Curiam.* Dismissed for lack of jurisdiction in this court by reason of § 1 of the Act of February 13, 1925, entitled "An act to amend the Judicial Code, and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes." *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States, in support of the motion. *Messrs. Charles A. Houts* and *Charles A. Karch* for plaintiffs in error, in opposition thereto.

No. 524. Canal-Commercial Trust and Savings Bank and Union Indemnity Company *v.* Earl Brewer. Motion submitted November 1, 1926. Decided November

23, 1926. The motion to amend the judgment in this case is denied. *Mr. William W. Ross* in behalf of *Mr. John W. Cutrer* for defendant in error, in support of the motion. *Messrs. Marcellus Green, Garner W. Green,* and *Chalmers Potter* for plaintiffs in error, in opposition thereto. See *ante,* p. 638.

No. 7, original. STATE OF WISCONSIN *v.* STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO. Motions submitted November 1, 1926. Decided November 23, 1926. The motions of the States of Arkansas and Mississippi for leave to intervene are granted. *Mr. James M. Beck* in behalf of *Messrs. William B. Applegate, Daniel N. Kirby,* and *Cornelius Lynde* for the State of Arkansas, and in behalf of *Messrs. Rush H. Knox, Daniel N. Kirby,* and *Cornelius Lynde* for the State of Mississippi, in support of the motion.

No. —, original. EX PARTE WILLIAM G. BENHAM. November 23, 1926. The motion for leave to file petition for a writ of habeas corpus is denied. *Messrs. Smith W. Bennett* and *R. R. Nevin* for petitioner.

No. —, original. EX PARTE VINCENT I. WHITMAN ET AL. November 23, 1926. The motion for leave to file petition for writ of habeas corpus is denied, without prejudice to an application for the writ to the District Court of the United States for the Western District of Pennsylvania as the applicants may be advised. *Mr. Vincent I. Whitman, pro se.*

No. 81. ENRIQUE COLLADO *v.* MANUEL NATER GIRONA, MARSHAL. Appeal from the District Court of the United States for the District of Porto Rico. Argued November 24, 1926. Decided November 29, 1926. *Per Curiam.*

Affirmed upon the authority of *Craig* v. *Hecht*, 263 U. S. 255, 277; *Goto* v. *Lane*, 265 U. S. 393, 401; *Knewel* v. *Egan*, 268 U. S. 442, 446. *Messrs. James A. O'Shea, Charles Hartzell, Alfred Goldstein,* and *Henry G. Molina* for appellant, submitted. *Mr. William C. Rigby* with whom *Messrs. George C. Butte* and *A. R. Stallings* were on the brief, for appellee.

No. 309. Olaf Qualsett *v.* Reinold Kattenburg and Augusta Anderson. Error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted November 23, 1926. Decided November 29, 1926. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Mr. F. D. Williams* for defendants in error, in support of the motion. *Mr. Willis E. Reed* for plaintiff in error, in opposition thereto.

No. 556. Wong Hay Poy, Wong Tung Hung and Wong Bing Yuen *v.* John D. Nagle, Commissioner of Immigration. Appeal from the District Court of the United States for the Northern District of California. Motion to dismiss submitted November 23, 1926. Decided November 29, 1926. *Per Curiam.* Dismissed under § 238 of the Judicial Code as amended in § 1 of the Act of February 13, 1925. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for appellee, in support of the motion. *Mr. George A. McGowan* for appellants, in opposition thereto.

No. 561. Mrs. Bill Breaux *v.* State of Louisiana. Error to the Supreme Court of the State of Louisiana.

Submitted November 23, 1926. Decided November 29, 1926. *Per Curiam.* Affirmed on the authority of *Adams* v. *New York,* 192 U. S. 585; *Hebert* v. *Louisiana,* 272 U. S. 312; and *Van Oster* v. *Kansas,* 272 U. S. 465. *Mr. A. R. Mitchell* for plaintiff in error. *Messrs. Percy Saint* and *E. R. Schowalter* for defendant in error.

No. 50. MARBLEHEAD LAND COMPANY *v.* COUNTY OF LOS ANGELES, PRESCOTT F. COGSWELL, J. H. BEAN, ET AL., ETC. Error to the District Court of Appeal, Second Appellate District, of the State of California. Argued December 2, 1926. Decided December 2, 1926. *Per Curiam.* Dismissed for want of jurisdiction. *Mr. M. F. Mitchell,* with whom *Mr. Nathan Newby* was on the brief, for plaintiff in error. *Mr. Everett W. Mattoon* appeared for defendants in error.

No. 647. PAUL SCHMOLKE *v.* DANIEL J. O'BRIEN, AS CHIEF OF POLICE. Error to the Supreme Court of the State of California. Argued November 30, 1926. Decided December 6, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Pacific States Telephone Co.* v. *Oregon,* 223 U. S. 118; (2) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Mr. Theodore M. Stuart,* with whom *Mr. Jeremiah F. Sullivan* was on the brief, for plaintiff in error. *Messrs. U. S. Webb* and *Frank L. Guerena* were on the brief for defendant in error.

No. 8. JOHN B. MACKEN AND MARY LOIS MACKEN *v.* CITY OF WATERBURY. Error to the Supreme Court of Errors of the State of Connecticut. Argued November 30,

1926. Decided December 6, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Pacific States Telephone Co.* v. *Oregon,* 223 U. S. 118; (2) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Messrs. Lawrence L. Lewis* and *Pierre M. Brown* for plaintiffs in error, submitted. *Mr. Charles O'Connor,* with whom *Messrs. Francis P. Guilfoile* and *Terrence F. Carmody* were on the brief, for defendant in error.

No. 84. Pacific Power and Light Company *v.* L. D. Bayer, Pearl Durst, William H. Bucher, et al. Error to the Supreme Court of the State of Oregon. Argued December 7, 1926. Decided December 7, 1926. Dismissed for want of jurisdiction for want of a final judgment. *Mr. Henry S. Gray,* with whom *Messrs. Roger S. Greene* and *Will R. King* were on the brief, for plaintiff in error. *Messrs. Elton Watkins* and *George R. Wilbur* were on the brief for defendants in error.

No. —, original. Ex parte in the matter of the Delaware, Lackawanna and Western Railroad Company. December 13, 1926. The motion for leave to file petition for a writ of mandamus herein is denied. *Mr. Frederic B. Scott* for petitioner.

No. 500. D. Edmonds, R. B. Edwards, and R. D. Kelly, in behalf of themselves, etc. *v.* Town of Haskell, Oklahoma, F. N. Shoemaker, as Town Clerk, etc., et al. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm sub-

mitted December 6, 1926. Decided December 13, 1926. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303; *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson, Son and Co.* v. *Bird,* 248 U. S. 268, 271. *Messrs. Almond B. Cochran, R. C. Allen,* and *I. J. Underwood* for defendants in error, in support of the motion. *Mr. Charles A. Moon* for plaintiffs in error, in opposition thereto.

No. 41. Edith Stege, William C. Dohrman (sometimes called W. C. Dohrman), Teresa L. Dohrman, etc., et al. *v.* City of Richmond and G. W. Cushing. Error to the Supreme Court of the State of California. Argued December 1, 1926. Decided December 13, 1926. *Per Curiam.* Dismissed on the authority of *Klinger* v. *Missouri,* 13 Wall. 257, 263. *Mr. Leonard J. Mather* in behalf of *Messrs. R. M. F. Soto* and *J. W. Dorsey* for plaintiffs in error, submitted. *Mr. Charles N. Kirkbride,* with whom *Mr. Beverly Hodghead* was on the brief, for defendants in error.

No. 56. Thomas M. Livingston *v.* United States. Appeal from the Court of Claims. Argued December 6, 7, 1926. Decided December 13, 1926. *Per Curiam.* Affirmed upon the authority of (1) *Tempel* v. *United States,* 248 U. S. 121, 129; *United States* v. *North American Transportation and Trading Co.,* 253 U. S. 330; *Pearson* v. *United States,* 267 U. S. 423; *Klebe* v. *United States,* 263 U. S. 188; (2) *Hijo* v. *United States,* 194 U. S. 315, 323. *Mr. Ashby Williams* for appellant. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Randolph S. Collins* were on the brief, for the United States.

No. 59. EVERETT FLINT DAMON EX REL. FONG HANG LEONG *v.* JOHN B. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. Argued December 7, 1926. Decided December 13, 1926. *Per Curiam.* Affirmed upon the authority of *Chin Yow* v. *United States,* 208 U. S. 8, 11; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *United States ex rel. Tisi* v. *Tod,* 264 U. S. 131, 133. *Mr. Everett Flint Damon* for appellant. *Assistant to the Attorney General Donovan,* with whom *Solicitor General Mitchell* and *Mr. Harry S. Ridgely* were on the brief, for appellee.

No. 62. STATE OF UTAH *v.* HUBERT WORK, SECRETARY OF THE INTERIOR AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE. Appeal from the Court of Appeals of the District of Columbia. Argued December 7, 8, 1926. Decided December 13, 1926. *Per Curiam.* Affirmed upon the authority of (1) *Louisiana* v. *Garfield,* 211 U. S. 70; *New Mexico* v. *Lane,* 243 U. S. 52; (2) *United States ex rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324; *United States ex rel. Ness* v. *Fisher,* 223 U. S. 683, 692; *United States ex rel. Hall* v. *Payne,* 254 U. S. 343. *Mr. Patrick H. Loughran,* with whom *Mr. Harvey H. Cluff* was on the brief, for appellant. *Mr. Ira E. Robinson,* with whom *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. George P. Barse* were on the brief, for appellees.

No. 64. JOHN F. JENKINS *v.* UNITED STATES. Appeal from the Court of Claims. Argued December 8, 9, 1926. Decided December 13, 1926. Affirmed upon the authority of (1) *Tempel* v. *United States,* 248 U. S. 121, 129; *United States* v. *North American Transportation and Trading*

Co., 253 U. S. 330; *Pearson* v. *United States*, 267 U. S. 423; *Klebe* v. *United States*, 263 U. S. 188; (2) *Hijo* v. *United States*, 194 U. S. 315, 323. *Mr. John D. Miller*, with whom *Mr. George A. King* was on the brief, for appellant. *Mr. Gardiner P. Lloyd*, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Galloway* were on the brief, for the United States.

No. 66. CHIN WEY *v.* IRVING F. WIXON, ACTING COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. Argued December 9, 1926. Decided December 13, 1926. *Per Curiam.* Affirmed upon the authority of *United States* v. *Sing Tuck*, 194 U. S. 161; *United States* v. *Ju Toy*, 198 U. S. 253. *Mr. Warren Ozro Kyle* for appellant. *Solicitor General Mitchell*, with whom *Assistant to the Attorney General Donovan* and *Mr. Alfred A. Wheat* were on the brief, for appellee.

No. —, original. EX PARTE IN THE MATTER OF EDWIN C. JAMESON, LEROY W. BALDWIN, LOUIS V. BRIGHT, JOSEPH S. FRELINGUYSEN, AND THOMAS READ. January 3, 1927. The motion for leave to file petition for a writ of mandamus herein is denied. *Mr. Nathan L. Miller*, with whom *Messrs. Weymouth Kirkland, Robert K. Prentice, John Dickey, Jr., Gerard C. Henderson*, and *Robert N. Golding* were on the brief, for petitioner.

No. —, original. EX PARTE IN THE MATTER OF CITY OF NEW YORK, TRANSIT COMMISSION, AND JOHN F. GILCHRIST ET AL., ETC. January 3, 1927. The motion for leave to file petition for writs of mandamus and/or pro-

hibition and/or certiorari is denied. *Messrs. George P. Nicholson, George H. Stover, Clarence M. Lewis,* and *William G. Fullen* for petitioners.

No. 372. R. B. MORRIS, DOING BUSINESS AS MORRIS AND LOWTHER ET AL. *v.* WM. DUBY, H. B. VAN DUZER, AND W. H. MALONE, ETC. January 10, 1927. On consideration of the motion to vacate it is ordered that the decree heretofore entered on October 29 last, be, and it is hereby, vacated, and the case is set for reargument on Monday, February 28 next, after the cases heretofore assigned for that day. *Messrs. W. R. Crawford* and *Edwin C. Ewing* for appellants. *Messrs. I. H. Van Winkle* and *J. M. Devers* for appellees. See *ante,* p. 641.

No. 141. DO WING *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. Motion to dismiss or affirm submitted January 3, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed on the authority of *Chin Yow* v. *United States,* 208 U. S. 8, 11; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *United States ex rel. Tisi* v. *Tod,* 264 U. S. 131, 133. *Solicitor General Mitchell* for appellee, in support of the motion. *Mr. Everett Flint Damon* for appellant, in opposition thereto.

No. 314. L. ANTHONY, ALERT TRANSFER AND STORAGE COMPANY, INC., G. T. HINES, ET AL., *v.* SAM A. KOZER, SECRETARY OF STATE; and

No. 373. I. S. MARTINE, M. C. YAHNE, FRED GORDON, ET AL. *v.* SAM A. KOZER, SECRETARY OF STATE. Appeals from the District Court of the United States for the District

of Oregon. Motions to dismiss submitted January 3, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Moore* v. *Fidelity and Deposit Co.*, 272 U. S. 317; *In re Buder*, 271 U. S. 461. *Messrs. I. H. Van Winkle, J. M. Devers,* and *Willis S. Moore* for appellee, in support of the motion. *Messrs. Edwin C. Ewing* and *W. R. Crawford* for appellants, in opposition thereto.

No. 416. WALTER NELSON, EDWIN POWELL, JOHN HICKS, ET AL., *v.* W. G. POTTS, TREASURER OF THE STATE OF WASHINGTON; and

No. 417. W. S. CUNNINGHAM, REDMOND FREIGHT COMPANY, R. STRAIN, ET AL. *v.* W. G. POTTS, TREASURER OF THE STATE OF WASHINGTON. Appeals from the District Court of the United States for the Western District of Washington. Motions to dismiss submitted January 3, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Moore* v. *Fidelity and Deposit Co.*, 272 U. S. 317; *In re Buder*, 271 U. S. 461. *Mr. John H. Dunbar* for appellee, in support of the motion. *Messrs. Robert F. Cogswell, Edwin C. Ewing,* and *W. R. Crawford* for appellants, in opposition thereto.

No. 564. NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY *v.* UNITED STATES AND INTERSTATE COMMERCE COMMISSION. Appeal from the District Court of the United States for the Southern District of New York. Argued January 5, 1927. Decided January 10, 1927. *Per Curiam.* Affirmed on the authority of § 207 of the Judicial Code. *United States* v. *Illinois Central Railroad Co.*, 244 U. S. 82. *Mr. C. L. Andrus* for appellant. *Attorney General Sargent* and *Mr. Blackburn Esterline,* Assist. S. G., were on the brief for the United States, and

Messrs. Patrick J. Farrell and *Oliver E. Sweet* on that for the Interstate Commerce Commission.

No. 472. R. Burney Long *v.* State of Louisiana. Error to the Supreme Court of the State of Louisiana. Argued January 6, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed for want of a Federal question on the authority *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147; and also on the authority of *Hebert* v. *Louisiana,* 272 U. S. 312. *Mr. M. C. Scharff,* with whom *Messrs. R. Burney Long, N. Vick Robbins,* and *Bernard F. Garvey* were on the brief, for plaintiff in error. *Mr. E. R. Schowalter* for defendant in error.

No. 80. Louisville and Nashville Railroad Company *v.* Levy Hall. Error to the Supreme Court of the State of Mississippi. Argued January 6, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed for want of jurisdiction under § 237 of the Judicial Code, there not appearing in the record of the case before the entry of a final judgment to which this writ of error was allowed that the validity of any statute of the State was drawn in question in the State court. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Harry H. Smith* for plaintiff in error. *Mr. Walter J. Gex* for defendant in error, submitted.

No. 83. Max Siff and Albert L. Siff, Trading as Siff Brothers Company, *v.* United States. Appeal from the Court of Claims. Argued January 6, 1927. Decided January 10, 1927. *Per Curiam.* Affirmed upon the authority of *Chamberlain Machine Works* v. *United States,* 270 U. S. 347. *Mr. Raymond M. Hudson* for appellants.

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

No. 89. STATE OF OHIO EX REL. K. B. ALLEN *v.* JOSEPH A. LUTZ, AS AUDITOR OF MONTGOMERY COUNTY, OHIO. Error to the Supreme Court of the State of Ohio. Submitted January 7, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed under § 237 of the Judicial Code, it not appearing in the record of the case that prior to the final judgment to which this writ of error was allowed there was any challenging averment that the act of the Ohio Legislature in question was repugnant to the Constitution or laws of the United States. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Earl H. Turner* and *Wellmore B. Turner* for plaintiff in error. *Messrs A. H. Scharrer* and *Ralph E. Hoskot* for defendant in error.

No. 97. UNITED STATES EX REL. CHARLES MCCAUL COMPANY *v.* ANDREW W. MELLON, SECRETARY OF THE TREASURY. Error to the Court of Appeals of the District of Columbia. Argued January 7, 1927. Decided January 10, 1927. *Per Curiam.* Dismissed for want of finality in the judgment below on the authority of *Oneida Navigation Corp.* v. *Job and Co.,* 252 U. S. 521, 522; *Collins* v. *Miller,* 252 U. S. 364, 370. *Mr. William C. Prentiss* for plaintiff in error. *Solicitor General Mitchell* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for defendant in error.

No. —, original. EX PARTE LLOYD C. WHITMANN ET AL. January 17, 1927. The motion for leave to file petition for writ of habeas corpus herein is denied. *Mr. Lloyd C. Whitmann, pro se.*

No. 133. EVERETT FLINT DAMON EX REL. CHIN WING DIP *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. Motion to affirm submitted January 10, 1927. Decided January 17, 1927. *Per Curiam.* Affirmed on the authority of *Chin Yow* v. *United States,* 208 U. S. 11; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *United States ex rel. Tisi* v. *Tod,* 264 U. S. 131, 133. *Solicitor General Mitchell* for appellee, in support of the motion. *Messrs. Everett Flint Damon* and *Walter B. Farr* for appellant, in opposition thereto.

No. 110. LUCY FISHER, JAMES CHARLES, ELLEN STAKE, NÉE CHARLES ET AL. *v.* E. J. CRIDER. Error to the Supreme Court of the State of Oklahoma. Submitted January 10, 1927. Decided January 17, 1927. *Per Curiam.* Writ of error dismissed for want of jurisdiction on the authority of § 237 of the Judicial Code, as amended by the Act of September 16, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6; *Tiger* v. *Fewell,* 271 U. S. 649. Motion for rehearing of the application for certiorari also denied. *Mr. William Neff* for plaintiff in error, submitted. No appearance for defendant in error.

No. 98. W. G. BEGLEY *v.* ALICE ERASIME. Error to the Court of Appeals of the State of Kentucky. Argued January 10, 1927. Decided January 17, 1927. *Per Curiam.* Dismissed for want of jurisdiction on the authority of (1) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671; (2) *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272,

276; *Ownbey* v. *Morgan,* 256 U. S. 94. *Mr. Cleon K. Calvert* for plaintiff in error. *Alice Erasime, pro se.*

No. 104. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY AND YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* F. A. COCKE. Certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued January 10, 1927. Decided January 17, 1927. *Per Curiam.* Reversed on the authority of *Phillips Co.* v. *Grand Trunk Western Ry. Co.,* 236 U. S. 662; *Kansas City Southern Ry. Co.* v. *Wolf,* 261 U. S. 133; *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.,* 266 U. S. 435; *William Danzer and Co.* v. *Gulf and Ship Island R. R. Co.,* 268 U. S. 633. *Messrs. Harry McCall* and *Charles N. Burch,* with whom *Messrs. H. D. Minor* and *Victor Leovy* were on the brief, for petitioners. *Mr. Frederick H. Lotterhos,* with whom *Mr. George Butler* was on the brief, for respondent.

No. 644. BYRON DUNN AND ROBERT DUNN *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Argued January 10, 1927. Decided January 17, 1927. *Per Curiam.* Writ of error dismissed for want of a substantial Federal constitutional question on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.,* v. *Town of Graham,* 263 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. Application for certiorari also denied. *Mr. M. G. Adams,* with whom *Mr. C. W. Howth* was on the brief, for plaintiffs in error. *Messrs. Percy Saint, E. R. Schowalter,* and *John J. Robira* were on the brief for defendant in error.

No. 512. FREDERICK L. MILLER *v.* STATE OF OREGON. Error to the Supreme Court of the State of Oregon. Argued January 10, 11, 1927. Decided January 17, 1927. *Per Curiam.* Affirmed on the authority of *Nash* v. *United States,* 229 U. S. 373. *Mr. Edward W. Wickey,* with whom *Messrs Thomas Mannix, Jerry A. Matthews,* and *Josephus C. Trimble* were on the brief, for plaintiff in error. *Messrs. Willis S. Moore, Stanley Myers,* and *I. H. Van Winkle* were on the brief for defendant in error.

No. 118. W. H. DONHAM, AS PROSECUTING ATTORNEY, ET. AL., ETC., *v.* WEST-NELSON MANUFACTURING COMPANY. Appeal from the District Court of the United States for the Eastern District of Arkansas. Submitted January 11, 1927. Decided January 17, 1927. *Per Curiam.* Affirmed on the authority of *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Murphy* v. *Sardell,* 269 U. S. 530. Mr. Justice Brandeis dissents. *Messrs. J. W. Utley, William T. Hammock,* and *Brooks Hays* for appellants. *Mr. George A. McConnell* for appellee.

No. 112. CITY AND COUNTY OF DENVER *v.* E. STENGER, AS RECEIVER OF THE DENVER TRAMWAY COMPANY. Appeal from the District Court of the United States for the District of Colorado. Argued January 11, 12, 1927. Decided January 17, 1927. *Per Curiam.* Appeal transferred to the Circuit Court of Appeals for the Eighth Circuit under the authority of the Act of September 14, 1922, c. 305, 42 Stat. 837, and of the following cases: *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31, 37; *Brown* v. *Alton Water Co.,* 222 U. S. 325, 331–334; *Carter* v. *Roberts,* 177 U. S. 496, 500; *Union Trust Co.* v. *Westhus,* 228 U. S. 519, 522, 524; *Metropolitan Water Co.* v. *Kaw*

Valley Drainage District, 223 U. S. 519, 522–524; *Shapiro* v. *United States,* 235 U. S. 412, 415–417; *Farmers and Mechanics National Bank* v. *Wilkinson,* 266 U. S. 503, 506. *Messrs. Thomas H. Gibson* and *Henry E. May,* with whom *Mr. Myron H. Walker* was on the brief, for appellant. *Mr. Gerald Hughes,* with whom *Messrs. Clayton C. Dorsey* and *H. S. Robertson* were on the brief, for appellee.

No. 121. A. J. Thigpen and A. J. Thigpen, Jr., *v.* Midland Oil Company. Error to the Circuit Court of Appeals for the Eighth Circuit. Argued January 12, 1927. Decided January 17, 1927. *Per Curiam.* Writ of error dismissed for want of finality in the judgment of the court below, on the authority of *Keike* v. *United States,* 217 U. S. 423, 429. Application for certiorari also denied. *Mr. Frank McCoy,* with whom *Messrs. Elmer E. Grinstead* and *J. R. Speilman* were on the brief, for plaintiffs in error. *Messrs. J. W. Finley, Hayes McCoy, George A. Henshaw, Samuel N. Hawkes,* and *A. C. Hough* were on the brief for defendant in error.

No. 124. Great Northern Railway Company *v.* State of Minnesota. Error to the Supreme Court of the State of Minnesota. Argued January 13, 14, 1927. Decided January 17, 1927. *Per Curiam.* Dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of the claim of a substantial Federal constitutional question in the court below on the authority of *Sayward* v. *Denny,* 158 U. S. 180; *Oxley Stave Co.* v. *Butler Co.,* 166 U. S. 648, 655; *Jett Bros. Co.* v. *City of Carrollton,* 252 U. S. 1, 6. *Mr. F. G. Dorety,* with whom *Mr. M. L. Countryman* was on the brief, for plaintiff in error. *Mr. Patrick J. Ryan,* with whom *Messrs. Clifford*

L. Hilton and *G. A. Youngquist* were on the brief, for defendant in error.

No. 126. FRANK C. MEBANE, AS RECEIVER OF SYMES FOUNDATION, INC., AND AMERICAN TITLE AND TRUST COMPANY *v.* STATEN ISLAND RAILWAY COMPANY, STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, NEW YORK TRANSIT AND TERMINAL COMPANY ET AL. Error to the Supreme Court of the State of New York. Argued January 14, 1927. Decided January 17, 1927. *Per Curiam.* Dismissed for want of jurisdiction for want of a substantial Federal constitutional question on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power and Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Messrs. Hugh H. O'Bear* and *Benjamin Catchings,* with whom *Messrs. Merle I. St. John* and *Charles A. Douglas* were on the briefs, for plaintiffs in error. *Messrs. John W. Welsh, John F. Hughes, Q. S. Gilbert, Royal E. T. Riggs, Morgan J. O'Brien, Albert B. Boardman,* and *Albert Ottinger* were on the brief for defendants in error.

No. 137. STATE OF MISSOURI EX REL. JOSEPH J. LUECHTEFELD AND F. WILLIAM KUEHL *v.* HENRY W. KIEL, LOUIS NOTTE, AND OLIVER SENTI. Error to the Supreme Court of the State of Missouri. Argued January 17, 18, 1927. Decided January 24, 1927. *Per Curiam.* Dismissed because of want of jurisdiction under the Act of September 6, 1916. *Mr. Luke E. Hart* for plaintiffs in error. *Mr. Oliver Senti* was on the brief for defendants in error.

No. 138. INDUSTRIAL ENGINEERING COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued January 18, 1927. Decided January 24, 1927. *Per Curiam.* Affirmed on the authority of *Jacob Reed's*

Sons, Inc., v. *United States*, 273 U. S. 200. *Mr. Raymond M. Hudson* for appellant, submitted. *Assistant Attorney General Galloway*, with whom *Solicitor General Mitchell* was on the brief, for the United States.

No. 276. E. A. EDENFIELD *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued January 18, 19, 1927. Decided January 24, 1927. *Per Curiam.* Reversed on the authority of *United States* v. *Katz*, 271 U. S. 354, and remanded to the court below for resentence on the first count of each of the three indictments. *Mr. W. W. Larsen*, with whom *Messrs. Frank H. Saffold, John Dekle Kirkland, Francis McD. Oliver*, and *Edgar J. Oliver* were on the brief, for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt*, and *Mr. John J. Byrne* for the United States.

No. 139. A. L. FERGUSON AND A. L. FERGUSON, AS EXECUTOR AND TRUSTEE, ETC., ET AL. *v.* UNITED STATES. Appeal from the Court of Claims. Argued January 20, 1927. Decided January 24, 1927. *Per Curiam.* Affirmed on the authority of *Jacob Reed's Sons, Inc.*, v. *United States*, 273 U. S. 200 and of *Baltimore and Ohio Railroad Co.* v. *United States*, 261 U. S. 592. *Mr. Raymond M. Hudson* for appellants. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* were on the brief for the United States.

No. 129. OREGON BASIN OIL AND GAS COMPANY *v.* HUBERT WORK, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE. Appeal from the Court of Appeals of the District of Columbia. Argued January 14, 17, 1927. Decided January 24, 1927. *Per Curiam.* The decree below is affirmed upon the authority of *Ness* v. *Fisher*, 223 U. S.

683; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *Work* v. *Rives,* 267 U. S. 175, 183. *Mr. Charles F. Consaul,* with whom *Messrs. Charles C. Heltman,* and *C. W. Burdick* were on the brief, for appellant. *Solicitor General Mitchell* for appellees.

No. 176. Willie Conner and John Conner *v.* H. U. Bartlett, E. G. Bailey, McMann Oil Company, et al. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted January 24, 1927. Decided February 21, 1927. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. W. H. Francis, B. B. Blakeney,* and *L. O. Lytle* for defendants in error, in support of the motion. *Mr. William Neff* for plaintiffs in error, in opposition thereto.

No. 842. Anna Nelson *v.* J. L. Walrod, S. E. Ellsworth, and C. W. Burnham. See *post,* p. 745.

No. —, original. Ex parte in the Matter of William Leather. February 28, 1927. The motion for leave to file petition for a writ of mandamus herein is denied. *Mr. Oliver J. Cook* for petitioner.

No. —, original. Ex parte Semaphoric Indicator Company et al. February 28, 1927. The motion for leave to file petition for a writ of mandamus herein is denied. *Mr. William R. Rummler* for petitioner.

No. —, original. Ex parte Malleable Iron Range Company. February 28, 1927. The motion for leave to file petition for a writ of mandamus herein is denied with-

out prejudice to a resumption of the application in some other form. *Messrs. Arthur W. Fairchild* and *J. Gilbert Hardgrove* for petitioner.

No. —, original. Ex parte in the matter of Merle Phillips. February 28, 1927. The motion for leave to file a petition for a writ of habeas corpus herein is denied. *Messrs. Frans E. Lindquist, William H. Mason, and Richard O. Mason* for petitioner.

No. 299. Paul L. James and W. Willis Houston, Partners, Trading as Pan-Handle Coal Company *v.* Norfolk and Western Railway Company. Error to the Special Court of Appeals of the State of Virginia. Motion to dismiss or affirm submitted February 21, 1927. Decided February 28, 1927. *Per Curiam.* Writ of error herein dismissed and, the Court treating the same as an application for certiorari, denies such application, all on authority of *Emmons Coal Mining Co.* v. *Norfolk and Western Railway Co.*, 272 U. S. 709. *Messrs. Robert M. Hughes, Jr., Walter R. Staples, Theodore W. Reath,* and *J. Hamilton Cheston* for defendant in error, in support of the motion. *Messrs. Claudian B. Northrop, Gibbs L. Baker,* and *Thomas W. Shelton* for plaintiffs in error, in opposition thereto.

No. 812. Frank Weeke *v.* United States. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted February 21, 1927. Decided February 28, 1927. *Per Curiam.* Writ of error dismissed under § 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936), and, treating the writ of error as a petition for a writ of certiorari, the Court also denies the same. *Solicitor General Mitchell* and

Assistant Attorney General Willebrandt for the United States, in support of the motion. *Mr. Walter A. Hill* for plaintiff in error, in opposition thereto. See *post*, p. 751.

No. 722. J. J. Eiseman and Alexander R. Abrams *v.* State of California; and

No. 723. Holmes Ives and N. J. Whelan *v.* State of California. Error to the District Court of Appeals, First Appellate District of the State of California. Submitted February 21, 1927. Decided February 28, 1927. *Per Curiam.* Dismissed for lack of jurisdiction in this Court on the authority of *Kipley* v. *Illinois*, 170 U. S. 182, 186; *New York Central Railroad Co.* v. *New York*, 186 U. S. 269, 273. *Messrs. R. P. Henshall, Joseph A. Brown,* and *S. A. Riley* for plaintiffs in error. *Mr. U. S. Webb* for defendant in error.

No. 739. Fortune Ferguson, Jr. *v.* State of Florida. Error to the Supreme Court of the State of Florida. Argued February 28, 1927. Decided February 28, 1927. *Per Curiam.* Dismissed for want of a federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. Furman Y. Smith* for plaintiff in error. *Mr. J. B. Johnson* for defendant in error.

No. 106. Jacob M. Dickinson, Receiver of the Chicago, Rock Island and Pacific Railway Company *v.* United States. Appeal from the Court of Claims. Argued February 23, 1927. Decided February 28, 1927. *Per Curiam.* Affirmed on the authority (1) of *Illinois Central Railroad Co.* v. *United States*, 265 U. S. 209, and (2) of *Southern Pacific Co.* v. *United States*, 268 U. S. 263.

Mr. Benjamin Carter for appellant. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 149. NEW YORK CENTRAL SECURITIES CORPORATION *v.* CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY AND NEW YORK CENTRAL RAILROAD COMPANY. Appeal from the District Court of the United States for the Northern District of Ohio. Argued February 24, 1927. Decided February 28, 1927. *Per Curiam.* The judgment of dismissal herein by the district court for want of jurisdiction is reversed on the authority of *General Investment Co.* v. *New York Central Railroad Co.*, 271 U. S. 228. *Mr. Frederick A. Henry* for appellant. *Mr. S. H. West* for appellees, submitted.

No. 151. KNIGHTS OF THE KU KLUX KLAN *v.* STATE OF KANSAS EX REL. CHARLES B. GRIFFITH, ATTORNEY GENERAL. Error to the Supreme Court of the State of Kansas. Argued February 24, 1927. Decided February 28, 1927. *Per Curiam.* Dismissed for want of a federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; and *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. John S. Dean*, with whom *Messrs. William F. Zumbrunn, Harris W. Colmery, Benjamin H. Sullivan, John H. Connaughton*, and *William B. Brown* were on the brief, for plaintiff in error. *Messrs. Charles B. Griffith, John G. Egan*, and *Thomas A. Lee* were on the brief, for defendant in error.

No. 162. G. M. ROSENGRANT, DOING BUSINESS AS THE RIVERSIDE MANUFACTURING COMPANY *v.* EVA J. HAVARD. Error to the Supreme Court of the State of Alabama. Argued February 24, 1927. Decided February 28, 1927.

Per Curiam. Affirmed on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59. *Mr. Gregory L. Smith* for plaintiff in error, submitted. *Mr. Vincent F. Killom,* with whom *Mr. Frederick G. Bromberg* was on the brief, for defendant in error.

No. 168. TIMKEN ROLLER BEARING COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY; and

No. 178. THOMAS P. GOODBODY, AS RECEIVER OF THE HYDRAULIC STEEL COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY. Error to the District Court of the United States for the Northern District of Ohio. Argued February 25, 1927. Decided February 28, 1927. *Per Curiam.* Dismissed for lack of jurisdiction in this Court on the authority of *Transportes Maritimos Do Estado* v. *Almeida,* 265 U. S. 104, 105, and *Oliver American Trading Co.* v. *United States of Mexico,* 264 U. S. 440, 442. *Messrs. Luther Day, Rufus Day, William L. Day,* and *Donald W. Kling* for plaintiffs in error, submitted. *Mr. Andrew P. Martin,* with whom *Messrs. Frederic D. McKenney, Thomas M. Kirby,* and *Andrew Squire* were on the brief, for defendant in error.

No. 172. GEORGE F. PAWLING & COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued February 28, March 1, 1927. Decided March 7, 1927. *Per Curiam.* Affirmed on the authority of *Robinson* v. *United States,* 261 U. S. 486. *Mr. James Craig Peacock,* with whom *Mr. John W. Townsend* was on the brief, for petitioner. *Assistant Attorney General Galloway,* with whom *Solicitor General Mitchell* was on the brief, for the United States.

No. 183. MUNICH REINSURANCE COMPANY *v.* FIRST REINSURANCE COMPANY OF HARTFORD. Appeal from the Circuit Court of Appeals for the Second Circuit. Submitted March 1, 1927. Decided March 7, 1927. *Per Curiam.* Dismissed on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561 and of § 240 of the Judicial Code. *Messrs. Hartwell Cabell* and *John J. Cunneen* for appellant. *Messrs. Lucius F. Robinson* and *Charles W. Gross* for appellee.

No. 191. MARGAY OIL CORPORATION *v.* H. W. APPLEGATE, AS ATTORNEY GENERAL OF ARKANSAS, SAM S. SLOAN, TREASURER, ETC., AND JOHN CARROLL CONE, AUDITOR, ETC. Error to the Supreme Court of the State of Arkansas. Argued March 4, 1927. Decided March 7, 1927. *Per Curiam.* Affirmed on the authority of *Roberts and Schaefer Co.* v. *Emerson,* 271 U. S. 50. *Mr. A. F. House,* with whom *Messrs. George B. Rose, J. F. Loughborough, D. H. Cantrell,* and *A. W. Dobbins* were on the brief, for plaintiff in error. *Messrs. H. W. Applegate* and *S. M. Wassell* for defendant in error, submitted.

No. 192. CITY OF KANSAS CITY, MISSOURI, *v.* ROBERT S. BAKER. Error to the Supreme Court of the State of Kansas. Argued March 4, 1927. Decided March 7, 1927. *Per Curiam.* Dismissed on the authority of *Sayward* v. *Denny,* 158 U. S. 180; *Oxley Stave Co.* v. *Butler,* 166 U. S. 648; *Capital National Bank* v. *First National Bank,* 172 U. S. 425; *Kipley* v. *Illinois,* 170 U. S. 182, 186; *New York Central Railroad Co.* v. *New York,* 186 U. S. 269, 273. *Mr. John T. Barker,* with whom *Mr. Egbert F. Halstead* was on the brief, for plaintiff in error. *Mr. Robert S. Baker, pro se.*

No. 315. FONG SUEY CHONG *v.* JOHN D. NAGLE, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the Northern District of California. Motion to dismiss submitted March 7, 1927. Decided March 14, 1927. *Per Curiam.* Dismissed for want of jurisdiction under § 238 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936). *Solicitor General Mitchell* for appellee, in support of the motion. *Mr. George A. McGowan* for appellant, in opposition thereto.

No. 525. YIP WAH, ALIAS JIM, ALIAS WOO YIP WOO, *v.* JOHN D. NAGLE, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the Northern District of California. Motion to dismiss submitted March 7, 1927. Decided March 14, 1927. *Per Curiam.* Dismissed for want of jurisdiction under § 238 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936). *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for appellee, in support of the motion. *Mr. George A. McGowan* for appellant, in opposition thereto.

No. 195. ROBERT GALLAGHER, JOSEPH A. DENNISON, AND DANIEL V. MCISAAC *v.* JOHN E. HANNIGAN, TRUSTEE IN BANKRUPTCY OF OLD COLONY FOREIGN EXCHANGE COMPANY. Appeal from the Circuit Court of Appeals for the First Circuit. Argued March 7, 1927. Decided March 14, 1927. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Central Trust Co.* v. *Lueders,* 239 U. S. 11; *William R. Staats Co.* v. *Security Trust and Savings Bank,* 243 U. S. 121; and *Harris* v. *Moreland Truck Co.,* 250 U. S. 702. *Messrs Lowell A. Mayberry*

and *Robert Gallagher* for appellants, submitted. *Mr. Edward A. McLaughlin, Jr.,* with whom *Mr. John E. Hannigan* was on the brief, for appellee.

No. 353. BENJAMIN OR BEN HARMON *v.* JOSEPH W. TYLER. Error to the Supreme Court of the State of Louisiana. Argued March 8, 1927. Decided March 14, 1927. *Per Curiam.* Reversed on the authority of *Buchanan* v. *Warley,* 245 U. S. 60. *Mr. Loys Charbonnet,* with whom *Mr. Frank B. Smith* was on the brief, for plaintiff in error. *Messrs. Francis P. Burns* and *Walter W. Wright,* with whom *Mr. J. Zack Spearing* was on the brief, for defendant in error.

No. 811. FRANK W. KEELER *v.* STANLEY MYERS, DISTRICT ATTORNEY, ETC., AND THOMAS M. HURLBURT, SHERIFF. Error to and petition for writ of certiorari to the Supreme Court of the State of Oregon. Argued March 9, 1927. Decided March 14, 1927. *Per Curiam.* Writ of error dismissed for want of jurisdiction under § 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936); and, the Court treating the writ of error as an application for certiorari, denies the certiorari. *Mr. Peter Q. Nyce,* with whom *Mr. Martin L. Pipes* was on the brief, for plaintiff in error. *Mr. Stanley Myers* was on the brief for defendants in error.

No. 221. C. S. GIBSON, SHERIFF, *v.* NATIONAL BOND & INVESTMENT COMPANY. Error to the District Court of the United States for the District of Kansas. Submitted March 10, 1927. Decided March 14, 1927. *Per Curiam.* Dismissed for want of jurisdiction under § 238 of the Judicial Code as amended by the Act of February 13,

1925 (43 Stat. 936). *Messrs. C. B. Griffith, Roland Boynton,* and *William A. Smith* for plaintiff in error. *Messrs. Clay C. Rogers* and *John W. Creekmore* for defendant in error.

No. 197. Ed C. Curdts, Vardry McBee, Robert Wilson, et al. *v.* South Carolina Tax Commission. Error to the Supreme Court of the State of South Carolina. Argued March 7, 8, 1927. Decided Mar. 14, 1927. *Per Curiam.* Judgment affirmed on the authority of *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 254, *et seq.; Missouri* v. *Lewis,* 101 U. S. 22, 31; *Hayes* v. *Missouri,* 120 U. S. 68, 72; *Chappell Chemical Co.* v. *Sulphur Mines Co.,* 172 U. S. 474. *Mr. P. A. Bonham,* with whom *Mr. H. O'B. Cooper* was on the brief, for plaintiff in error. *Mr. Cordie Page,* with whom *Mr. John M. Daniel* was on the brief, for defendant in error.

No. —, original. Ex parte in the matter of Louisiana Western Railroad Company. March 21, 1927. The motion for leave to file petition for a writ of mandamus and the motion for a temporary stay in this case are denied. *Messrs. Percy Saint, Michael M. Irwin, Francis Williams,* and *John E. Benton* for petitioner.

No. —, original. Ex parte in the matter of Morgan's Louisiana and Texas Railroad and Steamship Company. March 21, 1927. The motion for leave to file petition for a writ of mandamus and the motion for a temporary stay in this case are denied. *Messrs. Percy Saint, Michael M. Irwin, Francis Williams,* and *John E. Benton* for petitioner.

No. —, original. Ex parte in the matter of Franklin and Abbeville Railway Company. March 21, 1927. The motion for leave to file petition for a writ of mandamus and the motion for a temporary stay in this case are denied. *Messrs. Percy Saint, Michael M. Irwin, Francis Williams,* and *John E. Benton* for petitioner.

No. —, original. Ex parte in the matter of Lake Charles and Northern Railroad Company. March 21, 1927. The motion for leave to file petition for a writ of mandamus and the motion for a temporary stay in this case are denied. *Messrs. Percy Saint, Michael M. Irwin, Francis Williams,* and *John E. Benton* for petitioner.

No. 226. Thomas E. Williams, State Tax Commissioner, J. A. Cates, County Clerk, et al., *v.* Chicago and Northwestern Railway Company. Appeal from the District Court of the United States for the District of Nebraska. Argued March 11, 1927. Decided March 21, 1927. *Per Curiam.* Affirmed on the authority (1) of *Greene* v. *Louisville and Interurban Railroad Co.,* 244 U. S. 499, 516; *Sunday Lake Iron Co.* v. *Township of Wakefield,* 247 U. S. 350, 352; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 445; and *Taylor* v. *Louisville and Nashville Railroad Co.,* 88 Fed. 350; and (2) of *Crawford* v. *Neal,* 144 U. S. 585, 596; *Furrer* v. *Ferris,* 145 U. S. 132, 134; and *Warren* v. *Keep,* 155 U. S. 265, 267. *Mr. O. S. Spillman,* with whom *Mr. Hugh LaMaster* was on the brief, for appellants. *Mr. Wymer Dressler,* with whom *Messrs. R. N. VanDoren* and *Samuel H. Cady* were on the brief, for appellee.

No. 222. Victor Talking Machine Company *v.* Brunswick-Balke-Collender Company and John

BAILEY BROWNING. Certiorari to the Circuit Court of Appeals for the Third Circuit. Argued March 14, 1927. Decided March 21, 1927. *Per Curiam.* Affirmed on the authority (1) of *Morgan* v. *Daniels,* 153 U. S. 120, and (2) of *United States* v. *State Investment Co.,* 264 U. S. 206, 211; *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86; *Bodkin* v. *Edwards,* 255 U. S. 221, 233; *National Bank of Athens* v. *Shackleford,* 239 U. S. 81, 82; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 297, 402; *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Texas and Pacific Co.* v. *Louisiana Railroad Commission,* 232 U. S. 338, 339; *Chicago Junction Railway Co.* v. *King,* 222 U. S. 222, 224; *Page* v. *Rogers,* 211 U. S. 575, 577; *Dun* v. *Lumbermen's Credit Assn.,* 209 U. S. 20, 24; and *Charleston Mining Co.* v. *United States,* 273 U. S. 320. *Messrs. Charles E. Hughes* and *William H. Kenyon,* with whom *Messrs. Frederick Bachmann, William C. Mason,* and *George W. Schurman* were on the brief, for petitioner. *Mr. Melville Church,* with whom *Mr. George W. Case, Jr.,* was on the brief, for respondents.

No. 244. E. J. KELLY *v.* F. E. WATKINS AND PAUL S. COTNER. Error to the Supreme Court of the State of Oklahoma. Submitted March 15, 1927. Decided March 21, 1927. *Per Curiam.* Dismissed on the authority of the Act of September 6, 1916, c. 448, § 6 (39 Stat. 727), and of *Morse* v. *United States,* 270 U. S. 151. *Mr. H. A. Ledbetter* for plaintiff in error. *Messrs. J. B. Moore, W. Y. Dilley* and *A. T. West* for defendants in error.

No. 232. CHARLES B. BEERY *v.* JAMES G. HOUGHTON, AS INSPECTOR OF BUILDINGS FOR THE CITY OF MINNEAPOLIS. Error to the Supreme Court of the State of Min-

nesota. Argued March 15, 1927. Decided March 21, 1927. *Per Curiam.* Affirmed on the authority of *Village of Euclid* v. *Ambler Realty Company,* 272 U. S. 365. *Messrs. Charles B. Elliott* and *Charles S. Lobingier* for plaintiff in error, submitted. *Mr. Richard S. Wiggin* for defendant in error.

No. 233. American Railway Express Company and Clinton H. McKay *v.* Jacob Kriger. Certiorari to the Supreme Court of the State of Tennessee. Argued March 15, 1927. Decided March 21, 1927. *Per Curiam.* Reversed on the authority of *Barrett* v. *Van Pelt,* 268 U. S. 85, 90; *Davis* v. *Roper Lumber Co.,* 269 U. S. 158; and *Chesapeake and Ohio Railway* v. *Thompson Manufacturing Co.,* 270 U. S. 416. *Mr. Clinton H. McKay,* with whom *Messrs. Charles N. Burch, H. D. Minor, H. S. Marx,* and *A. M. Hartung* were on the brief, for petitioners. *Mr. Auvergne Williams* for respondent.

No. 234. Seaboard Air Line Railway *v.* United States. Appeal from the Court of Claims. Argued March 15, 16, 1927. Decided March 21, 1927. *Per Curiam.* Affirmed on the authority of *St. Louis, Brownsville and Mexico Railway Co.* v. *United States,* 268 U. S. 169, and *Southern Pacific Co.* v. *United States,* 268 U. S. 263. *Mr. Benjamin Carter* for appellant. *Assistant Attorney General Galloway,* with whom *Solicitor General Mitchell* was on the brief, for the United States.

No. 260. Miller Lumber Company, Archer Lumber Company, Theo Fathauer Lumber Company, et al. *v.* W. E. Floyd, Ed Harper and Clay Henderson, as Commissioners composing the Arkansas Railroad Com-

MISSION. Error to the Supreme Court of the State of Arkansas. Submitted March 17, 1927. Decided March 21, 1927. *Per Curiam.* Affirmed on the authority of *Stratton's Independence, Ltd.*, v. *Howbert,* 231 U. S. 399, and *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172. *Messrs. Charles P. Coleman* and *Allen Hughes* for plaintiffs in error. *Mr. H. W. Applegate* for defendants in error.

No. 256. ATLANTIC COAST LINE RAILROAD COMPANY *v.* GEORGE L. WIMBERLEY, JR., ADMINISTRATOR. Certiorari to the Supreme Court of the State of North Carolina. Argued March 18, 1927. Decided March 21, 1927. *Per Curiam.* Reversed on the authority of *St. Louis-San Francisco Railway Co.* v. *Mills,* 271 U. S. 344, and *Chicago, Milwaukee, and St. Paul Railway Co.* v. *Coogan,* 271 U. S. 472. *Mr. Thomas W. Davis* for petitioner. *Mr. Joseph B. Ramsey* for respondent, submitted.

No. —, original. EX PARTE MAISON DORIN SOCIETE ANONYME. April 11, 1927. The motion for leave to file a petition for a writ of mandamus in this cause is denied. *Messrs. Howard Thayer Kingsbury, Hugo Mock,* and *Asher Blum* for petitioner.

No. 15, original. THOMAS CONTRERAS *v.* UNITED STATES. April 11, 1927. Motion for leave to file petition for writ of mandamus to compel the allowance of a writ of error from the District Court of Alaska is denied for the reason that the motion contains no averment of fact or law that would justify the issuance of such a writ. The motion to proceed further herein in forma pauperis is therefore also denied, but the costs already incurred herein by

direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in an order of October 29, 1926. *Mr. Thomas Contreras, pro se.* No appearance for the United States.

No. 783. MALLEABLE IRON RANGE COMPANY *v.* UNITED STATES. Certiorari to the Court of Claims. Motion to remand for additional findings. Motion submitted March 21, 1927. Decided April 11, 1927. The motion is granted, and the cause is remanded for additional findings by the Court of Claims from the evidence already introduced before the Court of Claims in respect to the outlay in bonds or money required to be deposited by the petitioner herein in securing a stay of the execution of the judgment against the petitioner in the suit against it by the United States in the United States District Court for the Eastern District of Wisconsin and in the Circuit Court of Appeals for the Seventh Circuit. *Messrs. Arthur W. Fairchild* and *J. Gilbert Hardgrove* for petitioner, in support of the motion. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States, in opposition thereto.

No. 942. IDA CONLEY *v.* N. J. WOLLARD, ADMINISTRATOR OF THE ESTATE OF ETHAN L. ZANE, DECEASED. Error to the Supreme Court of the State of Kansas. April 11, 1927. Motion for leave to proceed further herein in forma pauperis is denied for the reason that the record discloses no state statute alleged to be repugnant to the Constitution, treaties, or laws of the United States as required to sustain a writ of error brought to this Court under § 237 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, and the writ of error must

be and accordingly is dismissed. Likewise, deeming the writ of error an application for certiorari, the Court can find no federal question whatever involved herein and therefore denies that writ. The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in an order of October 29, 1926. *Lyda B. Conley* for plaintiff in error. No appearance for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 4, 1926, TO AND INCLUDING APRIL 11, 1927.

No. 362. LIGGETT AND MYERS TOBACCO COMPANY *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Chester A. Gwinn* and *Adrian C. Humphreys* for petitioner. *Solicitor General Mitchell* for the United States.

No. 377. RAY C. SIMMONS *v.* EDWARD P. SWAN. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Percy S. Bryant* for petitioner. *Mr. William A. Davenport* for respondent.

No. 385. CITY OF HAMMOND *v.* SCHAPPI BUS LINE (INC.). October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. L. T. Michener* and *John A. Gavit* for petitioner. *Mr. William J. Whinery* for respondent.

No. 386. CITY OF HAMMOND *v.* FARINA BUS LINE AND TRANSPORTATION COMPANY. October 11, 1926. Petition

for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. L. T. Michener* and *John A. Gavit* for petitioner. *Messrs. Jesse J. Ricks* and *Edmond W. Hebel* for respondent.

No. 387. MERCANTILE TRUST COMPANY OF ST. LOUIS, MISSOURI *v.* WILMOT ROAD DISTRICT. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. George B. Rose, S. A. Mitchell, S. H. Cantrell, J. F. Loughborough,* and *A. W. Dobyns* for petitioner. *Mr. Robert E. Wiley* for respondent.

No. 394. C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE, *v.* ELECTRIC REDUCTION COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Mitchell* for petitioner. No appearance for respondent.

No. 409. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, *v.* ARKANSAS LAND & LUMBER COMPANY. October 11, 1926. Petition for writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. J. Q. Mahaffey* for petitioner. *Mr. E. F. McFaddin* for respondent.

No. 436. A. B. LEACH AND COMPANY, INC., *v.* WALTER PEIRSON. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Francis Rawle, Henry M. Earle,* and *Joseph W. Henderson* for petitioner. *Mr. James M. Brown* for respondent.

No. 412. BEDFORD CUT STONE COMPANY ET AL., *v.* JOURNEYMEN STONE CUTTERS' ASSOCIATION OF NORTH AMERICA ET AL. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Daniel Davenport, Charles Martindale,* and *Walter Gordon Merritt* for petitioners. *Messrs. Moses B. Lairy, Edward E. Gates,* and *Frederick Van Nuys* for respondents.

No. 465. WALLACE R. FARRINGTON, GOVERNOR OF THE TERRITORY OF HAWAII, ET AL. *v.* T. TOKUSHIGE ET AL. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. William B. Lymer* and *Lawrence H. Cake* for petitioners. *Messrs. Joseph Lightfoot* and *Joseph B. Poindexter* for respondents.

No. 482. HENRY W. MCMASTER AND FRANCIS H. SKELDING, AS RECEIVERS OF THE WABASH PITTSBURGH TERMINAL RAILWAY COMPANY, *v.* GEORGE J. GOULD ET AL., ETC. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Messrs. Louis Marshall* and *James Marshall* for petitioners. *Mr. William Wallace, Jr.,* for respondents.

No. 497. E. PAUL YASELLI *v.* GUY D. GOFF. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. E. Paul Yaselli, pro se,* and *Alfred Cerceo* for petitioner. *Mr. Nathan A. Smyth* for respondent.

No. 503. E. W. BLISS COMPANY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Bynum E. Hinton* and

George A. King for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, Messrs. Perry W. Howard* and *Louis R. Mehlinger* for the United States.

No. 507. ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, *v.* MISSOURI PACIFIC RAILROAD COMPANY. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Sewall Key* for petitioner. *Messrs. Edward J. White, Merritt U. Hayden,* and *James F. Green* for respondent.

No. 511. PUEBLO OF SANTA ROSA *v.* ALBERT B. FALL, SECRETARY, ET AL. October 25, 1926. The petition for a writ of certiorari in this case is granted and the case set for hearing on January 10 next, after the cases heretofore assigned for that day, on the issue as to the existence of authority of counsel who filed the bill to represent complainant. *Messrs. Louis Kleindeinst, W. C. Reid,* and *Levi H. David* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for respondents.

No. 531. CHARLES H. PHELPS, ETC., ET AL. *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. L. Russell Alden, Charles S. Haight,* and *Harold S. Deming* for petitioners. *Solicitor General Mitchell* for the United States.

No. 539. CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* K. S. LEITCH. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of

West Virginia granted. *Mr. Douglas W. Brown* for petitioner. *Messrs. George B. Martin, John H. Holt,* and *Rufus S. Dinkle* for respondent.

No. 540. RICHMOND SCREW ANCHOR COMPANY, INC. *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Joseph W. Cox, Archibald Cox, O. Ellery Edwards,* and *William H. Kenyon* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 542. MISSOURI PACIFIC RAILROAD COMPANY *v.* MARY I. AEBY. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. Merritt U. Hayden, Edward J. White,* and *James F. Green* for petitioner. *Messrs. Patrick H. Cullen* and *Thos. T. Fauntleroy* for respondent.

No. 546. ROBINS DRY DOCK AND REPAIR COMPANY *v.* GEORGE FLINT ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. James K. Symmers* for petitioner. *Messrs. H. Allen Dawson, Roscoe H. Hupper,* and *William J. Dean* for respondents.

No. 547. JOHN JAMES JACKSON ET AL. *v.* STEAMSHIP "ARCHIMEDES" ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John W. Davis* and *Silas Blake Axtell* for petitioners. *Messrs. Van Vechten Veeder* and *William J. Dean* for respondents.

No. 552. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS *v.* J. H. KING. October 25, 1926. Petition for a writ of certiorari to the Court of Civil Appeals, Fourth Supreme Judicial District of the State of Texas, granted. *Messrs. Alexander H. McKnight, Joseph M. Bryson,* and *Charles C. Huff* for petitioner. No appearance for respondent.

No. 557. A. W. DUCKETT AND COMPANY, INC. *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Ernie Adamson* and *Don R. Almy* for petitioner. *Solicitor General Mitchell* for the United States.

No. 568. UNITED STATES STEEL PRODUCTS COMPANY ETC. *v.* DONALD J. ADAMS. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. George Denegre, Victor Leovy, Henry H. Chaffe, Harry McCall, James H. Bruns,* and *John M. Woolsey* for petitioners. No appearance for respondent.

No. 577. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY ET AL. *v.* E. B. SPILLER ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Edward T. Miller* for petitioners. *Messrs. S. H. Cowan, John S. Leahy,* and *Walter H. Saunders* for respondents.

No. 592. H. L. EVELAND, HUGH SMITH, AND B. W. BAER, CONSTITUTING TAX COMMISSION OF THE STATE OF SOUTH DAKOTA, *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit granted. *Messrs. Byron S. Paine* and *Samuel Herrick* for petitioners. *Mr. A. K. Gardner* for respondent. See *post*, p. 775.

No. 601. AETNA INSURANCE COMPANY ET AL. *v.* BEN C. HYDE, SUPERINTENDENT, ETC. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. Charles E. Hughes, Robert J. Folonie, William S. Hogsett, Ashley Cockrill,* and *John S. Leahy* for petitioners. *Messrs. North T. Gentry* and *John T. Barker* for respondent.

No. 570. UNITED STATES *v.* UNITED CIGAR STORES COMPANY OF AMERICA. November 23, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. A. W. Gregg* for the United States. *Messrs. S. M. Stroock, C. C. Carlin,* and *M. Carter Hall* for respondent.

No. 604. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* WESTERN UNION TELEGRAPH COMPANY. November 23, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell, Messrs. Chauncey G. Parker,* and *Ralph H. Hallett* for petitioner. *Messrs. Francis R. Stark* and *Paul E. Lesh* for respondent.

No. 605. N. AND G. TAYLOR COMPANY, INC. *v.* JOHN A. ANDERSON AND C. A. GUSTAFSON, DOING BUSINESS, ETC. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Henry S. Drinker, Jr.,* and *Robert W. Childs* for petitioner. *Mr. Hobart P. Young* for respondents.

No. 607. JOHN D. NAGLE, COMMISSIONER OF IMMIGRATION *v.* LOI HOA. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Luhring* for petitioner. No appearance for respondent.

No. 608. JOHN D. NAGLE, COMMISSIONER OF IMMIGRATION *v.* LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Luhring* for petitioner. No appearance for respondent.

No. 609. DANIEL V. HARKIN ET AL. *v.* EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Lloyd C. Whitman* and *Bernhardt Frank* for petitioners. *Messrs Ralph F. Potter, Edward R. Johnston,* and *Henry Jackson Darby* for respondents.

No. 615. FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, *v.* WALTER E. FREW, WARREN B. NASH ET AL., ETC. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell* for petitioner. *Messrs. Abram J. Rose, Alfred A. Petti,* and *Philip M. Brett* for respondents.

No. 617. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* ROSENBERG BROTHERS AND COMPANY. November 23, 1926. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell, Messrs. J. Frank Staley, Arthur M. Boal, Frederick R. Conway,* and *Ira S. Lillick* for petitioner. *Messrs. J. M. Mannon, Jr.,* and *Farnum P. Griffith* for respondent.

No. 618. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* CALIFORNIA WINE ASSOCIATION. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell, Messrs. J. Frank Staley, Arthur M. Boal, Frederick R. Conway,* and *Ira S. Lillick* for petitioner. *Messrs. J. M. Mannon, Jr.,* and *Farnum P. Griffith* for respondent.

No. 619. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* S. L. JONES AND COMPANY. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell, Messrs. J. Frank Staley, Arthur M. Boal, Frederick R. Conway,* and *Ira S. Lillick* for petitioner. *Messrs. J. M. Mannon, Jr.,* and *Farnum P. Griffith* for respondent.

No. 626. UNITED STATES *v.* DAVID R. J. ARNOLD, AS ADMINISTRATOR, ETC. November 23, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. A. W. Gregg* for the United States. *Mr. T. Ludlow Chrystie* for respondent.

No. 627. UNITED STATES *v.* GEORGE P. MILLER ET AL., ETC. November 23, 1926. Petition for a writ of certiorari to the Court of Claims granted. *Solicitor General Mitch-*

ell, Assistant Attorney General Galloway, and *Mr. Fred K. Dyar* for the United States. *Mr. William M. Williams* for respondents.

No. 642. INGRAM-DAY LUMBER COMPANY *v.* SIDNEY C. MCLOUTH, REVIVED AGAINST THE AMERICAN LOAN AND TRUST COMPANY, ETC. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. George L. Canfield, W. A. White,* and *Sidney T. Miller* for petitioner. No appearance for respondents.

No. 655. ARTHUR MAUL *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Howard M. Long* and *Moses E. Clapp* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 661. EQUITABLE TRUST COMPANY, AS TRUSTEE, ETC., *v.* FIRST NATIONAL BANK OF TRINIDAD, COLORADO. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Godfrey Goldmark* for petitioner. *Mr. William DeForest Manice* for respondent.

No. 662. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., *v.* EDWARD GOODYEAR, AS ADMINISTRATOR, ETC. November 23, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Kansas granted. *Messrs. M. L. Bell, W. F. Dickinson, Thomas P. Littlepage, Luther Burns, J. E. DuMars,* and *W. D. Vance* for petitioner. *Messrs. Edwin C. Brandenburg* and *John F. McClure* for respondent.

No. 669. UNITED STATES *v.* LEIB RITTERMAN. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell, Messrs. J. Kennedy White,* and *Harry B. Amey* for the United States. *Mr. Albert MacC. Barnes, Jr.,* for respondent.

No. 673. ED. W. HOPKINS, ASSESSOR, ET AL. *v.* SOUTHERN CALIFORNIA TELEPHONE COMPANY ET AL. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Everett W. Mattoon* for petitioners. *Messrs. Oscar Lawler, F. D. Madison,* and *Alfred Sutro* for respondents.

No. 697. UNITED STATES *v.* MORITZ NEUBERGER. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell* for the United States. *Mr. Louis Marshall* for respondent. See *post,* p. 777.

No. 705. ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "BOB" KERCHEVAL, ETC., *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. William E. Leahy, William J. Hughes, Jr.,* and *Edward J. Callahan* for petitioner. *Solicitor General Mitchell, Assistant to the Attorney General Donovan, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 727. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* JOHN RELLSTAB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRCT OF NEW JERSEY, ET AL. December 13, 1926. Petition for a writ of certio-

rari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederic B. Scott* for petitioner. *Mr. Isidor Kalisch* for respondents.

No. 719. MAMMOTH OIL COMPANY ET AL. *v.* UNITED STATES. January 3, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. George P. Hoover, John W. Lacey, Martin W. Littleton, Paul D. Cravath, J. W. Zevely, Edward H. Chandler,* and *G. T. Stanford* for petitioners. *Messrs. Atlee Pomerene* and *Owen J. Roberts* for the United States.

No. 744. HENRY WILSON, F. A. WILSON, W. T. WILSON, ET AL. *v.* PACIFIC MAIL STEAMSHIP COMPANY ET AL. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Louis T. Hengstler* for petitioner. *Messrs. Edward J. McCutchen, Warren Olney, Jr.,* and *Farnum P. Griffith* for respondents.

No. 747. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* TOWN OF MORRISTOWN, HENRY LADEN, ET AL. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. John W. Davis, Maximilian M. Stallman,* and *J. L. Seager* for petitioner. *Mr. Robert H. McCarter* for respondents.

No. 752. UNITED STATES *v.* JAMES M. LEE, ALIAS JAMES M. LEACH. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt,* for the United States. No appearance for respondent.

No. 764. JESSIE L. WICKWIRE, INDIVIDUALLY AND AS EXECUTRIX AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWARD L. WICKWIRE *v.* MABEL G. REINECKE, AS COLLECTOR AND AS ACTING COLLECTOR OF INTERNAL REVENUE, ETC. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Forest D. Siefkin* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Sewall Key* for respondent.

No. 770. F. H. MASON *v.* C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. January 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Horace Andrews* and *S. M. Jett* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for respondent.

No. 791. L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE *v.* MILTON DAIRY COMPANY. January 24, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Mitchell, Messrs. A. W. Gregg* and *J. R. Wheeler* for petitioner. *Mr. Haydn S. Cole* for respondent.

No. 799. S. M. GORIEB *v.* CHARLES D. FOX ET AL., MEMBERS OF THE CITY COUNCIL OF ROANOKE, VIRGINIA, ET AL. February 21, 1927. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted. *Mr. G. A. Wingfield* for petitioner. *Messrs. Robert C. Jackson* and *Charles D. Fox, pro se,* for respondents.

No. 801. UNITED STATES *v.* W. A. MCFARLAND AND J. NORRIS MCFARLAND, COPARTNERS, TRADING AS HENRY MARCUS AND SON. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Mitchell* for the United States. *Mr. William H. Hudgins* for respondents.

No. 783. MALLEABLE IRON RANGE COMPANY *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Arthur W. Fairchild* and *J. Gilbert Hardgrove* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

No. 823. TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY *v.* HILBERT STUART ALLEN. February 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. James C. Jones, Walter A. Eversman, Edward C. Crow, Lon O. Hocker,* and *Frank H. Sullivan* for petitioner. No appearance for respondent.

No. 836. ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, ET AL *v.* NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Louis O. Van Doren, Edward R. Baird, Jr., H. G. Connor, Jr.,* and *Edward S. Bentley* for petitioners. *Mr. Tazewell Taylor* for respondent.

No. 813. PRESSED STEEL CAR CO. *v.* UNITED STATES. See *post,* p. 780.

No. 848. UNITED STATES EX REL. NIELS PETER CLAUSSEN *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRA-

TION. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Silas B. Axtell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 850. W. C. TUCKER *v.* ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. C. H. Garnett* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Messrs. Sewall Key, A. W. Gregg,* and *Fred W. Dewart* for respondent.

No. 851. UNITED STATES *v.* MANLY S. SULLIVAN. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Messrs. Sewall Key,* and *A. W. Gregg* for the United States. *Messrs. Frederick W. Aley* and *E. Willoughby Middleton* for respondent.

No. 854. JAMES W. BOTHWELL, WILLIAM J. MICHEL, ET AL., RECEIVERS OF EMPLOYERS MUTUAL INSURANCE AND SERVICE COMPANY *v.* BUCKBEE, MEARS COMPANY. March 7, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Messrs. Morton Barrows* and *George P. Metcalf* for petitioners. *Messrs. William H. Oppenheimer* and *Montreville J. Brown* for respondent.

No. 858. FINANCE AND GUARANTY COMPANY *v.* HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT. March 7, 1927. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Fourth Circuit granted. *Mr. S. M. Brandt* for petitioner. No appearance for respondent.

No. 860. KATHERINE LINSTEAD, EXECUTRIX OF THE ESTATE OF JOHN A. LINSTEAD, DECEASED, *v.* CHESAPEAKE & OHIO RAILWAY COMPANY. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Katherine Linstead, pro se.* No appearance for respondent.

No. 852. ANCIENT EGYPTIAN ARABIC ORDER NOBLES OF THE MYSTIC SHRINE, ETC., ET AL. *v.* D. W. MICHAUX, CHESTER H. BRYAN, A. J. DOW, ET AL. March 14, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Texas granted. *Messrs. James E. White* and *Samuel A. T. Watkins* for petitioners. No appearance for respondents.

No. 863. PACIFIC MAIL STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "NEWPORT," HER ENGINES, ETC., ET AL. *v.* HENRY WILSON, F. A. WILSON, W. T. WILSON, ET AL. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Edward J. McCutchen, Warren Olney, Jr.,* and *Farnum P. Griffith* for petitioners. No appearance for respondents.

No. 866. BLACK AND WHITE TAXICAB AND TRANSFER COMPANY *v.* BROWN AND YELLOW TAXICAB AND TRANSFER COMPANY. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John L. Stout* for petitioner. No appearance for respondent.

No. 653. SEABOARD AIR LINE RAILWAY COMPANY *v.* STATE OF FLORIDA EX REL. R. HUDSON BURR, A. S. WELLS, ET AL., ETC., AND

No. 654. ATLANTIC COAST LINE RAILROAD COMPANY *v.* STATE OF FLORIDA EX REL. R. HUDSON BURR, A. S. WELLS, ET AL., ETC. March 21, 1927. The orders of November 23, 1926, denying the petitions for writs of certiorari in these cases are hereby revoked and it is now here ordered that the petitions for writs of certiorari in these cases be, and they are hereby, granted. *Mr. James F. Wright* for petitioner in No. 653. *Messrs. W. E. Kay, Thomas B. Adams, Frank W. Gwathmey,* and *Thomas W. Davis* for petitioner in No. 654. *Messrs. Fred H. Davis* and *George C. Bedell* for respondents. See *post,* pp. 729, 730.

No. 872. ATLANTIC COAST LINE RAILROAD COMPANY *v.* STANDARD OIL COMPANY OF KENTUCKY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Helm Bruce* and *Thomas W. Davis* for petitioner. No appearance for respondent.

No. 873. STANDARD OIL COMPANY, INCORPORATED IN KENTUCKY, *v.* ATLANTIC COAST LINE RAILROAD COMPANY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Charles S. Middleton, Edward P. Humphrey,* and *William W. Crawford* for petitioner. No appearance for respondent.

No. 891. GULF, MOBILE AND NORTHERN RAILROAD COMPANY *v.* L. G. TOUCHSTONE. March 21, 1927. 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. 966. GEORGE MCNEIR *v.* CHARLES V. ANDERSON, COLLECTOR OF INTERNAL REVENUE. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Russell L. Bradford* for petitioner. *Solicitor General Mitchell* for respondent.

No. 816. GOODYEAR TIRE AND RUBBER COMPANY *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Spencer Gordon* and *Dean G. Acheson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. John E. Hoover* for the United States.

No. 829. SAMUEL J. KORNHAUSER *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Mr. L. L. Hamby* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 915. CORONA CORD TIRE COMPANY *v.* DOVAN CHEMICAL CORPORATION. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Dean S. Edmonds, Frank E. Barrows,* and *William H. Davis* for petitioner. *Messrs. John W. Davis* and *James J. Kennedy* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM OCTOBER 4, 1926, TO AND INCLUDING APRIL 11, 1927.

No. 1224. JOHN LAPIQUE, ASSIGNEE OF THE ESTATE OF MIGUEL LEONIS, ET AL. *v.* DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. See *ante,* p. 635.

No. 522. KATE TENDLER *v.* MORRIS TENDLER. Petition for writ of certiorari to the Court of Appeals of the District of Columbia. October 11, 1926. *Per Curiam.* The motion for leave to proceed in forma pauperis is denied for the reason that upon examination of the unprinted record the court finds no ground for certiorari, application for which is also denied. *Messrs. Harry A. Hegarty* and *Edwin A. Mooers* for petitioner. *Messrs. E. Hilton Jackson* and *Morgan H. Beach* for respondent.

No. 437. DANIEL J. HART *v.* H. B. NORTH ET AL. See *ante,* p. 637.

No. 248. JACOB GOLDMAN *v.* STATE OF ILLINOIS. See *ante,* p. 637.

No. 524. CANAL-COMMERCIAL TRUST & SAVINGS BANK AND UNION INDEMNITY COMPANY *v.* EARL BREWER. See *ante,* p. 638.

No. 657. DAVIS F. MITCHELL *v.* UNITED STATES. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 11, 1926. *Per Curiam.* Motion to proceed further in forma pauperis is denied for the reason that upon examination of the unprinted record the court finds no ground for certiorari, the application for which is also denied. *Mr. David F. Mitchell, pro se.* The *Attorney General* for the United States.

No. 371. ROTHSCHILD FRANCIS *v.* GEORGE WASHINGTON WILLIAMS, JUDGE OF THE DISTRICT COURT OF THE VIRGIN ISLANDS. October 11, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David Wallerstein* for petitioner. *Mr. Charles H. Gibson* for respondent.

No. 374. PULITZER PUBLISHING COMPANY *v.* HOUSTON PRINTING COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John F. Green* for petitioner. No appearance for respondent.

No. 376. MISSOURI PACIFIC RAILROAD COMPANY *v.* H. K. WELLBORN AND J. A. WALLS, UNDER THE FIRM NAME OF WELLBORN AND WALLS. October 11, 1926. Petition for writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. Robert E. Wiley* and *Edgar B. Kinsworthy* for petitioner. *Mr. Tillman B. Parks* for respondents.

No. 379. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* T. A. BINFORD, SHERIFF ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sam Streetman* and *Samuel B. Dabney* for petitioners. *Messrs. Jewel P. Lightfoot, John W. Brady,* and *George L. Edwards* for respondents.

No. 380. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* GEORGE EDGELEY ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sam Streetman* and *Samuel B. Dabney* for petitioners. No appearance for respondents.

No. 382. FRANK C. HART *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Martin L. Pipes* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 383. TOWN OF FLAGSTAFF *v.* WILLIAM D. WALSH, AS THE SURVIVING PARTNER OF THE COPARTNERSHIP OF MCLEAN AND WALSH, ETC., ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Walter Bennett* and *John L. Gust* for petitioner. *Mr. Henry G. Bodkin* for respondent.

No. 384. AMERICAN SMELTING & REFINING COMPANY *v.* GEORGE CAMPBELL CARSON. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles Earl, Frederick P. Fish, George Donworth,* and *John C. Higgins* for petitioner. *Messrs. John H. Miller* and *A. W. Boyken* for respondent.

No. 389. SYLVIA LAKE COMPANY INC., DOMINION COMPANY OF NEW YORK ET AL. *v.* NORTHERN ORE COMPANY, NEW YORK ZINC COMPANY, INC., HENRY W. BORST, ET AL. October 11, 1926. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Edwin L. Garvin* and *Alfred G. Reeves* for petitioners. *Mr. Henry Purcell* for respondents.

No. 390. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* WARREN LANDERS. October 11, 1926. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. C. B. Stuart, J. F. Sharpe, M. K. Cruce, Ben Franklin, E. T. Miller,* and *Thomas P. Littlepage* for petitioner. No appearance for respondent.

No. 392. AMERICAN RAILWAY EXPRESS COMPANY *v.* CLINTON HARRIS. October 11, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Co-

lumbia denied. *Messrs. Benjamin S. Minor, H. Prescott Gatley, Hugh B. Rowland,* and *Arthur P. Drury* for petitioner. No appearance for respondent.

No. 396. UNITED STATES, SUBSTITUTED FOR R. BERGMAN, MASTER OF THE STEAMSHIP "HENRY COUNTY," *v.* A CARGO OF ABOUT 3,253 TONS OF COAL LADEN ON BOARD THE STEAMSHIP "HENRY COUNTY," ETC. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Chauncey G. Parker, Arthur M. Boal,* and *Harold F. Birnbaum* for petitioner. *Messrs. T. Catesby Jones* and *James W. Ryan* for respondent.

No. 397. UNITED STATES, SUBSTITUTED FOR MARTIN MILLER, MASTER OF THE STEAMSHIP "FRANKLIN COUNTY," *v.* A CARGO OF ABOUT 3,248 TONS OF COAL LADEN ON BOARD THE STEAMSHIP "FRANKLIN COUNTY," ETC. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Chauncey G. Parker, Arthur M. Boal,* and *Harold F. Birnbaum* for petitioner. *Messrs. T. Catesby Jones* and *James W. Ryan* for respondent.

No. 399. N. B. JOSEY GUANO COMPANY AND N. B. JOSEY COMPANY ET AL. *v.* E. I. DU PONT DE NEMOURS AND COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. J. S. Manning, John H. Manning,* and *P. W. McMullan* for petitioners. No appearance for respondents.

No. 400. UNITED STATES EX REL. L. MARGULIES AND SONS, INC. *v.* J. RAYMOND MCCARL, COMPTROLLER GENERAL. October 11, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied.

Messrs. Raymond M. Hudson and *Lewis K. Torbet* for petitioner. *Solicitor General Mitchell* for respondent.

No. 401. GULF REFINING COMPANY OF LOUISIANA *v.* A. H. PHILLIPS, TAX COLLECTOR. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. L. Herold* for petitioner. *Mr. Robert A. Hunter* for respondent.

No. 402. GULF REFINING COMPANY OF LOUISIANA *v.* A. H. PHILLIPS, TAX COLLECTOR. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. L. Herold* for petitioner. *Mr. Robert A. Hunter* for respondent.

No. 403. GULF REFINING COMPANY OF LOUISIANA *v.* M. H. SANDLIN, TAX ASSESSOR. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. L. Herold* for petitioner. *Mr. Robert A. Hunter* for respondent.

No. 404. J. W. MCINTOSH, COMPTROLLER OF THE CURRENCY, E. F. ANDERSON, RECEIVER, GEORGIA NATIONAL BANK, ET AL. *v.* MISS RUTH M. JACKSON AND MRS. ANNA M. SCOTT. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. M. C. Elliott* and *Thos. F. Green* for petitioners. No appearance for respondents.

No. 405. LOUIS HOROWITZ AND S. ABRAMSON *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. *Mr. Henry A. Behrendt* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 407. MAURICE R. SHAW, OWNER OF THE DERRICK BARGE HOLLY, *v.* WESTERN ASSURANCE COMPANY OF TORONTO, CANADA. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Curtis Tilton* and *Willard M. Harris* for petitioner. *Mr. Henry J. Bigham* for respondent.

No. 408. UNITED STATES *v.* JOHN B. SEMPLE AND COMPANY, A FORMER PENNSYLVANIA CORPORATION, BY ITS DIRECTORS, JOHN B. SEMPLE ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Messrs. Sewall Key, A. W. Gregg,* and *John R. Wheeler* for the United States. *Mr. Charles H. Woods* for respondents.

No. 410. CHICAGO STEAMSHIP LINES, INC., AND NORTHERN TRUST COMPANY *v.* UNITED STATES LLOYDS, INC., GLOBE AND RUTGERS FIRE INSURANCE COMPANY, ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles E. Kremer* for petitioners. *Messrs. D. Roger Englar* and *Henry N. Longley* for respondents.

No. 411. GRACE HENRY AND MAE HENRY *v.* OLIVE HENRY ET AL. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. M. G. Adams* and *C. W. Howth* for petitioners. No appearance for respondents.

No. 413. HARRY BARUSCH *v.* G. W. BRAINARD, AS TRUSTEE OF CHARLES H. DUREL ET AL., ETC. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edgar C. Chapman* for petitioner. No appearance for respondents.

No. 415. UNITED CIGAR STORES COMPANY OF AMERICA *v.* EDWARD R. RAYHER, TRUSTEE IN BANKRUPTCY OF BERTRAND BARNETT, TRADING AS CULVER AND COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sol. M. Stroock* for petitioner. *Mr. Samuel Leavitt* for respondent.

No. 419. B. F. TRAPPEY ET AL., TRADING AS B. F. TRAPPEY AND SONS *v.* MCILHENNY COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William L. Symons* for petitioner. *Messrs. Joseph S. Clark* and *Edward S. Rogers* for respondent.

No. 420. GEORGE WEINSTEIN *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William H. Lewis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Byron M. Coon* for the United States.

No. 423. AMERICAN CHAIN COMPANY, INC. *v.* CHESTER N. WEAVER, INC. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frederick S. Duncan* and *Gilbert H. Montague* for petitioner. *Mr. William K. White* for respondent.

No. 425. FRANKLIN D'OLIER, BURTON ETHERINGTON, JAMES D'OLIER, ET AL., ETC. *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Marvin Haynes, Thomas G. Haight,* and *Robert H. Montgomery* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway, Messrs. Fred K. Dyar,* and *John R. Wheeler* for the United States.

No. 426. EUGENE BERGRON, MYER BYNE, ET AL. *v.* ERNEST G. HELLSTEN, AS BAILEE OF THE OWNER, PERE MARQUETTE LINES STEAMER, CLAIMANT, OF THE AMERICAN VESSEL NEVADA, ETC. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioners. *Messrs. Ambrose Gherini, Irving H. Frank,* and *Nathan H. Frank* for respondent.

No. 427. JULIUS KESSLER AND COMPANY, INC. *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Court of Claims denied. *Messrs. William C. Breed* and *Edward A. Craighill, Jr.,* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 428. JAMES-DICKINSON FARM MORTGAGE COMPANY AND A. D. DICKINSON *v.* CORA SEIMER. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George F. Rearick* for petitioners. No appearance for respondent.

No. 430. CARL B. ANDERSON *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Mr. Rufus S. Day* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 431. HARRY J. BOVARD *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Luther Day* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 432. WILLIAM M. JONES *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward E. Gates* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 433. MORD CARTER *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Rufus S. Day* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 434. ANTHONY A. SCHEIB *v.* UNITED STATES. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. M. Frumberg* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 435. MARGARET COLLINS, ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF MARTIN COLLINS, DECEASED, *v.* ERIE RAILROAD COMPANY. October 11, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Susan Brandeis* and *Mr. Nathan Probst, Jr.*, for petitioner. *Mr. Clement K. Corbin* for respondent.

No. 25. DELIA SALZER *v.* UNITED STATES, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE. See *post*, p. 771.

No. 381. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* TEXAS COMPANY. See *post*, p. 771.

No. 483. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* TEXAS COMPANY. See *post*, p. 771.

No. 470. UNITED STATES *v.* CURTIS AND COMPANY MANUFACTURING COMPANY. See *post*, p. 771.

No. 622. ALEXANDER ACKERSON *v.* UNITED STATES. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 18, 1926. Application to proceed further in forma pauperis is denied for the reason that the court upon consideration of the unprinted record finds no ground for certiorari, the application for which is also denied. *Mr. Alexander Ackerson, pro se.* No appearance for respondent.

No. 393. RUSH MEADOWS *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Hugh L. Dickson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 438. MRS. GERTRUDE S. PONDER *v.* LAMAR LIFE INSURANCE COMPANY. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. H. B. Warren, Joseph D. Barksdale,* and *Albert H. Van Hook* for petitioner. No appearance for respondent.

No. 440. LEHIGH VALLEY RAILROAD COMPANY *v.* STEAM TUG CUTCHOQUE, HER ENGINES, ETC., LONG ISLAND RAILROAD COMPANY, CLAIMANT. October 18, 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. Chauncey I. Clark* and *William J. Dean* for respondents.

No. 441. IRVIN McD. GARFIELD, AS RECEIVER OF B. B. & R. KNIGHT, INC. *v.* MALLORY STEAMSHIP COMPANY. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Hunter* for petitioner. *Mr. Ray Rood Allen* for respondent.

No. 442. J. A. KEMP, T. B. NOBLE, I. H. ROBERTS, ET AL. *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Messrs. Sewall Key,* and *A. W. Gregg* for the United States.

No. 445. MAX HART *v.* B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY ET AL. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Messrs. Martin W. Littleton, Louis B. Eppstein, Ira W. Hirshfield,* and *Lawrence H. Axman* for petitioner. *Messrs. Charles E. Hughes* and *Maurice Goodman* for respondents.

No. 446. MAX HART *v.* B. F. KEITH VAUDEVILLE EXCHANGE, ORPHEUM CIRCUIT, INC., EXCELSIOR COLLECTION AGENCY ET AL. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Martin W. Littleton, Louis B. Eppstein, Ira W. Hirshfield,* and *Lawrence H. Axman* for petitioner. *Messrs. Charles E. Hughes* and *Maurice Goodman* for respondents.

No. 449. S. D. GUGGENHEIM, M. GUGGENHEIM, L. GUGGENHEIM, ET AL., ETC. *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Frank Davis, Jr.,* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. George H. Foster* for the United States.

No. 455. ALEXANDER MENAREGIDIS, IN BEHALF OF ANDREAS MENAREGIDIS, *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 456. SOTIOUROS CHRISTOULAS, ALSO KNOWN AS CHRIST LAWYER, *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION. October 18. 1926. Petition for a writ

of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 457. GEORGE F. PAWLING AND COMPANY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. P. M. Cox* for the United States.

No. 458. ROY GAY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart. A. Riley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Byron M. Coon* for the United States.

No. 459. RUSSELL GAY *v.* UNITED STATES. October 18, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart. A. Riley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Byron M. Coon* for the United States.

No. 460. HARRY WASHER, ALIAS HARRY THE JEW, *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart. A. Riley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 461. H. M. ALBURY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart A. Riley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. K. L. Campbell* for the United States.

No. 462. JAMES THOMPSON AND THE J. L. HUDSON COMPANY, DOING BUSINESS, ETC., ET AL. *v.* VOGUE COMPANY. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Samuel W. Banning* and *Thomas A. Banning* for petitioners. *Messrs. Harry D. Nims* and *Minturn DeS. Verdi* for respondent.

No. 463. GEORGE BELVIN AND JOHN MCGOWAN *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry Bowden* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 464. UNITED STATES EX REL. CRIPPLE CREEK & COLORADO SPRINGS RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISION. October 18, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. M. C. Elliott* and *C. C. Hamlin* for petitioner. *Messrs. R. Granville Curry* and *P. J. Farrell* for respondent.

No. 466. JACOB P. TETER *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Mr. L. Ert. Slack* for petitioner. *Solicitor General Mitchell* and *Mr. Alfred A. Wheat* for the United States.

No. 468. Oregon and California Railroad Company *v.* Andrew B. Hammond and Charles J. Winton. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied. *Messrs. Ben C. Dey* and *Alfred A. Hampson* for petitioner. *Messrs. Charles H. Carey* and *James B. Kerr* for respondents.

No. 469. Oregon and California Railroad Company *v.* Booth-Kelly Lumber Company. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied. *Messrs. Ben C. Dey* and *Alfred A. Hampson* for petitioner. *Messrs. Mark Norris* and *Glenn E. Husted* for respondent.

No. 471. W. J. McInnes, Receiver of the Citizens National Bank, of Roswell, N. M. *v.* American Surety Company. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Renzo D. Bowers* for petitioner. No appearance for respondent.

No. 473. Andrew W. Mellon, Director General of Railroads *v.* W. M. Grantham. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Alexander H. McKnight, A. A. McLaughlin, Joseph M. Bryson,* and *Charles C. Huff* for petitioner. No appearance for respondent.

No. 474. Howard P. Converse and Edwin P. Bliss, Trading as Converse and Company *v.* United States. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. George R. Shields* for petitioners *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 475. Eric Lange and A. H. Bergstrom, Copartners, Trading as Lange and Bergstrom *v.* United States. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Bynum E. Hinton* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 476. Mary D. A. Sayles, Charles O. Read, and James R. MacCall, individually, etc. *v.* Chase National Bank and Frederick K. Rupprecht. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Samuel Williston, Robert B. Dresser,* and *Claude R. Branch* for petitioners. *Messrs. Eldon Bisbee, Charles F. Choate, Jr.,* and *Arthur M. Allen* for respondents.

No. 477. Joshua Russell *v.* United States. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph C. Breitenstein, William L. Day,* and *Luther Day* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 478. Merle B. Copeland *v.* United States. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Messrs. William L. Day, Luther Day, and *Joseph C. Breitenstein* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 479. WARREN E. BARNETT *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph C. Breitenstein, William L. Day,* and *Luther Day* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 480. OREGON SHORT LINE RAILROAD COMPANY *v.* ERNEST R. GUBLER. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Robert B. Porter, George H. Smith, William R. Harr,* and *Charles H. Bates* for petitioner. *Mr. E. R. Callister* for respondent.

No. 481. EARL B. BARNES, AS TRUSTEE IN BANKRUPTCY OF THOMAS H. COWLEY, PAUL E. BRADY ET AL., ETC. *v.* WILLIAM SCHATZKIN ET AL., ETC., AND LAWRENCE J. HIRSCH ET AL., ETC. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Saul S. Myers, William J. Hughes,* and *Edwin L. Garvin* for petitioners. *Messrs. Harold Nathan* and *B. B. Pettus* for respondents.

No. 484. MILTON F. WEBSTER *v.* JOSEPH T. TERRY. October 18, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Archibald Cox* for petitioner. *Mr. Melville Church* for respondent.

No. 485. ILLINOIS CENTRAL RAILROAD COMPANY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Lawrence H. Cake* and *F. W. Clements* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Louis R. Mehlenger* for the United States.

No. 486. JACINTO MOSS, PEDRO L. MOSS, PEDRO J. MOSS, ET AL., ETC. *v.* JOHN H. SHERBURNE AND HOWARD STOCKTON, TRUSTEES, ETC. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert H. Holt* for petitioners. *Messrs. John H. Sherburne* and *Howard Stockton, Jr., pro se.*

No. 487. VILLAGE OF TERRACE PARK *v.* RUSSELL ERRETT. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Weld Peck* for petitioner. *Messrs. Russell Errett, pro se,* and *James J. Muir* for respondent.

No. 489. ALBERT CARELLI *v.* STATE OF OHIO. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. M. A. Musmanno* for petitioner. No appearance for respondent.

No. 490. LENA B. MCKEE AND FRED MCKEE, TRUSTEES, ETC., ET AL. *v.* CUNO H. RUDOLPH, JAMES F. OYSTER, AND J. FRANKLIN BELL, ETC. October 18, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward F. Colladay* for petitioners. *Messrs. F. H. Stephens* and *Robert L. Williams* for respondents.

No. 491. UNIVERSAL RIM COMPANY *v.* FIRESTONE TIRE AND RUBBER COMPANY ET AL. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Rudolph W. Lotz* and *Arthur W. Nelson* for petitioner. *Messrs. A. L. Ely* and *F. O. Richey* for respondents.

No. 493. STANDARD ELECTRIC STOVE COMPANY *v.* TOLEDO, ST. LOUIS AND WESTERN RAILROAD. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Oliver B. Snider* for petitioner. *Mr. E. E. McInnis* for respondent.

No. 496. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* EUNICE PEARSON, ADMINISTRATRIX OF THE ESTATE OF J. L. PEARSON, DECEASED. October 18, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. Edward T. Miller* and *Edward L. Westbrooke* for petitioner. No appearance for respondent.

No. 498. UNITED STATES EX REL. HELEN L. GIVENS *v.* HUBERT WORK, SECRETARY OF THE INTERIOR. October 18, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. J. Harry Covington, Spencer Gordon,* and *Newell W. Ellison* for petitioner. *Solicitor General Mitchell* and *Mr. George P. Barse* for respondent.

No. 501. NEW YORK LIFE INSURANCE COMPANY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James H. McIntosh* for peti-

tioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Howard T. Jones, A. W. Gregg,* and *Edward H. Horton* for the United States.

No. 502. New York Life Insurance Company *v.* United States. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James H. McIntosh* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Howard T. Jones, A. W. Gregg,* and *Edward H. Horton* for the United States.

No. 505. Atlantic Coast Line Railroad Company *v.* Standard Oil Company of New Jersey. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Thomas W. Davis, F. W. Gwathmey, James F. Wright,* and *Murray Allen* for petitioner. *Messrs. Charles McH. Howard* and *George H. Tower* for respondent.

No. 506. Seaboard Air Line Railway Company *v.* Standard Oil Company of New Jersey. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Murray Allen, F. W. Gwathmey, Thomas W. Davis,* and *James F. Wright* for petitioner. *Messrs. Charles McH. Howard* and *George H. Tower* for respondent.

No. 508. State Bank *v.* Philip Applebaum. October 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Archibald Palmer* and *Max L. Rosenstein* for petitioner. No appearance for respondent.

No. 510. SUBMARINE SIGNAL COMPANY *v.* UNITED STATES. October 18, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Philip B. Buzzell, Andrew B. Duvall,* and *Elmer T. Bell* for the petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 643. WILLIAM C. AMOS *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 25, 1926. The motion for leave to print only such portions of the record in this case as opposing counsel shall agree is relevant to petitioner's conviction below or in the alternative to proceed further in forma pauperis is denied for the reason that upon examination of the petition and accompanying papers, including brief of counsel for the petitioner, the record as printed in the Circuit Court of Appeals, and the opinion of the court below, the court finds that the case is not one in which a writ of certiorari should issue, the application for which is, therefore, also denied. *Mr. Walter S. Hilborn* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 513. SECURITY TRUST COMPANY, RECEIVER, *v.* CHARLES J. DE LAND, RECEIVER. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas G. Long* for petitioner. *Mr. Carl W. Mosier* for respondent.

No. 514. THE DETROIT UNITED RAILWAY *v.* ALFRED LEROY CRAVEN. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick T. Harward* for petitioner. No appearance for respondent.

No. 516. RALPH A. HORTON *v.* CARY A. HARDEE, GOVERNOR, ET AL. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied. *Messrs. Scott M. Loftin, James E. Calkins,* and *Jno. P. Stokes* for petitioner. *Messrs. Francis P. Fleming* and *Marvin C. McIntosh* for respondents.

No. 517. JOSEPH LAVEIRGE ET AL. *v.* JAMES C. DAVIS, AGENT. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Messrs. Webster Ballinger* and *John B. Arnold* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Pedro Capo-Rodriguez* for respondent.

No. 518. J. W. CRAIG *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. T. A. Noftzger* for petitioner. No appearance for respondent.

No. 519. STEEL AND TUBE COMPANY OF AMERICA *v.* DINGESS RUM COAL COMPANY. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Arthur W. Fairchild, J. Gilbert Hardgrove,* and *Harold A. Ritz* for petitioner. *Mr. Douglas W. Brown* for respondent.

No. 520. AUBURN AND ALTON COAL COMPANY *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Robert N. Miller* and *Haines H. Hargrett* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 523. HILDA ROBERTS ET AL. *v.* CHRIS YEGEN ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. Lowndes Maury* for petitioners. *Mr. George Hurd* for respondents.

No. 530. ROSS BANTA *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas A. Flynn* and *Joseph E. Morrison* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 532. MECHANICS AND METALS NATIONAL BANK *v.* J. C. BUCHANAN. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frank M. Patterson* and *D. H. Linebaugh* for petitioner. *Mr. M. W. McKenzie* for respondent.

No. 534. ETHEL CROKER WHITE ET AL. *v.* BULA CROKER, ETC., ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George C. Bedell* and *J. T. G. Crawford* for petitioners. *Messrs. Francis P. Fleming* and *Samuel T. Ansell* for respondents.

No. 535. W. R. GRACE AND COMPANY *v.* PANAMA RAILROAD COMPANY. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ocar R. Houston* and *Ezra G. Benedict Fox* for petitioner. *Mr. Richard Reid Rogers* for respondent.

No. 536. CHARLES WAXMAN *v.* UNITED STATES. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles Waxman, pro se. Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 538. AETNA LIFE INSURANCE COMPANY *v.* HERMINA BUNDSCHO. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Y. Freeman* for petitioner. *Messrs. George I. Haight, Edmund D. Adcock,* and *T. W. Bramhall* for respondent.

No. 541. FRANK MCGARRY ET AL. *v.* JOHN J. LENTZ ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Smith W. Bennett* and *Arthur I. Vorys* for petitioners. *Messrs. J. D. Karns* and *Henry A. Williams* for respondents.

No. 543. SCOTT M. ATKIN *v.* NATHAN H. BAIER ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William M. Toomer* and *George P. Garrett* for petitioner. *Mr. Halsted L. Ritter* for respondents.

No. 544. UNITED STATES *v.* MAY MCKINNEY ET AL., EXECUTORS, ETC. October 25, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Alexander H. McCormick* for the United States. *Messrs. Harry H. Simmes* and *W. Clyde Jones* for respondents.

No. 550. PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY, LIMITED, INC. *v.* GABRIELA ANDREA DE COSTER. October 25, 1926. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. F. G. Fisher* and *C. A. DeWitt* for petitioner. *Messrs. Chester I. Long, George E. Chamberlain, Peter Q. Nyce,* and *Antonio M. Oppisso* for respondent.

No. 551. JAMES E. ARNOLD *v.* ROSS A. COLLINS. October 25, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. William E. Richardson* for petitioner. *Mr. John S. Barbour* for respondent.

No. 554. CITY OF TOLEDO ET AL. *v.* MAUMEE VALLEY ELECTRIC COMPANY. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles A. Seiders* for petitioners. *Messrs. U. G. Denman* and *Karl E. Burr* for respondent.

No. 555. W. R. GRACE AND COMPANY *v.* TOYO KISEN KABUSHIKI KAISHA. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Orrick* for petitioner. *Mr. Thomas B. Dozier* for respondent.

No. 451. PROCTER AND GAMBLE COMPANY ET AL. *v.* FEDERAL TRADE COMMISSION. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank F. Dinsmore* for petitioners. *Solicitor General Mitchell* and *Mr. Bayard T. Hainer* for respondent.

No. 494. FEDERAL TRADE COMMISSION *v.* PROCTER AND GAMBLE COMPANY ET AL. October 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Mitchell* and *Mr. Bayard T. Hainer* for petitioner. *Mr. Frank F. Dinsmore* for respondents.

No. 703. WILLIAM M. WEBB *v.* UNITED STATES. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. November 1, 1926. The motion for leave to proceed further in this cause in forma pauperis is denied for the reason that the court upon inspection of the record of proceedings below as submitted in *Anderson* v. *United States,* No. 430; *Bovard* v. *United States,* No. 431; *Jones* v. *United States,* No. 432; and *Carter* v. *United States,* No. 433, finds that there is no ground for certiorari, application for which is also denied. The costs already incurred herein by direction of the court shall be paid by the clerk from the special fund in his custody as provided in order of October 29, 1926. *Mr. Oscar O'Neill Touchston* for petitioner. No appearance for respondent.

No. 450. WILLIAM LEE POPHAM *v.* UNITED STATES. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert H. McNeill, Julius C. Martin, Herbert W. Waguespack,* and *W. J. Waguespack* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 558. VIRGINIAN RAILWAY COMPANY *v.* UNITED STATES, OWNER OF STEAM TUG *Barrenfork.* November 1, 1926. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Fourth Circuit denied. *Messrs. W. H. T. Loyall, George M. Lanning, E. W. Knight,* and *Edward R. Baird, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. J. Frank Staley* for the United States.

No. 559. L. J. Riggs *v.* Siegel Workman, United States Marshal. November 1, 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 Willebrandt,* and *Mr. Mahlon D. Kiefer* for respondent.

No. 560. L. J. (Bear Cat) Riggs *v.* United States November 1, 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 Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 562. New York and Cuba Mail Steamship Company *v.* United States and Flannery, Guinan and Moran, Inc. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. J. Frank Staley* for respondents.

No. 563. New York and Cuba Mail Steamship Company *v.* United States and Flannery, Guinan and Moran, Inc. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Eugene*

Underwood for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. J. Frank Staley* for respondents.

No. 565. M. Samuel and Sons, Inc. *v.* Second National Bank of Toledo. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Morris D. Kopple* for petitioner. *Mr. Robert C. Morris* for respondent.

No. 566. New State Land Company, H. F. Wilcox Oil and Gas Company, Albert Kelly, et al. *v.* Robert Kelley and Sukey Kelley. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. John W. Davis* for petitioners. *Messrs. William Neff, R. C. Allen,* and *I. J. Underwood* for respondents.

No. 569. Louis Rauch *v.* A. F. Duff. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. Gordon G. Lyell* for petitioner. No appearance for respondent.

No. 571. Texas and New Orleans Railroad Company and United States Fidelity and Guaranty Company *v.* J. J. Cammack. November 1, 1926. Petition for a writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District of the State of Texas, denied. *Messrs. J. H. Tallichet* and *H. M. Garwood* for petitioners. *Mr. Alexander White Spence* for respondent.

No. 572. Calcasieu National Bank of Southwest Louisiana *v.* Alfred Campbell. November 1, 1926.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles A. McCoy* for petitioner. No appearance for respondent.

No. 573. WILLIAM G. BENHAM AND DWIGHT HARRISON *v.* UNITED STATES. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert R. Nevin* and *Smith W. Bennett* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 576. WILLIAM F. WILLIAMS AND FRANK E. LYMAN, COMMISSIONERS OF PUBLIC WORKS, ETC. *v.* GENERAL OUTDOOR ADVERTISING COMPANY, INC., O. J. GUDE COMPANY, THOMAS CUSACK COMPANY ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Jay R. Benton* for petitioners. *Messrs. Lowell A. Mayberry* and *Robert Gallagher* for respondents.

No. 578. HENDERSON COUNTY, TENNESSEE, *v.* SOVEREIGN CAMP, WOODMEN OF THE WORLD. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioner. *Mr. Charles Claflin Allen, Jr.,* for respondent.

No. 584. GEORGE LANGSTAFF *v.* ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles K. Wheeler* for petitioner. *Solicitor General Mitchell, As-*

sistant Attorney General Willebrandt, and *Messrs. Sewall Key,* and *A. W. Gregg* for respondent.

No. 585. A. I. WINSETT, NATHAN KENDALL, CHARLES E. WALKER ET AL. *v.* H. J. SPURWAY, RECEIVER OF THE TUCSON NATIONAL BANK. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied. *Mr. Frank E. Curley* for petitioners. *Mr. Francis M. Hartman* for respondent.

No. 586. M. WEHBY, JOHN JOSEPH, RAF R. FLORES ET AL. *v.* H. J. SPURWAY, RECEIVER OF THE TUCSON NATIONAL BANK. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied. *Mr. Frank E. Curley* for petitioners. *Mr. Francis M. Hartman* for respondent.

No. 587. STATE OF MONTANA *v.* SUNBURST REFINING COMPANY. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied. *Mr. L. A. Foot* for petitioner. *Mr. George E. Hurd* for respondent.

No. 588. FEDERAL LIFE INSURANCE COMPANY *v.* MRS. JENNIE M. RASCOE. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas J. Tyne* and *James C. Jones* for petitioner. *Messrs. W. H. Washington* and *Edwin A. Price* for respondent.

No. 590. GORDON CAMPBELL *v.* UNITED STATES. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Messrs. Eugene C. Campbell and *James E. Fenton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. John S. Pratt* for the United States.

No. 593. FORD HYDRO-ELECTRIC COMPANY *v.* JANET NEELEY ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William Ryan* for petitioner. *Mr. William P. Belden* for respondents.

No. 594. GEORGE S. KUNIHIRO *v.* M. O. COGGINS COMPANY, CLIFFORD A. COGGINS, C. SWIFT BOLLENS, ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George E. Waldo* for petitioner. *Mr. W. I. Gilbert* for respondents.

No. 595. GEORGE S. KUNIHIRO *v.* LYON BROTHERS COMPANY, ARTHUR MILLER, M. O. COGGINS COMPANY ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George E. Waldo* for petitioner. *Mr. W. I. Gilbert* for respondents.

No. 597. SIOUX CITY BRIDGE COMPANY *v.* WALTER E. MILLER, COUNTY TREASURER, ET AL. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wymer Dressler* and *Richard L. Kennedy* for petitioner. *Mr. John J. McCarthy* for respondents.

No. 598. CELLULOID COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS. November 1, 1926. Petition for a writ of certiorari to the Supreme Judicial Court of the State

of Massachusetts denied. *Mr. Joseph Larocque* for petitioner. *Messrs. Jay R. Benton,* Attorney General of Massachusetts, and *Alexander Lincoln* for respondent.

No. 599. AARON T. BLISS, CLERK OF MIDLAND COUNTY, ET AL. *v.* JAMES C. GRAVES AND CLIFFORD G. OLMSTEAD. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Gilbert A. Curry* for petitioners. *Mr. Frank A. Rockwith* for respondents.

No. 600. CENTRAL NATIONAL BANK OF MARIETTA, OHIO, AS ADMINISTRATOR DE BONIS NON OF THE ESTATE OF HARRY B. HULINGS, DECEASED, *v.* COMMODORE D. DODSON. November 1, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Messrs. Lowrie C. Barton* and *Edward B. Follett* for petitioner. No appearance for respondent.

No. 602. WARREN O. WATSON, TRUSTEE IN BANKRUPTCY ET AL. *v.* J. HALL LEBLANC, BANKRUPT. November 1, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph A. Loret* for petitioners. No appearance for respondent.

No. 391. UNITED STATES EX REL. JULIO E. ROMAN CHECA *v.* GEORGE E. WILLIAMS, SHERIFF. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. No appearance for respondent.

No. 548. WILLIAM A. ZEIDLER *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari

to the Court of Claims denied. *Messrs. Joseph W. Cox, Archibald Cox,* and *O. Ellery Edwards* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Harry E. Knight,* and *Manuel Whittemore* for the United States.

No. 589. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. F. W. Clements* and *Lawrence H. Cake* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Gardiner P. Lloyd,* and *Louis R. Mehlinger* for the United States.

No. 603. SINCLAIR REFINING COMPANY ET AL. *v.* ALONZO SMITH AND N. W. WASHBURN. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Walter H. Walne, Maco Stewart,* and *Albert J. DeLange* for petitioners. *Mr. George A. Hill, Jr.,* for respondents.

No. 610. GALVESTON DRY DOCK AND CONSTRUCTION COMPANY *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Maco Stewart, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. J. Frank Staley* for the United States.

No. 611. JOHN E. WAGNER *v.* NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George S. Graham* for petitioner. *Messrs Roscoe H. Hupper* and *Everett Masten* for respondent.

No. 612. UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Stanleigh P. Friedman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 613. LUTHER WALKER *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. T. Kennerly* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 614. PIEDMONT COAL COMPANY ET AL. *v.* JAMES EDGAR HUSTEAD ET AL. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Ohio County of the State of West Virginia denied. *Messrs. David A. Reed, Samuel McClay, George Poffenbarger,* and *Frank W. Nesbitt* for petitioners. *Messrs. Charles McCamic* and *James Morgan Clarke* for respondents.

No. 621. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* NEW YORK AND NEW JERSEY TRANSPORTATION COMPANY AND JOHN MOSK. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James W. Ryan, Evan Shelby,* and *T. Catesby Jones* for petitioner. *Messrs. Pierre M. Brown* and *Horace L. Cheyney* for respondents.

No. 623. CHARLES H. GRAVES *v.* FRANK W. BRUNSKILL, CHIEF OF POLICE ET AL. November 23, 1926. Petition

for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. John E. Palmer* for petitioner. *Messrs. Clifford L. Hilton* and *James E. Markham* for respondents.

No. 624. KANSAS FLOUR MILLS COMPANY *v.* FARMERS NATIONAL BANK OF BURLINGTON, KANSAS, ET AL. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. A. Noftzger* for petitioner. No appearance for respondents.

No. 625. LARABEE FLOUR MILLS CORPORATION *v.* FIRST NATIONAL BANK OF HENRYETTA, OKLAHOMA, ET AL. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. A. Noftzger for petitioner. Mr. R. B. F. Hummer* for respondent.

No. 628. COLONIAL TRANSPORTATION COMPANY, LTD. *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Howard H. Long* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Arthur W. Henderson* for the United States.

No. 629. JOHN MOORE, ADMINISTRATOR OF THE ESTATE OF EARL H. MOORE, DECEASED, *v.* BALTIMORE AND OHIO RAILROAD COMPANY. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Daniel O. Hastings* for petitioner. No appearance for respondent.

No. 631. SATURNINO LOPEZ *v.* MANUEL ERNESTO GONZALEZ. November 23, 1926. Petition for a writ of cer-

tiorari to the Supreme Court of the Philippine Islands denied. *Mr. Samuel T. Ansell* for petitioner. No appearance for respondent.

No. 632. PAUL M. ASHBAUGH *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. J. W. Barry* and *Paul M. Ashbaugh pro se,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 636. PARADON ENGINEERING COMPANY, INC., *v.* ELECTRO BLEACHING COMPANY ET AL. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. F. P. Warfield* and *C. A. L. Massie* for petitioner. *Messrs. Drury W. Cooper* and *Loren N. Wood* for respondents.

No. 640. ADDISON MILLER, SECURITY STORAGE COMPANY, RYAN HOTEL COMPANY, ET AL., *v.* CITY OF ST. PAUL. November 23, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. W. B. Douglas* for petitioners. *Messrs. Morton Barrows, Arthur A. Stewart,* and *Eugene M. O'Neill* for respondent.

No. 641. GEORGE H. JENNINGS AND CREEKMORE WALLACE *v.* LONZETRA CANADY AND MOUNTAIN STATE OIL COMPANY. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. B. B. Blakeney* and *Creekmore Wallace* for petitioners. No appearance for respondent.

No. 645. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *v.* GERTRUDE MAPPIN, ADMINISTRATRIX OF THE ESTATE OF WALTER W. MAPPIN, DECEASED. November 23, 1926. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Messrs. Edgar W. Camp, Robert O. Brennan,* and *E. E. McInnes* for petitioner. *Mr. Maxwell McNutt* for respondent.

No. 649. CARON CORPORATION *v.* HENRI MURAOUR ET CIE. November 23, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Maurice Leon* and *Joseph H. Choate, Jr.,* for petitioner. *Mr. George W. Offutt* for respondent.

No. 650. KNICKERBOCKER MERCHANDISING COMPANY, INC., ET AL. *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Holley Clark, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 651. T. E. MCLENDON *v.* UNITED STATES. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles M. Bryan* and *J. M. Grimmet* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 653. SEABOARD AIR LINE RAILWAY COMPANY *v.* STATE OF FLORIDA EX REL. R. HUDSON BURR, A. S. WELLS, ET AL., ETC. November 23, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Florida

denied. *Messrs. James F. Wright, W. E. Kay, Thomas B. Adams,* and *Frank W. Gwathmey* for petitioner. *Messrs. Fred H. Davis* and *George C. Bedell* for respondents. See *ante,* p. 691.

No. 654. Atlantic Coast Line Railroad Company *v.* State of Florida ex rel. R. Hudson Burr, A. S. Wells, et al., etc. November 23, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied. *Messrs. James F. Wright, W. E. Kay, Thomas B. Adams,* and *Frank W. Gwathmey* for petitioner. *Messrs. Fred H. Davis and George C. Bedell* for respondents. See *ante,* p. 691.

No. 659. National Bank of Commerce in St. Louis *v.* Henry Clay Pierce. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George L. Edwards, Edward J. White,* and *W. T. Jones* for petitioner. *Messrs. H. S. Priest* and *John F. Green* for respondent.

No. 660. William A. Gillespie and Frank X. Kinzly *v.* United States. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin Conboy* for petitioners. *Solicitor General Mitchell* and *Mr. J. Kennedy White* for the United States.

No. 667. Steam Tug Esther M. Rendle, George T. Rendle *v.* United States. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George T. Dillaway* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 677. EMLENTON REFINING COMPANY *v.* WALTER A. CHAMBERS, TRADING AS G. L. P. CHAMBERS AND COMPANY, TO THE USE OF JAMES A. ADAMS, ETC. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. E. Mullin* and *W. Pitt Gifford* for petitioner. *Mr. Henry J. Bigham* for respondents.

No. 681. MARSHALL HODGMAN, GEORGE I. SEIDMAN, PERCY HEINEMAN, ET AL. *v.* ATLANTIC REFINING COMPANY AND SUPERIOR OIL CORPORATION. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis* and *Andrew C. Gray* for petitioners. *Messrs. Ira Jewell Williams, Robert H. Richards,* and *Charles E. Hughes* for respondents.

No. 683. CARNEGIE STEEL COMPANY *v.* COLORADO FUEL AND IRON COMPANY. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. D. Anthony Usina, Henry M. Huxley,* and *George W. Morgan* for petitioner. *Mr. Fred Farrar* for respondent.

No. 687. WESLEY L. SISCHO *v.* FINCH R. ARCHER, WARDEN. November 23, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat,* and *Harry S. Ridgely* for respondent.

No. 616. STANDARD TRANSPORTATION COMPANY *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Goldthwaite H. Dorr, Peter M. Speer,* and *Russell H. Robbins* for petitioner. *Solicitor General Mitchell, Assistant Attorney Galloway,* and *Mr. J. Frank Staley* for the United States.

No. 633. CHARLES M. COTTERMAN *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. William F. Norman, Daniel R. Williams, Walter E. Barton,* and *J. J. Lynch* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 635. H. A. PHARR, TRUSTEE IN BANKRUPTCY OF MOBILE SHIPBUILDING COMPANY *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Monte Appel* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 663. JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY, *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Mr. F. Carter Pope* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 672. W. J. TUBBS *v.* STATE OF WASHINGTON. November 29, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Messrs. Fred B. Morrill* and *F. H. McDermont* for petitioner. No appearance for respondent.

No. 678. RODOLFO A. FAJARDO *v.* PHILIPPINE ISLANDS. November 29, 1926. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Gabriel La O* for petitioner. *Mr. William C. Rigby* for respondent.

No. 680. GUY H. SHOWN, TRUSTEE IN BANKRUPTCY IN THE MATTER OF R. R. BAKER, BANKRUPT, *v.* ROBERT R. BAKER, BANKRUPT. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert Burrow* for petitioner. *Mr. H. H. Shelton* for respondent.

No. 682. GEORGE A. MOORE AND COMPANY *v.* EDGAR MATHIEU. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel Knight* for petitioner. *Mr. Charles D. Hamel* for respondent.

No. 684. UNITED STATES *v.* BELRIDGE OIL COMPANY. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for the United States. *Mr. Oscar Lawler* for respondent.

No. 688. JOE MILLER ET AL., INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF L. MILLER, DECEASED, *v.* GEORGE W. BROWN AND J. O. SIMS, RECEIVERS OF MILLER-LINK LUMBER COMPANY. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. W. Kaiser* for petitioners. *Mr. H. M. Garwood* for respondents.

No. 689. RANGHILD JOHNSON *v.* WHITNEY COMPANY. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur I. Moulton* for petitioner. No appearance for respondent.

No. 690. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* HOWE-McCURTAIN COAL AND COKE COMPANY. November 29, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. W. R. Bleakmore* for petitioner. *Mr. James H. Gordon* for respondent.

No. 692. UNITED VERDE COPPER COMPANY *v.* W. A. JORDAN, W. E. JORDAN, C. A. JORDAN, ET AL., ETC. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edward W. Rice* and *Clifton Mathews* for petitioner. *Mr. William R. Harr* for respondents.

No. 693. UNITED VERDE EXTENSION MINING COMPANY *v.* W. A. JORDAN, W. E. JORDAN, C. A. JORDAN, ET AL., ETC. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. E. E. Ellinwood, Howard Cornick,* and *John M. Ross* for petitioner. *Mr. William R. Harr* for respondents.

No. 694. EDWIN H. ARMSTRONG AND WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY *v.* LEE DE FOREST, DE FOREST RADIO TELEPHONE & TELEGRAPH COMPANY ET AL. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John C. Kerr* and *Drury W. Cooper* for petitioners. No appearance for respondents.

No. 696. UNITED STATES *v.* ARKELL AND DOUGLAS, INC., ET. AL., AND THOMAS G. PLANT COMPANY. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. J. Frank Staley* for the United States. *Mr. D. Roger Englar* for respondents.

No. 698. ALBERT ROSS *v.* UNITED STATES;

No. 699. PETER C. JEZEWSKI *v.* UNITED STATES;

No. 700. MAX WOSINSKI *v.* UNITED STATES;

No. 706. SAM LASKOLIN *v.* UNITED STATES. November 29, 1926. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Earl J. Davis* for petitioner in No. 698. *Mr. Thomas W. Payne* for petitioners in Nos. 699 and 700. *Mr. Ira J. Pettiford* for petitioner in No. 706. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 701. UNITED STATES *v.* HEBER NATIONS. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States. *Messrs. Charles G. Rivelle* and *Patrick H. Cullen* for respondent.

No. 702. COMMONWEALTH OF KENTUCKY EX REL. FRANK E. DAUGHERTY, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY *v.* WALDEMAR CONRAD VON ZEDWITZ, UNITED STATES TRUST COMPANY OF NEW YORK AND HENRY CACHARD, TRUSTEES, ETC. November 29, 1926. Petition for a writ of certiorari to the Court of

Appeals of the State of Kentucky denied. *Mr. Benjamin D. Warfield* for petitioner. *Messrs. Alex. P. Humphrey, Edward P. Humphrey, Charles W. Milner, William A. W. Stewart,* and *George L. Shearer* for respondents.

No. 704. ARTHUR H. LAMBORN ET AL., SURVIVING PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LAMBORN AND COMPANY *v.* STEAMSHIP TEXAS MARU, KOKUSAI KISEN KABUSHIKI KAISHA. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis O. Van Doran* for petitioners. *Mr. George C. Sprague* for respondent.

No. 718. DOROTHY LEE *v.* UNITED STATES. November 29, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank J. Hennessy* and *Marshall B. Woodworth* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 740. JOHN L. HICKS *v.* UNITED STATES. December 6, 1926. Motion for leave to proceed further *in forma pauperis* is denied for the reason that the court, upon inspection of the record as herein submitted, finds that there is no ground for certiorari to the Circuit Court of Appeals, application for which is hereby also denied. The costs already incurred herein by direction of the court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. John L. Hicks, pro se,* for petitioner. No appearance for the United States.

No. 707. MAX SEIF, ON BEHALF OF NATHAN SEIF, HIS BROTHER *v.* JOHN D. NAGLE, COMMISSIONER OF IMMIGRATION. December 6, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. A. A. McGee* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 717. JESUS M. ROSSY *v.* RAFEAL DEL VALLE ZENO. December 6, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Cornelius C. Webster* for petitioner. *Messrs. Carroll G. Walter* and *William Greenough* for respondent.

No. 720. L. BILODEAU, W. R. SWORD, DAVID EVERETT, AND BERNARD FRANK *v.* UNITED STATES. December 6, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert B. McMillan* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 721. SOUTH BEND BAIT COMPANY *v.* JAMES HEDDONS' SONS, INC., AND HENRY S. DILLS. December 6, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick D. McKenney* for petitioner. *Mr. Samuel W. Banning* for respondents.

No. 724. HARRY F. SINCLAIR AND ALBERT B. FALL *v.* UNITED STATES. December 6, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of

Columbia denied. *Messrs. George P. Hoover, Martin W. Littleton, J. W. Zevely, Henry A. Wise,* and *Levi Cooke* for petitioners. *Messrs. Atlee Pomerene, Owen J. Roberts,* and *Peyton Gordon* for the United States.

No. 467. Baltimore & Ohio Southwestern Railroad Company *v.* Sherman D. Hill, Administrator of the Estate of Thomas J. Hill, Deceased. December 13, 1926. Petition for a writ of certiorari to the Appellate Court of the State of Indiana denied. *Messrs. William A. Eggers, C. W. McMullen,* and *Morrison R. Waite* for petitioner. *Mr. Thomas M. Honon* for respondent.

No. 726. Lehigh Valley Railroad Company *v.* Harriet A. Bissett. December 13, 1926. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. George S. Hobart* for petitioner. *Mr. Isidor Kalisch* for respondent.

No. 731. United States ex rel. Vincenzo Cosmano *v.* James J. Davis, Secretary of Labor, and W. J. Coyne, Inspector in Charge. December 13, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Taylor E. Brown* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondents.

No. 733. F. C. Boorman, doing business under the name and style of the Twentieth Century Company, and Lillian Mencl *v.* Edwards and Deutsch Lithographing Company. December 13, 1926. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Nelson J. Jewett* and *George A. Critton* for petitioners. *Mr. Wallace R. Lane* for respondent.

No. —, original. Ex parte in the matter of City of New York, Transit Commission, and John F. Gilchrist et al., etc. See *ante*, p. 650.

No. 765. Otis Reese *v.* United States. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. January 3, 1927. Motion for leave to proceed further in forma pauperis denied for the reason that the court, upon inspection of the record herein submitted, finds that there is no ground for certiorari to the Circuit Court of Appeals, application for which is hereby also denied. The costs already incurred herein by direction of the court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Otis Reese, pro se.* No appearance for the United States.

No. 728. Al Lau *v.* United States. January 3, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James M. Beck* and *Cyrus E. Dietz* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 730. Hyman Schroeder, as Trustee in Bankruptcy of Famous Fain Company, Inc., Bankrupt *v.* Edward Howard O'Flyn. January 3, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for

the Second Circuit denied. *Mr. Charles A. Riegelman* for petitioner. *Mr. George W. Wingate* for respondent.

No. 735. JAMES G. TRAINER *v.* DARBY A. DAY. January 3, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. C. C. Daniels* for petitioner. *Mr. Thomas McCall* for respondent.

No. 592. H. L. EVELAND, HUGH SMITH, AND B. W. BAER, CONSTITUTING TAX COMMISSION OF SOUTH DAKOTA *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY. See *post*, p. 775.

No. 782. MORTON S. HAWKINS *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. January 10, 1927. Motion for leave to proceed further in forma pauperis denied for the reason that the court, upon inspection of the record herein submitted, finds that there is no ground for certiorari to the Circuit Court of Appeals, application for which is hereby also denied. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Morton S. Hawkins, pro se,* for petitioner. No appearance for the United States.

No. 732. WILLIAM BOBKOWSKI, IN BEHALF OF SABINA BOBKOWSKI, JOSEPHINE BOBKOWSKI, ET AL. *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION. January 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 736. HARRY F. SINCLAIR *v.* UNITED STATES. January 10, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George P. Hoover, Martin W. Littleton, J. W. Zevely,* and *G. T. Stanford* for petitioner. *Messrs. Atlee Pomerene, Owen J. Roberts,* and *Peyton Gordon* for the United States.

No. 738. UNION PACIFIC RAILROAD COMPANY *v.* HERBERT W. BOYLE. January 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Messrs. C. A. Magaw* and *N. H. Loomis* for petitioner. *Mr. Frank L. McCoy* for respondent.

No. 743. LUCKENBACH STEAMSHIP COMPANY, INC., OWNER OF THE STEAMSHIP "*Walter A. Luckenbach*" *v.* UNION OIL COMPANY OF CALIFORNIA, CLAIMANT ON BEHALF OF ITSELF AND ITS UNDERWRITERS ON THE STEAM TANKER, ETC., ET AL. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis T. Hengstler* for petitioner. *Messrs. S. Hasket Derby, Carroll Single, William Denman, William B. Acton, Edward J. McCutcheon, Warren Olney, Jr.,* and *Farnham P. Griffiths* for respondents.

No. 745. CHILLICOTHE FURNITURE COMPANY *v.* CHARLES G. REVELLE, RECEIVER OF INTERSTATE CASUALTY COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Guy A. Thompson* for petitioner. No appearance for respondent.

No. 746. BRODERICK AND BASCOM ROPE COMPANY *v.* LUCKENBACH STEAMSHIP COMPANY. January 10, 1927.

Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Winter S. Martin* for petitioner. No appearance for respondent.

No. 750. C. G. CATE *v.* UNITED STATES. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. T. Pope Shepherd* and *Frank S. Carden* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat,* and *Harry S. Ridgely* for the United States.

No. 751. TEXAS PIPE LINE COMPANY *v.* J. L. WARE. January 10, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. Zach Spearing* for petitioner. No appearance for respondent.

No. 753. JOHN H. LOTHROP *v.* SOUTHERN PACIFIC COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James G. Wilson* and *John F. Reilly* for petitioner. *Messrs. Ben C. Dey* and *Alfred A. Hampson* for respondent.

No. 754. JOHN H. LOTHROP *v.* SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James G. Wilson* and *John F. Reilly* for petitioner. *Messrs. Charles H. Carey, James B. Kerr,* and *Charles A. Hart* for respondent.

No. 755. JOHN H. LOTHROP *v.* OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James*

G. Wilson and *John F. Reilly* for petitioner. *Mr. Arthur C. Spencer* for respondent.

No. 757. AMERICAN RAILWAY EXPRESS COMPANY *v.* BERT ROSE AND ARTHUR L. LOWE, EXECUTORS UNDER THE WILL OF GEORGE ROSE. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Austin M. Pinkham* and *A. M. Hartung* for petitioner. No appearance for respondents.

No. 758. PETER SCHOENHOFEN BREWING COMPANY *v.* ALVEY-FERGUSON COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George A. Chritton, Russell Wiles,* and *Frederic D. McKenney* for petitioner. *Mr. Jo. Baily Brown* for respondent.

No. 759. ROBERT B. HUDSON, A JUDGE OF THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA *v.* VERNON V. HARRIS, AS RECEIVER OF THE RIVERSIDE OIL AND REFINING COMPANY, J. B. DUDLEY, AND J. D. LYDICK. January 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Henry B. Martin* for petitioner. *Messrs. John B. Dudley* and *J. D. Lydick* for respondents.

No. 760. ODIE OLAND OWENS *v.* VERNON V. HARRIS, AS RECEIVER OF THE RIVERSIDE OIL AND REFINING COMPANY, J. B. DUDLEY, AND J. D. LYDICK. January 10, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Henry B. Martin* for petitioner. *Messrs. John B. Dudley* and *J. D. Lydick* for respondents.

No. 762. BANK OF MONTREAL *v.* BEACON CHOCOLATE COMPANY. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Louis S. Dent* and *Charles Y. Freeman* for petitioner. *Mr. Mitchell D. Follansbee* for respondent.

No. 763. HENDERSON TIRE AND RUBBER COMPANY *v.* ALBERT L. REEVES AND MERRILL E. OTIS, JUDGES OF THE UNITED STATES DISTRICT COURT, ETC., ET AL. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Maurice H. Winger* for petitioner. No appearance for respondent.

No. 767. FRANK D. DRAKE *v.* SARAH THOMPSON, JOHN R. THOMPSON, AND IOWA SAVINGS BANK. January 10, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William E. Shuman* and *Matthew A. Hall* for petitioner. *Mr. James J. Halligan* for respondents.

No. 110. LUCY FISHER, JAMES CHARLES, ELLEN STAKE, NÉE CHARLES ET AL. *v.* E. J. CRIDER. See *ante*, p. 655.

No. 644. BYRON DUNN AND ROBERT DUNN *v.* STATE OF LOUISIANA. See *ante*, p. 656.

No. 121. A. J. THIGPEN AND A. J. THIGPEN, JR. *v.* MIDLAND OIL COMPANY. See *ante*, p. 658.

No. 761. LUCEY MANUFACTURING CORPORATION *v.* MALCOLM F. MORLAN. January 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Godfrey Goldmark* and *Albert H. Crutcher* for petitioner. *Mr. Oscar Lawler* for respondent.

No. 773. ARTURO MENDEŻ *v.* JUSTICES BINGHAM, ANDERSON, AND JOHNSON. January 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Felix C. Devila* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for respondents.

No. 774. FRANK SOFGE *v.* JOHN W. SNOOK, WARDEN. January 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Hooper Alexander* and *Thomas W. Hardwick* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 777. UTAH CONSTRUCTION COMPANY AND AETNA CASUALTY AND SURETY COMPANY *v.* UNITED STATES FOR THE USE AND BENEFIT OF H. LINDSTROM ET AL. January 17, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. B. M. Aikens* for petitioners. *Messrs. H. W. Hutton, Herman Phleger,* and *Fletcher G. Flaherty* for respondents.

No. 778. ORLA RUBSAMIN, INDIVIDUALLY AND AS RECEIVER, ETC. *v.* CARL H. SCHULTZ, A CORPORATION, ET AL. Certiorari to the Circuit Court of Appeals for the Second Circuit. January 24, 1927. The motion for leave to file petition for writ of certiorari *nunc pro tunc* is denied and the petition already filed is therefore stricken from the files. *Mr. David Steckler* for petitioner. *Mr. William A. Barber* for respondents.

No. 842. ANNA NELSON *v.* J. L. WALROD, S. E. ELLSWORTH, AND C. W. BURNHAM. Error to the Supreme Court of the State of North Dakota. February 21, 1927.

Motion for leave to proceed further herein in forma pauperis denied for the reason that the court, upon examination of the opinion of the court below and of the typewritten record herein submitted, finds (1) that there is no ground for the writ of error under § 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and (2) that there is involved no federal question upon which, treating the writ of error as an application for a writ of certiorari, such writ could be granted. The writ of error is therefore dismissed and the writ of certiorari denied. The costs already incurred herein by direction of the court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Kenneth D. McKellar* for plaintiff in error. No appearance for defendants in error.

No. 788. Northwestern Mutual Life Insurance Company *v.* Marion Wiggins, Individually and as Executrix and Trustee under the will of W. B. Wiggins, deceased. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles H. Carey, James B. Kerr,* and *Charles A. Hart* for petitioner. *Mr. Arthur C. Spencer* for respondent.

No. 789. Hagop Bogigian *v.* Henry F. Long, Commissioner of Corporations and Taxation; and

No. 790. Helen J. C. Bogigian *v.* Henry F. Long, Commissioner of Corporations and Taxation. February 21, 1927. Petition for writs of certiorari to the Superior Court of Suffolk County, State of Massachusetts, denied. *Messrs. Hagop Bogigian, pro se, W. B. Grant, Henry E. Whittemore,* and *Helen J. C. Bogigian, pro se,* for petitioners. No appearance for respondent.

No. 792. GEORGE N. KONSOUTE *v.* PENNSYLVANIA RAILROAD COMPANY. February 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. J. Thomas Hoffman* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery,* and *Robert D. Dalzell* for respondent.

No. 795. STATE OF WASHINGTON EX REL. ISADORE R. EDELSTEIN *v.* WILLIAM A. HUNEKE, JUDGE OF THE SUPERIOR COURT OF SPOKANE COUNTY. February 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Messrs. George Turner* and *Richard W. Nuzum* for petitioner. *Mr. S. M. Driver* for respondent.

No. 796. JACOB TELFAIR SMITH *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION; and

No. 797. CATZ AMERICAN SHIPPING COMPANY, INC. *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. February 21, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James K. Symmers* and *John C. Prizer* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for respondent.

No. 798. BUCKEYE TRACTION DITCHER COMPANY *v.* AUSTIN MACHINERY COMPANY. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wilber Owen* for petitioner. No appearance for respondent.

No. 800. SOUTHERN INDUSTRIAL INSTITUTE *v.* MRS. BURNHAM S. MARSH ET AL. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Daniel MacDougald* for petitioner. *Mr. Robert C. Alston* for respondents.

No. 803. Ida T. Dickinson, Luella J. Manning, Ellsworth Avery, et al. *v.* New England Power Company. February 21, 1927. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied. *Mr. Herman H. Field* for petitioner. *Mr. Frank W. Knowlton* for respondent.

No. 805. Barker Painting Company *v.* Brotherhood of Painters, Decorators, and Paperhangers of America et al. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry S. Drinker, Jr.,* for petitioner. *Mr. William A. Gray* for respondents.

No. 806. Dampskibs Aktieselsk Orient, claimant of the Danish Steamship "*Natal*," her engines, etc. *v.* W. R. Grace and Company. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Irving H. Frank, Nathan H. Frank, O. D. Duncan,* and *Russell T. Mount* for petitioner. *Mr. W. H. Orrick* for respondent.

No. 810. George Gracie *v.* United States. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel T. Hagan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 821. Pennsylvania Railroad Company *v.* William H. Muller and Company, Inc. February 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Frederic D. McKenney, Ralph Robinson,* and *Shirley Carter* for petitioner. *Mr. R. E. Lee Marshall* for respondent.

No. 345. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* STATE OF OKLAHOMA ET AL. See *post*, p. 779.

No. 855. PETER LEMIEUX *v.* UNITED STATES AND SHAH BAH YAUST. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. February 28, 1927. The motion for leave to proceed further herein in forma pauperis denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no ground upon which a writ of certiorari can be issued, application for which is therefore hereby also denied. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Webster Ballinger* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Nat M. Lacey* for respondents.

No. 299. PAUL L. JAMES AND W. WILLIS HOUSTON, PARTNERS, TRADING AS PAN-HANDLE COAL COMPANY, *v.* NORFOLK AND WESTERN RAILWAY COMPANY. See *ante*, p. 662.

No. 812. FRANK WEEKE *v.* UNITED STATES. See *ante*, p. 662.

No. 784. DANIEL O'NEILL, HARRY LEVIN, AND MORRIS MULTIN *v.* UNITED STATES. February 28, 1927 Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas J. Rowe, Jr.,* and *Charles A. Houts* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 785. MICHAEL WHALEN *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

Messrs. Thomas J. Rowe, Jr., and *Charles A. Houts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 786. NATHAN GOLDSTEIN v. UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas J. Rowe, Jr.,* and *Charles A. Houts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 787. HARRY F. STRATTON *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas J. Rowe, Jr.,* and *Charles A. Houts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 775. CITY OF WICHITA FALLS, TEXAS, *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Alexander H. McCormick* for the United States.

No. 776. AMERICAN RAILWAY EXPRESS COMPANY *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Benjamin S. Minor, H. Prescott Gatley, Hugh B. Rowland, Arthur P. Drury,* and *A. M. Hartung* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Louis R. Mehlinger* for the United States.

No. 780. LUTHER J. BAILEY AND JAMES E. FULGHAM *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Theodore D. Peyser* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Howard W. Ameli* for the United States.

No. 793. AMERICAN EXCHANGE IRVING TRUST COMPANY (FORMERLY IRVING BANK-COLUMBIA TRUST COMPANY), AS EXECUTOR OF THE ESTATE OF HERMAN SIELCKEN, DECEASED, *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Leonard B. Smith* and *John L. McMaster* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Alexander H. McCormick* for the United States.

No. 804. WABASH RAILWAY COMPANY *v.*. SOUTH DAVIESS COUNTY DRAINAGE DISTRICT. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. N. S. Brown, Homer Hall, S. J. Jones,* and *Frederic D. McKenney* for petitioner. *Mr. Platt Hubbell* for respondent.

No. 809. E. B. JOHNSON, L. A. SANDERS, COUNTY TREASURER, AND MAXWELL INVESTMENT COMPANY *v.* WILLIAM FETZER. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John B. Dudley* and *Alger Melton* for petitioners. *Messrs. A. D. Stevens* and *J. B. Furry* for respondent.

No. 812. FRANK WEEKE *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Mr. Walter A. Hill* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Norman J. Morrisson* for the United States.

No. 814. AMERICAN SECURITY COMPANY AND ALBERT PICK AND COMPANY *v.* STEEL'S CONSOLIDATED, INC. February 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Alfred M. Saperston* for petitioners. *Messrs. James C. Sweeney* and *Henry W. Killeen* for respondents.

No. 817. ILLINOIS CENTRAL RAILROAD COMPANY *v.* UNITED STATES. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edward C. Craig, Charles A. Helsell, W. S. Horton,* and *C. J. Baird* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States.

No. 818. MCGREW COAL COMPANY *v.* ANDREW W. MELLON, AS FEDERAL AGENT. February 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Edwin A. Krauthoff* for petitioner. *Messrs. E. J. White* and *James F. Green* for respondent.

No. 819. CITY OF SEATTLE *v.* PUGET SOUND POWER AND LIGHT COMPANY. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas J. L. Kennedy* for petitioner. No appearance for respondent.

No. 874. PUGET SOUND POWER AND LIGHT COMPANY *v.* CITY OF SEATTLE. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* for petitioner. No. appearance for respondent.

No. 820. SEABOARD AIR LINE RAILWAY COMPANY *v.* M. A. INGE. February 28, 1927. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Murray Allen* for petitioner. *Messrs. George C. Green* and *J. B. Ramsey* for respondent.

No. 822. M. COPPARD, TRUSTEE OF THE ESTATE OF DOLLINGERS, INCORPORATED, BANKRUPT *v.* B. C. MARTIN. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Perry J. Lewis* for petitioner. No appearance for respondent.

No. 824. A. G. JOHNS, AS TRUSTEE IN BANKRUPTCY OF E. Y. FOLEY, INC., A BANKRUPT, ETC. *v.* UNITED BANK AND TRUST COMPANY OF CALIFORNIA. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Tracy L. Jeffords, Edwin C. Dutton,* and *Theodore M. Stuart* for petitioner. *Messrs. D. S. Ewing, O. K. Cushing, Charles S. Cushing, Dilger Trowbridge,* and *John E. Biby* for respondent.

No. 825. A. G. JOHNS, AS TRUSTEE IN BANKRUPTCY OF E. Y. FOLEY, INC., A BANKRUPT, ETC. *v.* PACIFIC-SOUTHWEST TRUST AND SAVINGS BANK, J. E. LYNES, INDIVIDUALLY, ETC., ANDREWS BROS. ET AL. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Tracy L. Jeffords* for petitioner. *Messrs. John E. Biby* and *George E. Farrand* for respondents.

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No. 830. CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY *v.* ALVA CRAWFORD. February 28, 1927. Petition for a writ of certiorari to the Appellate Court for the First District of the State of Illinois denied. *Messrs. John D. Black* and *Edward G. Ince* for petitioner. *Messrs. Morse Ives* and *Herbert H. Patterson* for respondent.

No. 831. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *v.* AGNES SULLIVAN. February 28, 1927. Petition for a writ of certiorari to the Supreme Court of Errors, Third Judicial District of the State of Connecticut, denied. *Mr. John M. Gibbons* for petitioner. No appearance for respondent.

No. 832. SAVERIA SPREMULLI *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 833. JOHN H. PARROTT *v.* JOHN C. NOEL, COLLECTOR OF INTERNAL REVENUE. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourt Circuit denied. *Mr. Homer Sullivan* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. K. L. Campbell, A. W. Gregg,* and *William T. Sabine, Jr.,* for respondent.

No. 834. H. R. DAVIS, FOR THE USE AND BENEFIT OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *v.* S. J. MCFARLAND ET AL. February 28, 1927. Petition for a

writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Davis* for petitioner. *Messrs R. E. L. Saner, M. M. Crane,* and *Cullen F. Thomas* for respondents.

No. 835. ALEXANDER B. STEWART *v.* DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ET AL. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. W. Pendleton* and *Marion DeVries* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for respondents.

No. 837. HONTO H. TOOLEY, INDIVIDUALLY AND AS EXECUTRIX OF ESTATE OF WILLIAM L. TOOLEY, DECEASED, *v.* AETNA LIFE INSURANCE COMPANY. February 28, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank G. Morris* for petitioner. *Mr. Harry P. Lawther* for respondent.

No. 808. WILLIAM STEWART, ENROLLED AS A SEMINOLE INDIAN UNDER THE NAME OF WILLIAM, NED LUSTY, ACTING FOR HIMSELF AND AS GUARDIAN, ETC., ET AL. *v.* C. B. BILLINGTON, SKELLY OIL COMPANY, C. M. CADE, ET AL. March 7, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. John G. Campbell, William W. Pryor,* and *William N. Stokes* for petitioners. *Messrs. W. P. Z. German* and *Alvin F. Molony* for respondents.

No. 838. CHARLES HOXIE *v.* UNITED STATES. March 7, 1927. Petition for a writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit denied. *Messrs. J. A. Hellenthal* and *Morven Thompson* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 841. ALBERT V. T. DAY *v.* UNION SWITCH AND SIGNAL COMPANY. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles S. Jones* and *William S. Pritchard* for petitioner. *Mr. Ralph L. Scott* for respondent.

No. 845. WILLIAM F. ALLEN AND W. HERBERT HALL, COPARTNERS, ETC., ET AL. *v.* NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, ET AL. March 7, 1927. Petition for writ of certiorari to the Circuit Court for the Fourth Circuit denied. *Mr. James E. Heath* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery, George R. Allen,* and *Henry W. Biklé* for respondents.

No. 846. GUSTAVUS A. BUDER AND OSCAR E. BUDER *v.* EHRHARDT W. FRANZ. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Gustavus A. Buder* and *Oscar E. Buder, pro se. Messrs. S. Mayner Wallace* and *Allen McReynolds* for respondent.

No. 847. WHITE OAK COAL COMPANY *v.* UNITED STATES. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Addison C. Burnham, John W. Davis,* and *Robert S. Spilman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat,* and *Howard W. Ameli* for the United States.

No. 849. ALEXANDER MILBURN COMPANY *v.* UNION CARBIDE & CARBON CORPORATION, UNION CARBIDE COMPANY, UNION CARBIDE SALES COMPANY, ET AL. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. J. Kemp Bartlett, Edgar Allen Poe,* and *Guion Miller* for petitioner. *Messrs. Edwin G. Baetger, Fred H. Haggerson, W. Calvin Chesnut,* and *Julian C. Harrison* for respondents.

No. 853. CHICAGO AND NORTH WESTERN RAILWAY COMPANY *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., AND LOUIS VERUCHI, ADMINISTRATOR OF THE ESTATE OF DOMINIC VERUCHI, DECEASED. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Winnebago County, State of Illinois, denied. *Messrs. Samuel H. Cady, Weldon A. Dayton,* and *R. N. VanDoren* for petitioner. *Mr. Roy F. Hall* for respondents.

No. 856. STANLEY C. KIMBLE AND WALTER E. AHLBERG, ADMINISTRATORS OF BERNARD A. AHLBERG, DECEASED *v.* AETNA LIFE INSURANCE COMPANY. March 7, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Samuel H. Richards* and *Thomas E. French* for petitioners. *Mr. Paul Reilly* for respondent.

No. 857. JOHN R. LAND *v.* COLUMBUS BROCKETT. March 7, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. S. L. Herrold* for petitioner. No appearance for respondent.

No. 811. FRANK W. KEELER *v.* STANLEY MYERS, DISTRICT ATTORNEY, ETC., AND THOMAS M. HURLBURT, SHERIFF. See *ante,* p. 668.

No. 861. Birmingham Belt Railroad Company *v.* Jessie May Hendrix, as Administratrix of the Estate of George Hendrix, deceased. March 14, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Messrs. E. H. Cabaniss, Forney Johnston,* and *W. R. C. Cocke* for petitioner. *Messrs. John London, George W. Yancey,* and *Walter Brower* for respondent.

No. 839. Hanover Fire Insurance Company of New York *v.* Merchants Transportation Company. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Carroll Single, S. Hasket Derby,* and *Benjamin S. Grosscup* for petitioner. *Mr. Overton G. Ellis* for respondent.

No. 859. Thomas R. Tarn *v.* United States. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Howard W. Ameli* for the United States.

No. 865. Detroit Terminal Railroad Company *v.* Pennsylvania-Detroit Railroad Company and Pennsylvania Railroad Company. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank E. Robson* for petitioner. *Mr. Frederic D. McKenney* for respondents.

No. 867. P. S. Kendrick and J. A. Kendrick *v.* Mary W. Kendrick. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit denied. *Messrs. J. M. McCormick, S. M. Leftwich,* and *Paul Carrington* for petitioners. *Mr. David B. Trammett* for respondent.

No. 868. CAROLINE H. MCDOWELL, EXECUTRIX OF THE ESTATE OF JESSE C. MCDOWELL, DECEASED *v.* D. B. HEINER, COLLECTOR OF INTERNAL REVENUE. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William G. Heiner* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Sewall Key,* and *A. W. Gregg* for respondent.

No. 871. ORMSBY MCKNIGHT MITCHEL *v.* FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman Aaron* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Sewall Key* for respondent.

No. 877. FEDERAL TRADE COMMISSION *v.* HARRIET HUBBARD AYER, INC. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell,* and *Messrs. Bayard T. Hainer,* and *Adrian F. Busick* for petitioner. *Mr. Ernest W. Marlow* for respondent.

No. 870. UNITED STATES *v.* SAKHARAM GANESH PANDIT. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. No appearance for respondent.

No. 875. First National Bank of Ogden *v.* First National Bank of Rigby. March 14, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. H. DeVine* and *J. A. Howell* for petitioner. No appearance for respondent.

No. 961. Carlos Arocho *v.* Porto Rico. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. March 21, 1927. The motion for leave to proceed further herein in forma pauperis is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no ground upon which certiorari can be issued, application for which is therefore hereby also denied. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr Frank Antonsanti* for petitioner. No appearance for respondent.

No. 878. Sylvester Company *v.* Malcolm E. Nichols, Collector of Internal Revenue. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George S. Fuller* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. J. Louis Monarch, A. W. Gregg,* and *John R. Wheeler* for respondent.

No. 879. E. Henry Wemme Company *v.* Ben Selling, Dr. Allen P. Noyes, Edgar H. Sensenich, et al., etc. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edward W. Wickey* and *Thomas Mannix* for petitioner. No appearance for respondents.

No. 883. 500 CASES OF TOMATOES AND ITALIA-AMERICAN SHIPPING CORPORATION *v.* FRANCIS H. LEGGETT AND COMPANY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioners. *Mr. T. Catesby Jones* for respondent.

No. 885. CROPPER KNITTING MILLS, INC. *v.* FRANKLIN KNITTING MILLS, INC. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Avel B. Silverman* for petitioner. *Mr. Edward M. Evarts* for respondent.

No. 886. PHILADELPHIA AND READING RAILWAY COMPANY (NOW READING COMPANY) *v.* WILLIAM A. AUCHENBACH. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward L. Katzenbach* for petitioner. *Mr. Samuel Schneider* for respondent.

No. 892. MRS. J. W. PEEBLES AND J. W. PEEBLES *v.* EXCHANGE BUILDING COMPANY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. W. Canada* for petitioners. No appearance for respondent.

No. 895. BALTIMORE AND OHIO RAILROAD COMPANY AND GAULEY COMPANY *v.* CARY C. HINES, ADMINISTRATOR DE BONIS NON OF THE PERSONAL ESTATE OF WILLIAM CRENNELL, JR., DECEASED. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Braxton County, State of West Virginia, denied. *Mr. W. E. Haymond* for petitioners. *Mr. Carey C. Hines, pro se.*

No. 896. BALTIMORE AND OHIO RAILROAD COMPANY *v.* CARY C. HINES, ADMINISTRATOR DE BONIS NON OF THE PERSONAL ESTATE OF WILLAM CRENNELL, JR., DECEASED. March 21, 1927. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia, denied. *Mr. W. E. Haymond* for petitioner. *Mr. Carey C. Hines, pro se.*

No. 897. WILLIAM E. GUY *v.* HONORABLE JAKE FISHER, JUDGE OF THE CIRCUIT COURT OF BRAXTON COUNTY, CARY C. HINES, ADMINISTRATOR DE BONIS NON, ETC., ET AL. March 21, 1927. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. W. E. Haymond* for petitioner. *Mr. Carey C. Hines, pro se.*

No. 900. DERBY OIL COMPANY *v.* H. H. MOTTER, INTERNAL REVENUE COLLECTOR. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John H. Brennan* and *Harry H. Smith* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, and Mr. Sewall Key* for respondent.

No. 826. CLEMENT H. BETTS *v.* UNITED STATES. March 21, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Lucius H. Beers, Franklin B. Lord,* and *Parker McCollester* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

No. 887. SOPHIE WEICHERS *v.* BIRDIE WEICHERS. March 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Messrs. Frederick C. Peterson* and *Albert E. Carter* for petitioner.

Messrs. William I. Brobeck and *Herman Phleger* for respondent.

No. 888. MARION B. FRIEDENWALD *v.* HERBERT FRIEDENWALD. March 21, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Harry A. Hegarty* and *Edwin A. Mooers* for petitioner. *Mr. Henry E. Davis* for respondent.

No. 893. RED WING MALTING COMPANY *v.* LEVI M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE, ETC. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William H. Oppenheimer* and *Montreville J. Brown* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for respondent.

No. 899. ALICE A. BAUCHSPIES *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. March 21, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Ulysses S. Koons* for petitioner. No appearance for respondent.

No. 901. EARL CARROLL *v.* UNITED STATES. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James M. Beck, Herbert C. Smith, Wilton J. Lambert,* and *R. H. Yeatman* for petitioner. *Solicitor General Mitchell, Assistant to the Attorney General Donovan, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 907. LAND COMPANY OF FLORIDA *v.* I. H. FETTY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George T. Cann* and *Samuel B. Adams* for petitioner. *Messrs. A. B. Lovett* and *Robert M. Hitch* for respondent.

No. 908. NATIONAL ELECTRIC TICKET REGISTER COMPANY *v.* AUTOMATIC TICKET REGISTER COMPANY. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis E. Giles* for petitioner. *Mr. E. W. Marshall* for respondent.

No. 910. JULIA BURNET RICE *v.* MARK EISNER, COLLECTOR OF INTERNAL REVENUE. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Marshall* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Sewall Key, A. W. Gregg,* and *Fred W. Dewart* for respondent.

No. 911. HENRY C. DUNLAP *v.* UNITED STATES. March 21, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Sam G. Bratton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. G. A. Iverson* for the United States.

No. 756. MILLER AND LUX, INCORPORATED *v.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, H. W. BRUNDIGE, C. L. SEAVEY, ET AL., ETC. Error to the Supreme Court of the State of California. April 11, 1927. On suggestion of diminution of the record the motion for a

writ of certiorari herein is denied. *Mr. Adolphus E. Graupner* for plaintiff in error. *Mr. Carl I. Wheat* for defendants in error.

No. 942. IDA CONLEY *v.* N. J. WOLLARD, ADMINISTRATOR OF THE ESTATE OF ETHAN L. ZANE, DECEASED. See *ante*, p. 674.

No. 912. THOMAS P. DUFFY *v.* COLONIAL TRUST COMPANY. April 11, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Benjamin B. Pettus* for petitioner. *Mr. Thomas Patterson* for respondent.

No. 913. FRED HOOD *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren K. Snyder* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 917. EL RENO WHOLESALE GROCERY COMPANY *v.* CALIFORNIA PRUNE AND APRICOT GROWERS, INC. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. F. Wilson* for petitioner. *Mr. Aaron Sapiro* for respondent.

No. 918. ALICE MCCLELLAND *v.* HIGHWAY CONSTRUCTION COMPANY AND GEORGE STEWART. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Alice McClelland, pro se.* No appearance for respondent.

No. 919. GULF, MOBILE AND NORTHERN RAILROAD COMPANY *v.* J. A. MYERS. April 11, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. Ellis B. Cooper* for petitioner. *Mr. Elmer C. Sharp* for respondent.

No. 920. HERMANN F. M. MUTZENBECHER, FRANK F. MUTZENBECHER, ERNEST BEHR, ET AL., ETC. *v.* SUMNER BALLARD. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Jennings C. Wise* and *Frank D. Moore* for petitioners. *Mr. David Rumzey* for respondent.

No. 921. IVOR ARMSTRONG *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ernest B. D. Spagnoli* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. K. L. Campbell* for the United States.

No. 923. CHARLES J. BARNES AND JEAN MASON BARNES, MARGARET MULVIHILL, AND FRANK MULVIHILL *v.* SOUTHERN PACIFIC COMPANY AND SOUTHERN PACIFIC RAILROAD COMPANY. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Gurney E. Newlin* for petitioner. *Messrs. Frank Thunen, C. F. R. Ogilby,* and *W. I. Gilbert* for respondents.

No. 925. MAISON DORIN SOCIETE ANONYME *v.* JOHN W. ARNOLD, DAN H. ARNOLD, ADELAIDE F. ARNOLD, ET AL., ETC. April 11, 1927, Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Messrs. Charles R. Allen, Howard T. Kingsbury, Hugo Mock, and *Asher Bloom* for petitioner. *Mr. Lorenzo D. Armstrong* for respondents.

No. 926. Maison Dorin Societe Anonyme *v.* John W. Arnold, Dan H. Arnold, Adelaide F. Arnold, et al., etc. April 11, 1927, Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles R. Allen* for petitioner. *Mr. Lorenzo D. Armstrong* for respondents.

No. 928. Union Trust Company of Maryland *v.* Chapman A. Peck, Trustee. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Walter H. Buck* for petitioner. *Messrs. G. Ridgely Sappington* and *Charles G. Baldwin* for respondent.

No. 932. Louise Taylor *v.* Southern Railway Company. April 11, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. William H. DeLacy* and *William C. DeLacy* for petitioner. No appearance for respondent.

No. 933. Robert Murphy and Edward Caples, et al., as Trustees and Executors of Mrs. M. A. Caples, deceased *v.* Frank W. Vellacott, as Trustee in Bankruptcy of Estate of Joseph Caples, bankrupt. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Morrow* for petitioners. *Mr. William H. Burges* for respondent.

No. 934. GRAINGER BROTHERS COMPANY *v.* G. AMSINCK AND COMPANY, INC. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Ritchie, Jr.,* and *James M. Beck* for petitioner. *Mr. Joseph D. Fradenburg* for respondent.

No. 935. H. J. HUGHES COMPANY *v.* G. AMSINCK AND COMPANY, INC. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Ritchie, Jr.,* and *James M. Beck* for petitioner. *Mr. Joseph D. Fradenburg* for respondent.

No. 936. BLISS SYRUP REFINING COMPANY *v.* G. AMSINCK AND COMPANY, INC. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Ritchie, Jr.,* and *James M. Beck* for petitioner. *Mr. Joseph D. Fradenburg* for respondent.

No. 937. E. B. CANTRELL ET AL. *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Rhodes S. Baker* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 938. ROSCOE HUNNICUTT *v.* UNITED STATES. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Rhodes S. Baker* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt* and *Mr. John J. Byrne* for the United States.

No. 940. STAMATIS ANASTASOPOULOS ET AL. *v.* STEGER AND SONS PIANO MANUFACTURING COMPANY ET AL. April, 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Patrick H. O'Donnell* for petitioners. *Messrs. Edward J. Brundage, Benson Landon, Robert N. Holt,* and *David M. Kahane* for respondents.

No. 949. UNITED STATES EX REL. SAMUEL OPPENHEIM *v.* WILLIAM C. HECHT, UNITED STATES MARSHAL. April 11, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William E. Russell* and *M. Wallace Dickson* for petitioner. *Mr. Robert D. Murray* for respondent.

No. 922. LIBERTY NATIONAL BANK OF SOUTH CAROLINA ET AL. *v.* J. W. MCINTOSH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES ET AL. See *post,* p. 783.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 4, 1926, TO AND INCLUDING APRIL 11, 1927.

No. 10, original. UNITED STATES *v.* STATE OF WISCONSIN. October 4, 1926. Bill of complaint dismissed on motion of *Solicitor General Mitchell* for the United States. No appearance for respondent.

No. 10. UNITED STATES *v.* LUCIA E. BLOUNT, IN HER OWN RIGHT AND AS ADMINISTRATRIX, C. T. A., OF THE ESTATE OF HENRY F. BLOUNT, DECEASED. Appeal from the Court of Claims. October 4, 1926. Dismissed on motion of *Solicitor General Mitchell* for the United States. *Messrs. Jesse B. Adams* and *Charles F. Carusi* for appellee.

No. 668. W. HENRY MATTOX *v.* UNITED STATES. Error to the District Court of the United States for the North-

ern District of Georgia. October 4, 1926. Docketed and dismissed on motion of *Solicitor General Mitchell* for the United States. No appearance for plaintiff in error.

No. 99. J. McGuire *v.* Railroad Labor Board. Appeal from the District Court of the United States for the Northern District of Illinois. October 4, 1926. Appeal dismissed and case remanded to the United States District Court for the Northern District of Illinois with directions to dismiss the petition without costs to either party, per stipulation of counsel, on motion of *Solicitor General Mitchell* in that behalf, for appellee. *Mr. Donald R. Richberg* for appellant.

No. 7. Public Utilities Commission of the State of Kansas, C. M. Read, J. W. Greenleaf et al. *v.* Arkansas Valley Interurban Railway Company. Appeal from the District Court of the United States for the District of Kansas. October 4, 1926. Dismissed with costs on motion of *Mr. Fred S. Jackson* for appellants. *Mr. Chester I. Long* for appellee.

No. 321. Chicago Great Western Railroad Company *v.* Marian S. Jackson. Certiorari to the Supreme Court of the State of Minnesota. October 4, 1926. Dismissed without costs or disbursements to either party per stipulation of counsel. *Mr. Asa G. Briggs* for petitioner. *Mr. F. M. Miner* for respondent.

No. 581. Dad's Auto Accessories, Inc. *v.* City of Nashville, George J. Tompkins, J. W. Bauman, and Hiliary E. House, etc. Error to the Supreme Court of the State of Tennessee. October 4, 1926. Dismissed

with costs per stipulation of counsel. *Mr. Norman Farrell* for plaintiff in error. No appearance for defendant in error.

No. 25. DELIA SALZER *v.* UNITED STATES, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE. Error to and petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 11, 1926. Writ of error and petition for writ of certiorari dismissed per stipulation of counsel on motion of *Solicitor General Mitchell* in that behalf, for the United States. *Messrs. Thomas F. Walsh* and *James A. Beha* for plaintiff in error.

No. 381. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* TEXAS COMPANY. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 11, 1926. Petition for writ of certiorari dismissed on motion of *Mr. Richard W. Wilmer* in behalf of *Messrs. Sam Streetman* and *Samuel B. Dabney* for petitioner. *Mr. Herbert S. Garrett* for respondent.

No. 483. INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY ET AL. *v.* TEXAS COMPANY. Petition for writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. October 11, 1926. Petition for writ of certiorari dismissed on motion of *Mr. Richard W. Wilmer* in behalf of *Messrs. Sam Streetman* and *Samuel B. Dabney* for petitioners. *Messrs. Harry T. Klein, H. S. Garrett,* and *Charles A. Wilcox* for respondent.

No. 470. UNITED STATES *v.* CURTIS AND COMPANY MANUFACTURING COMPANY. Petition for a writ of cer-

tiorari to the Court of Claims. October 12, 1926. Dismissed on motion of *Mr. Dean Hill Stanley* for the United States. No appearance for respondent.

No. 695. ALBERT OTTINGER, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK *v.* BRONX GAS AND ELECTRIC COMPANY. Appeal from the District Court of the United States for the Southern District of New York. October 18, 1926. Docketed and dismissed with costs on motion of *Mr. William L. Ransom* for appellee. No appearance for appellant.

No. 77. S. NOSE *v.* U. S. WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL. October 21, 1926. Dismissed pursuant to nineteenth rule. *Mr. Lewis E. Whitehead* for plaintiff in error. *Messrs. Tracy C. Becker, U. S. Webb,* and *Frank English* for defendant in error.

No. 130. LESLIE A. GILMORE *v.* STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. October 29, 1926. Dismissed with costs on authority of *Mr. A. M. Fitzgerald* for plaintiff in error. *Mr. Oscar E. Carlstrom* for defendant in error.

No. 58. EVERETT FLINT DAMON EX REL. CHIN HEN YOUE *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts transferred from the Circuit Court of Appeals for the First Circuit. November 1, 1926. Cause remanded to the District Court of the United States for the District of Massachusetts with directions to dismiss the petition for a writ of *habeas corpus* without prejudice and without costs to either

party, per stipulation of counsel, on motion of *Solicitor General Mitchell* in that behalf, for appellee. *Mr. Everett Flint Damon* for appellant.

No. 670. JAMES CUSMANO *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. November 1, 1926. Dismissed on motion of *Mr. W. F. Connally* for petitioner. No appearance for the United States.

No. 67. UNITED STATES *v.* GEORGE C. TAYLOR, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY. Appeal from the Court of Claims. November 23, 1926. Dismissed, on motion of *Solicitor General Mitchell* for the United States. *Messrs. John G. Milburn* and *Joseph W. Welsh* for appellee.

No. 145. ELMER C. POTTER, PROHIBITION DIRECTOR, *v.* JAMES GERAGHTY. Appeal from the District Court of the United States for the District of Massachusetts. November 23, 1926. Remanded to the District Court of the United States for the District of Massachusetts, per stipulation of counsel, with directions to that court to vacate its judgment and to enter an order providing for the destruction of the liquors forthwith, and mandate granted, on motion of *Solicitor General Mitchell* for appellant.

No. 737. OKLAHOMA COAL COMPANY *v.* R. ATKINSON ET AL. Error to the Supreme Court of the State of Oklahoma. November 23, 1926. Docketed and dismissed on motion of *Mr. Robert F. Cogswell* for defendant in error. No appearance for plaintiff in error.

No. 4. HENRY F. MUELLER, JOSEPHINE WALDECK, LEONA MULLER BY JOSEPHINE WALDECH, CURATRIX, ET AL. *v.* SAMUEL W. ADLER, ST. LOUIS TRANSIT CO., ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. November 23, 1926. Appeal dismissed on motion of *Messrs. William J. Hughes* and *Henry J. Richardson* for appellants. *Mr. Henry S. Priest* for appellees.

No. 639. M. HARTLEY DODGE *v.* MINNIE E. ALLISON AND AUDREY E. ALLISON, EXECUTRICES OF J. WESLEY ALLISON, DECEASED. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit. November 23, 1926. Petition dismissed, on motion of *Messrs. Robert H. McCarter* and *John A. Garver* for petitioner. *Mr. Jacob L. Newman* for respondents.

No. 92. CHAPMAN S. CLARK *v.* UNITED STATES. Appeal from the Court of Claims. December 7, 1926. Judgment reversed on confession of error, and cause remanded to the Court of Claims for further proceedings on motion of *Solicitor General Mitchell* for the United States. *Messrs. Horace S. Whitman* and *Chapman S. Clark, pro se,* for appellant.

No. 188. CHIN SET WONG, UNCLE AND NEXT FRIEND OF CHIN FOOK, *v.* JOHN B. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. December 7, 1926. Dismissed with costs on motion of *Mr. Everett Flint Damon* for appellant. No appearance for appellee.

No. 580. CLAUDE P. STREET PIANO COMPANY, ROY WARDEN, KATHERINE D. STREET, ET AL. *v.* CITY OF NASHVILLE, GEORGE J. TOMPKINS, J. W. BAUMAN, AND HILARY E. HOUSE, ETC. Error to the Supreme Court of the State of Tennessee. December 13, 1926. Writ of error dismissed per stipulation of counsel, on motion of *Mr. Norman Farrell* for plaintiffs in error.

No. 144. UNITED STATES *v.* JOHN A. MUNROE. Error to the District Court of the United States for the District of Nebraska. January 3, 1927. Dismissed on motion of *Solicitor General Mitchell* for the United States.

No. 189. SEID MAN, AS NEXT FRIEND OF SEID WONG, *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of Massachusetts. January 3, 1927. Dismissed with costs, on motion of *Mr. Everett Flint Damon* for appellant. No appearance for appellee.

No. 592. H. L. EVELAND, HUGH SMITH, AND B. W. BAER, CONSTITUTING TAX COMMISSION OF SOUTH DAKOTA *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 3, 1927. Writ of certiorari dismissed, each party to pay their own costs, per stipulation of counsel. *Messrs. Byron S. Adams* and *Samuel Herrick* for petitioners. *Mr. A. K. Gardner* for respondent.

No. 708. A. S. RHODES *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. January 3,

1927. Dismissed with costs on motion of *Mr. Benjamin E. Pierce* for plaintiff in error. No appearance for defendant in error.

No. 658. S. F. LARSEN *v.* STATE OF TEXAS. Error to the Court of Criminal Appeals of the State of Texas. January 3, 1927. Dismissed with costs on motion of *Mr. Elgin H. Blalock* for plaintiff in error. No appearance for defendant in error.

No. 656. GEORGE R. DALE *v.* STATE OF INDIANA. Error to the Supreme Court of the State of Indiana. January 3, 1927. Dismissed with costs pursuant to the eleventh rule. *Messrs. William V. Rooker* and *Moses E. Clapp* for plaintiff in error. *Messrs. Arthur L. Gilliom* and *Edward M. White* for defendant in error.

No. 666. KNOXVILLE ICE AND COLD STORAGE COMPANY AND JOHN F. SHEA *v.* CITY OF KNOXVILLE, B. A. MORTON, MAYOR, ETC. Error to the Supreme Court of the State of Tennessee. January 3, 1927. Dismissed with costs on motion of *Mr. James B. Wright* for plaintiffs in error. No appearance for defendants in error.

No. 347. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* WILBUR E. SKINNER;

No. 348. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* VICTOR H. WILSON;

No. 349. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* WARREN R. BENNISON; and

No. 350. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* PETER S. STONEHAM. Certiorari to the Supreme Court of the State of Missouri. January 4,

1927. Dismissed with costs on motion of *Mr. Sidney F. Andrews,* with whom *Messrs. A. A. McLaughlin, E. T. Miller,* and *Henry S. Conrad* were on the brief, for petitioner. *Mr. William S. Hogsett* for respondents.

No. 802. UNITED STATES *v.* HURON NAVIGATION COMPANY. Appeal from the Court of Claims. January 10, 1927. Dismissed and mandate granted on motion of *Solicitor General Mitchell* for the United States

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No. 697. UNITED STATES *v.* MORITZ NEUBERGER. Certiorari to the Circuit Court of Appeals for the Second Circuit. January 10, 1927. Case remanded to the District Court of the United States for the Southern District of New York with instructions to dismiss the original petition for naturalization therein on the ground that the question involved has been rendered moot through the admission of the respondent to citizenship on December 20, 1926, on a new petition for naturalization filed September 1, 1926, per stipulation of counsel on motion of *Solicitor General Mitchell* for the United States. Mr. *Louis Marshall* for respondent.

No. 160. UNITED STATES *v.* AMERICAN REFINING COMPANY. Error to the District Court of the United States for the Northern District of Texas. January 17, 1927. Dismissed on motion of *Solicitor General Mitchell* for the United States. *Mr. Harry C. Weeks* for defendant in error.

No. 161. AMERICAN REFINING COMPANY *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of Texas. January 17, 1927.

Reversed on confession of error on motion of *Solicitor General Mitchell* for the United States. *Mr. Harry C. Weeks* for plaintiff in error.

No. 665. CELLULOID COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS. Error to the Supreme Judicial Court of the State of Massachusetts. January 17, 1927. Dismissed with costs on motion of *Mr. Joseph Larocque* for plaintiff in error. No appearance for defendant in error.

No. 152. HELENE A. KNY, SOLE EXECUTRIX OF THE ESTATE OF RICHARD KNY, DECEASED *v.* THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER OF THE UNITED STATES. Appeal from the Court of Appeals of the District of Columbia. January 17, 1927. Dismissed with costs on motion of *Messrs. Howard Ferris, Richard S. Doyle,* and *Dion S. Birney* for appellant. The *Attorney General* for appellees.

No. 153. HURON NAVIGATION CORPORATION *v.* UNITED STATES. Appeal from the Court of Claims. January 20, 1927. Dismissed per stipulation of counsel. *Messrs. J. Harry Covington* and *Spencer Gordon* for appellant. The *Attorney General* for the United States.

No. 164. FRITZ SCHUTTE *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the Court of Appeals of the District of Columbia. February 21, 1927. Decree reversed in part and affirmed in part, each party to pay his own costs, and the cause remanded to the Supreme Court of the District of Columbia for further proceedings per stipulation of counsel on motion of *Solicitor General Mitchell* in that behalf. *Messrs. Alfred K. Nippert* and *John W. Peck* for appellant.

No. 235. CALOGERO MANIGLIA, BY HIS NEXT FRIEND AND FATHER, ANTONINO MANIGLIA *v.* COMMANDER OF THE S. S. "GUISEPPE VERDI," ET AL. Appeal from the District Court of the United States for the District of Massachusetts. February 21, 1927. Dismissed with costs per stipulation of counsel and mandate granted on motion of *Solicitor General Mitchell* in that behalf. *Messrs. Clinton Robb* and *H. S. Avery* for appellant.

No. 345. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* STATE OF OKLAHOMA ET AL. Certiorari to the Supreme Court of the State of Oklahoma. February 21, 1927. Dismissed with costs on motion of *Mr. Albert Rae Williams* in behalf of *Messrs. E. T. Miller, C. B. Stuart, J. F. Sharpe, M. K. Cruce, Ben Franklin,* and *T. P. Littlepage* for petitioner. *Messrs. George A. Henshaw* and *A. Carey Hough* for respondents.

No. 488. CHICAGO AND NORTH WESTERN RAILWAY COMPANY *v.* MICHIGAN PUBLIC UTILITIES COMMISSION. Error to the Supreme Court of the State of Michigan. February 21, 1927. Judgment reversed with costs, and the cause remanded to the said Supreme Court for further proceedings, per stipulation of counsel, on motion of *Mr. Albert Rae Williams* in behalf of *Messrs. R. N. Van Doren* and *Nye F. Morehouse* for plaintiff in error, and *Mr. W. W. Potter* for defendant in error.

No. 165. MAX WEKSLER *v.* MORGAN G. COLLINS, SUPERINTENDENT OF POLICE, ET AL. Error to the Supreme Court of the State of Illinois. February 23, 1927. Dismissed with costs pursuant to the nineteenth rule, on motion of *Mr. F. R. Gibbs* in behalf of *Messrs. Francis X. Busch, Oscar E. Carlstrom,* and *Leon Hornstein* for defendants in error. *Mr. Charles Leviton* for plaintiff in error.

No. 181. LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, ET AL., ETC. *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, FRANK WHITE, TREASURER OF THE UNITED STATES, ET AL.; and

No. 182. DEUTSCHE BANK OF BERLIN, GERMANY *v.* LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, ET AL. Appeals from the Circuit Court of Appeals for the Second Circuit. February 25, 1927. Dismissed with costs on motion of *Messrs. Joseph M. Hartfield, Charles E. Hughes, Hamilton Vreeland, Jr.,* and *Thomas P. Littlepage* for appellants in No. 181 and appellees in No. 182. *Messrs. Amos J. Peaslee* and *Thomas G. Haight* for appellees in No. 181 and appellants in No. 182.

No. 813. PRESSED STEEL CAR COMPANY *v.* UNITED STATES. Petition for writ of certiorari to the Court of Claims. February 28, 1927. Writ of certiorari granted. Judgment of the Court of Claims in so far as it determined that the petitioner is not entitled to recover any sum in this action of and from the United States, affirmed, and the judgment of the Court of Claims in favor of the United States upon its counterclaim modified by reducing the amount thereof to the sum of $126,202.15, plus the sum of $1,775.34, the costs allowed by that court, and the cause forthwith remanded to the Court of Claims to proceed accordingly, per stipulation of counsel, on motion of *Solicitor General Mitchell,* in that behalf. *Messrs. George A. King, William B. King,* and *George R. Shields* for petitioner.

No. 216. ELLAMAR MINING COMPANY *v.* ALASKA STEAMSHIP COMPANY. Certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 7, 1927. Dismissed with costs per stipulation of *Messrs. George de Steiguer* and *John H. Powell* for petitioner, and *Messrs. W. H. Bogle* and *Lane Summers* for respondent.

No. 889. WILLIAM A. HIGGINS AND EDWARD S. HIGGINS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF WILLIAM A. HIGGINS AND COMPANY *v.* CALIFORNIA PRUNE AND APRICOT GROWERS, INC. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. March 7, 1927. Dismissed with costs per stipulation of counsel. *Mr. Francis E. Neagle* and *Annette Abbott Adams* for petitioners.

No. 201. FLORENCE L. CLAY, NORA WEBB, WM CHANDLER, ET AL. *v.* CITY OF EUSTIS. Appeal from the District Court of the United States for the Southern District of Florida. March 8, 1927. Dismissed with costs on motion of *Mr. John E. Laskey* in behalf of *Messrs. James L. Fort* and *J. R. Bedgood* for appellants. *Mr. Alexander Akerman* for appellee.

No. 219. GEORGE LEE MILLER ET AL. *v.* BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES ET AL. Error to the Supreme Court of the State of California. March 10, 1927. Dismissed with costs pursuant to the 19th rule. *Mr. William W. Bearman* for plaintiffs in error. *Messrs. Jess E. Stephens* and *Lucius P. Green* for defendants in error.

No. 259. TOXAWAY MILLS *v.* UNITED STATES. Certiorari to the Court of Claims. March 14, 1927. Judgment reversed on confession of error and mandate granted on motion of *Solicitor General Mitchell* for the United States. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioner.

No. 262. UNITED STATES *v.* ED MCMAHON, MIDWEST OIL COMPANY, AND SOUTHWEST OIL COMPANY. Certificate from the Circuit Court of Appeals for the Eighth Circuit. March 14, 1927. Certificate dismissed pursuant to stipulation of counsel on motion of *Solicitor General Mitchell* for the United States. *Messrs. Tyson S. Dines, Peter H. Holme,* and *Harold D. Roberts* for respondents.

No. 44. CHARLES E. RUTHENBERG *v.* STATE OF MICHIGAN. Error to the Supreme Court of the State of Michigan. March 14, 1927. Death of Charles E. Ruthenberg, plaintiff in error herein, suggested and writ of error dismissed with costs on motion of *Messrs. Isaac E. Ferguson* and *Frank P. Walsh* for plaintiff in error. *Messrs. Andrew B. Dougherty, O. L. Smith, George H. Bookwalter,* and *Max F. Burger* for defendant in error.

No. 1038. RAFAEL BARAGANO *v.* PORTO RICO. Error to the Supreme Court of Porto Rico. April 11, 1927. Docketed and dismissed with costs, on motion of *Mr. William C. Rigby* for defendant in error. No appearance for plaintiff in error.

No. 277. RED BALL TRANSIT COMPANY *v.* CHARLES C. MARSHALL ET AL., CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. April 11, 1927. Dismissed with costs on motion of *Messrs. George Hoadly* and *Benton S. Oppenheimer* for appellant. *Messrs. Albert M. Calland, C. C. Crabbe,* and *John W. Bricker* for appellees.

No. 676. T. L. SPARKMAN ET AL. *v.* W. T. RAWLEIGH COMPANY. Error to the Supreme Court of the State of

Oklahoma. April 11, 1927. Dismissed with costs pursuant to the Eleventh Rule. *Mr. John B. Dudley* for plaintiffs in error. No appearance for defendants in error.

No. 922. LIBERTY NATIONAL BANK OF SOUTH CAROLINA, ET AL. *v.* J. W. MCINTOSH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. April 11, 1927. Dismissed at petitioners' cost per stipulation of *Mr. D. W. Robinson* for petitioners, and *Messrs. R. B. Herbert* and *John K. Shields* for respondents.

AMENDMENT OF RULES.

ORDER ENTERED JANUARY 24, 1927.

It is now here ordered by this Court that section 7 of rule 29 of this Court be amended by striking therefrom the words "ten cents per folio of each one hundred words," in the clause prescribing fees for preparing records, etc., and substituting the words "eight cents per folio of each one hundred words," so that the entire clause will read:

"For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, eight cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision."

This order shall apply to causes filed here on or after February 1, 1927, but not to causes filed prior to that date.

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